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**ALBAUGH et al. v. MT. SHASTA
POWER CORPORATION.****McARTHUR et al. v. SAME.****Sac. Nos. 5062, 5063, 5066, 5067, 5068.**

Supreme Court of California.

Oct. 28, 1937.

Rehearing Denied Nov. 26, 1937.

1. Appeal and error ⇨1099(3)

On appeal from judgments allowing recovery by owners of lands riparian to pool for diversion from river supplying pool, holding on prior appeals that pool was in fact a lake or reservoir with two rivers as sources of supply, and with one outlet, one of such rivers, was controlling as the "law of the case."

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

2. Appeal and error ⇨1099(3)

On appeal from judgments allowing recovery by owners of lands riparian to pool for diversion during summer from river supplying pool, holding on prior appeals that since two rivers mingled indiscriminately to form corpus of water in pool during summer, lands riparian to pool were riparian to both rivers, was controlling as the "law of the case."

3. Appeal and error ⇨1099(3)

On appeal from judgments allowing recovery by owners of lands riparian to pool for diversion from river supplying pool, holding on prior appeals that where riparian owner diverts entire flow of stream away from another riparian owner, and entire flow is devoted to public use, second riparian owner has no action for injunction or apportionment, but only for damages, whether diverting riparian owner's use purports to be in exercise of his riparian rights, was controlling as the "law of the case."

4. Appeal and error ⇨1099(3)

On appeal from judgments allowing recovery by owners of lands riparian to pool for diversion from river supplying pool, holding on former appeals, that it was erroneous to ignore defendant's agreement to maintain level of pool by maintaining dam, did not fix as the "law of the cases" that, as to quantity of water, plaintiffs had suffered no damage, where question whether dam would maintain level of pool was not considered.

5. Waters and water courses ⇨78

Where pool was supplied by two rivers, if one river furnished dependable source of water sufficient for all riparians on pool for actual and prospective reasonable and beneficial needs, another riparian would not be liable for taking of water of the other river.

6. Waters and water courses ⇨143

An appropriator may lawfully divert all water not reasonably necessary for actual or prospective beneficial needs of riparians.

7. Waters and water courses ⇨86

Where pool was supplied by two rivers, and public use attached to full flow of one river, owners of lands riparian to pool could recover from diverter from such river for all damages suffered, both actual and prospective.

8. Waters and water courses ⇨84

An action may be maintained for deprivation of water for reasonable, beneficial, prospective needs.

9. Judgment ⇨725(1)

A decree establishing right by prescription of owners of lands riparian to pool to divert water through canal from tributary of river supplying pool, in action by owner of lands riparian to river to restrict such diversion, was res judicata of question whether such use was riparian, so as to preclude owner of lands riparian to river from defending action by owners of canal for diversion from river as source of supply to pool on ground that dependable supply to pool was sufficient notwithstanding diversion, and that water from canal should be considered in determining dependable supply.

10. Waters and water courses ⇨131

Even a riparian may gain right by prescription to use of waters of a stream.

11. Waters and water courses ⇨87

In actions by owners of lands riparian to pool for diversion from river supplying pool, evidence established that right of diversion of water from tributary of river through canal by certain plaintiffs was prescriptive, and not riparian, whether such plaintiffs' lands were riparian to tributary, so as to preclude consideration of water from canal in determining whether dependable source of supply to pool was sufficient notwithstanding defendant's diversion.

12. Waters and water courses ⇨145

The prescriptive right to divert water is usufructuary, and not a part or parcel of any particular land, and as long as beneficial use is continued, owners of right may change their place or character of use, provided vested rights are not injured thereby.

13. Waters and water courses ⇨87

In actions by owners of lands riparian to pool for diversion from river supplying pool, where certain plaintiffs had prescriptive right to divert water from tributary of river through canal adjacent to certain of their lands suitable for irrigation which were not being irrigated and the irrigation of which would exhaust supply from canal, and no rights would be injured if such plaintiffs should decide to change place of use, water from canal would not be considered in determining whether dependable source of supply to pool was sufficient notwithstanding defendant's diversion.

14. Waters and water courses ⇨87

In actions by owners of lands riparian to pool for diversion from river supplying pool, artificial supply to other owners of land riparian to pool through agreement with defendant, which supply could be taken away by such owners at any time, would not be considered in determining whether dependable source of supply to pool was sufficient notwithstanding defendant's diversion.

15. Evidence ⇨553(4)

In actions by owners of lands riparian to pool for diversion from river supplying pool, evidence authorized hypothetical interrogation of valuation witnesses based on assumption that there were approximately 3,000 acres of riparian land adjacent to pool, even if witnesses were led to believe that approximately 3,000 acres were susceptible of irrigation from pool.

16. Appeal and error ⇨1002

The Supreme Court cannot weigh conflicting evidence.

17. Waters and water courses ⇨86

In actions by owners of lands riparian to pool for diversion from one of two rivers supplying pool, evidence that lands riparian to pool were best suited for crops requiring large quantities of water, that, although existing supply was adequate, waste waters from canal and pipe line could be withdrawn, and that actual dependable sup-

ply would be inadequate for actual and prospective needs, authorized recovery for material damage by loss of quantity of water in pool.

18. Appeal and error ⇨1099(3)

On appeal from judgments allowing recovery by owners of lands riparian to pool for diversion from river supplying pool with clear water, wherein plaintiffs contended that diversion caused pollution of pool, since another river supplied pool with undesirable water, holding on former appeals that presence of current in pool was immaterial, and that rivers mingled indiscriminately in pool was the "law of the cases," so as to preclude defendant from denying pollution on ground that evidence established downstream flow in pool.

19. Waters and water courses ⇨87

In actions by owners of lands riparian to pool for diversion from river supplying pool with clear water, wherein plaintiffs contended that diversion caused pollution of pool, since another river supplied pool with undesirable water, it was unnecessary for plaintiffs to prove an "upstream" flow of river having clear water, but it was sufficient to show that the two rivers mingled indiscriminately in pool.

20. Waters and water courses ⇨86

In actions by owners of lands riparian to pool for diversion from river supplying pool with clear water, wherein plaintiffs contended that pool was polluted through diversion, since another river supplied pool with undesirable water, conflicting evidence as to whether pool became polluted from diversion and from maintenance of dam erected by defendant to maintain level of pool notwithstanding diversion, and as to whether pollution caused material depreciation in market value of plaintiffs' lands, authorized recovery for pollution.

21. Waters and water courses ⇨87

In actions by owners of lands riparian to pool for diversion from river supplying pool, instruction was proper that plaintiffs were entitled to have waters come to them unpolluted unless pollution resulted from reasonable enjoyment by defendant of its rights as a riparian owner.

22. Appeal and error ⇨1099(3)

On appeal from judgments allowing recovery by owners of lands riparian to pool for diversion by power company from river supplying pool, holding on former appeals

that defendant diverted entire flow of river to public use, which was an excessive use, was controlling as the "law of the cases."

23. Waters and water courses ⇨87

In actions by owners of lands riparian to pool for diversion by power company from river supplying pool, evidence established that defendant devoted entire flow of river to public use, which was an excessive use, so as to authorize recovery.

24. Appeal and error ⇨761

It was improper for appellant to present issue in briefs by argument based on appellant's view of evidence, by disregarding conflicting evidence, and by contention that certain adverse evidence had been "completely destroyed".

25. Trial ⇨139(1), 140(1)

The jury is the sole judge of the effect, sufficiency, and weight of evidence, and of the credibility of witnesses.

26. Appeal and error ⇨1003

The Supreme Court is without power to disturb verdicts if there is material credible evidence to support them, whatever the opinion of the court may be as to weight of evidence.

27. Appeal and error ⇨930(1)

In reviewing evidence on appeal, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged in to uphold verdict if possible.

28. Appeal and error ⇨989

Where verdict is attacked as being unsupported, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

29. Appeal and error ⇨1004(1)

Verdicts would not be disturbed by the Supreme Court if supported by substantial evidence, though they were larger than the Supreme Court would have rendered had it been trier of facts.

30. Waters and water courses ⇨86

In actions by owners of lands riparian to pool for diversion from river supplying pool, measure of damages was depreciation in market value of plaintiffs' land caused by diversion.

31. Evidence ⇨571(10)

In actions by five owners of lands riparian to pool for diversion from river supplying pool, resulting in loss of quantity of water in pool and pollution, expert testimony as to depreciation in market value of plaintiffs' lands caused by diversion supported verdicts awarding average amounts of \$73, \$159, \$159, \$170, and \$192 per acre to various plaintiffs.

32. Waters and water courses ⇨86

In actions by owners of lands riparian to pool for diversion from river supplying pool, depreciation in market value of certain plaintiffs' lands would be determined without consideration of sources of supply which were not dependable, but prescriptive, uncertain, and insufficient.

33. Appeal and error ⇨1006(1)

In determining whether verdicts were excessive, that substantial verdicts had been rendered on former trials, and that, after each trial, motions for new trials were denied, would be considered by Supreme Court, and such factors were entitled to considerable weight in determining whether verdicts under review were rendered under influence of passion or prejudice.

34. Appeal and error ⇨1099(10)

On appeal from judgments allowing recovery by owners of lands riparian to pool for diversion from river supplying pool, holding on former appeals that verdicts were excessive if dam erected by defendant would maintain level of pool did not establish as the "law of the case" that verdicts were excessive so as to make substantially identical verdicts on retrial improper, where it was determined on subsequent appeal that dam would not maintain level of pool.

35. Appeal and error ⇨1005(4)

The credibility of witnesses and the weight to be given to the evidence are questions primarily for the trial court, and not for the Supreme Court on appeal.

36. Trial ⇨133(6)

Improper remarks of counsel did not require reversal, under instructions given when remarks were challenged and at time of instructing jury, to the effect that jurors were sole judges of facts and credibility of witnesses and should decide case on evidence, and not on arguments.

In Bank.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Actions by William J. Albaugh, by Mer-ton Crum, and others, by Roderick McArthur, by Luther McArthur and by Roderick McArthur and another, as executors of the last will and testament of Anna McArthur, against Mt. Shasta Power Corporation. From judgments for plaintiffs, defendant appeals.

Affirmed.

William B. Bosley and Athearn, Chandler & Farmer, all of San Francisco, Chenoweth & Leininger, of Redding, and Thomas J. Straub, of San Francisco, for appellant.

Carter & Barrett, of Redding, and Huston, Huston & Huston, of Woodland, for respondents.

CURTIS, Justice.

The above five cases, consolidated for trial as indicated in the title, are companion cases, each having been instituted by the named plaintiffs against defendant Mt. Shasta Power Corporation. After trials before juries, separate and substantial judgments were entered in favor of each of the plaintiffs, from which judgments defendant has perfected these appeals. Except that the tracts of land involved in each action and the amounts of the respective verdicts are different, it is admitted by all concerned that substantially the same questions of fact and of law are involved in all of these appeals. For that reason one opinion will suffice to determine the issues herein presented.

The controversy between respondents and appellant is of long standing, and has several times received consideration in this and the appellate court. The Crum and Albaugh Cases have been before this court and the District Court of Appeal on three prior occasions. In *Crum v. Mt. Shasta Power Corp.*, 117 Cal.App. 586, 4 P.(2d) 564, and *Albaugh v. Mt. Shasta Power Corp.*, 117 Cal.App. 612, 4 P.(2d) 574, judgments in favor of the two named plaintiffs were reversed, and the actions remanded for new trials. After the issuance of the remittiturs in the above cases, Crum and Albaugh moved to recall the remittiturs for the purpose of assessing costs to the appellant, Mt. Shasta Power Corporation. These motions were denied with opinions by the appellate court; *Crum v. Mt. Shasta Power Corp.*, 124 Cal.App. 90, 12 P.(2d)

134; *Albaugh v. Mt. Shasta Power Corp.*, 124 Cal.App. 779, 12 P.(2d) 137. Thereafter, these two actions were consolidated and retried, again resulting in substantial judgments for plaintiffs. Upon defendant's appeal, again the judgments were reversed and the causes remanded for retrials on the issue of damages alone; *Crum and Albaugh v. Mt. Shasta Power Corp.*, 220 Cal. 295, 30 P.(2d) 30.

The three McArthur Cases have been before this court on one prior occasion. Upon appeals by the defendant from substantial judgments in favor of each of the McArthurs, the judgments were reversed (largely on the authority of 220 Cal. 295, 30 P.(2d) 30), and the causes were remanded for new trials on the issue of damages alone; *Anna McArthur v. Mt. Shasta Power Corp.*, 3 Cal.(2d) 704, 45 P.(2d) 807; *Roderick McArthur v. Mt. Shasta Power Corp.*, 3 Cal.(2d) 765, 45 P.(2d) 816; *Luther McArthur v. Mt. Shasta Power Corp.*, 3 Cal.(2d) 766, 45 P.(2d) 816 (the last two opinions being based on the Anna McArthur opinion).

In view of these prior opinions, in several of which the facts giving rise to this controversy were reviewed at length, no useful purpose would be served in again setting forth those facts in detail. Suffice it to say that each plaintiff is the owner of lands fronting on and riparian to Pitville pool. This pool extends from Young's Falls, where the Pit river flows into it, for a distance of about 8½ miles to a rock reef. After passing the rock reef, Pit river continues on, being the outlet of the pool. The pool has a width of about 145 feet. About 500 feet above the rock reef, Fall river, in its natural state, also flowed into the pool, and, as held on the prior appeals, this river, in the summer months, contributed a substantial amount of water to that impounded in the pool. Appellant has constructed a large hydroelectric power plant on Pit river about 7 miles below the rock reef. To operate this plant, in 1922, appellant constructed certain diversion works in Fall river about 2½ miles upstream from where that river, in its natural state, emptied into Pitville pool. Since 1922, by means of these diversion works, appellant, for power purposes, has diverted substantially the entire flow of Fall river away from the pool to its power plant located on Pit river downstream from the rock reef. It should also be mentioned that appellant owns substantially all of the ri-

parian rights from its diversion works on Fall river down to its power plant on Pit river.

[1] When Fall river was first diverted, it resulted in immediately lowering the level of the water in Pitville pool about 4 feet. In an attempt to remedy this depletion in the water supply of the riparians on the pool, appellant, in 1923, constructed a dam at the rock reef for the purpose of impounding the waters of the pool and to return them to their former height. Appellant has agreed to permanently maintain this dam for this purpose, and on the prior appeals it was held that this agreement must be considered in computing the damages suffered by respondents by reason of the diversion. It was mainly for the reason that the trial court on the prior trials failed to give any consideration to this agreement that this court reversed the judgments. The prior appeals have definitely established as the law of these cases that Pitville pool is, in effect, a lake or reservoir with two sources of supply, Pit and Fall rivers, and with one outlet, Pit river below the rock reef.

[2] The record shows that in the summer months the flow of Pit river at Young's Falls is erratic and very small, dropping on occasions to 1.8 second feet, while the flow of Fall river in those months is dependable and large, seldom dropping below 1,000 second feet, and averaging around 1,200 second feet. It is admitted that the waters of Fall river are clear, cold, and pure, while the waters of Pit river are dark, murky, and warm. In the winter months, Pit river flows in such quantities and with such velocity into the pool, that no substantial quantity of Fall river water (before the diversion) remained in the pool; it being forced out over the rock reef by the Pit river water. In the summer months, however, the former appeals have determined that Fall river water in a state of nature flowed into the pool and mingled indiscriminately therein with the Pit river water to form the corpus of the water in the pool. For that reason, it was held on the prior appeals, and this holding has become the law of these cases, that respondents' lands are riparian to Fall river in the summer months, as well as riparian to Pit river. These actions are for damages for the alleged injury to these riparian rights, the theory of respondents being that the deprivation of Fall river water in the summer months, caused by the

diversion, has resulted in diminution in the market value of their riparian properties in two ways: (1) That the quantity of water in the pool has been reduced below respondents' actual and prospective reasonable and beneficial needs; and (2) that the pool has been deprived of the freshening effect of the Fall river water, as a result of which the pool has become stagnant and polluted.

On these appeals appellant makes many objections to the judgments. One of appellant's main contentions, stated in various ways, is that its use of the waters of Fall river is in the exercise of its riparian rights, and that its use of the entire flow of the stream for power purposes, under the facts, constitutes a proper, reasonable, and beneficial use of the waters of the stream. Based on this major premise, appellant urges that no damages should have been awarded respondents; that respondents' proper and only remedy is an action to apportion; that the trial court should have ascertained the relative riparian rights of the appellant and respondents in and to the waters of Fall river as prayed for in its amended answer filed at the beginning of the present trials; that certain instructions dealing with this subject should not have been given, and others offered by appellant should have been given, and that certain statements dealing with this issue appearing in the hypothetical question submitted to respondents' valuation witnesses were based on an erroneous theory. Predicated on the same basic premise, it is also urged that even if the diversion has resulted in polluting the pool, such pollution is not actionable, being the result of the exercise by appellant of its riparian rights. This last-stated contention will be discussed later in this opinion. The basic premise upon which all of these contentions are based is unsound, and for that reason all of them are without merit. These identical contentions, in varying forms, have been made on each of the prior appeals. If appellant's basic premise were sound, it would inevitably lead to the conclusion that regardless of damages suffered no action would lie therefor. Such a conclusion would clearly be contrary to the law of these cases established on the prior appeals. The prior appeals have unequivocally determined that if the market value of respondents' properties was depreciated by reason of the diversion, they are entitled to damages, and that apportionment is not

the proper remedy. On each of the prior appeals this court and the District Court of Appeal held that if the evidence supports respondents' claims of damage, respondents are entitled to recover therefor even though the appellant's use of the water may be in the claimed exercise of its riparian rights. In the Anna McArthur appeal, 3 Cal.(2d) 704, 712, 45 P.(2d) 807, 811, in discussing this identical contention, this court stated: "This question was before the appellate and this court in the first and second appeals in the Crum and Albaugh Cases. The contention of appellant as to the nature of respondent's remedy finds support in none of the decisions rendered by either of said courts in the Crum and Albaugh Cases. On the contrary, the decisions, both of the District Court on the first appeal and of this court on the second appeal, held that respondents' remedy was one in damages and not for apportionment." In the Crum and Albaugh decision on the second appeal, this court stated (220 Cal. 295, 298, 30 P. (2d) 30, 31): "The opinions of the District Courts of Appeal in these cases have clearly established the law of the case to be that plaintiffs are entitled to damages. To the discussion contained in our former opinion on this point, we add the following observation. Assuming, but not deciding, that defendant's use of the water is in the exercise of its riparian rights, but constitutes an excessive use of the waters of Fall River, plaintiffs could not, as contended by defendant, secure an apportionment of said waters. This is so for the reason that a public use has attached to the entire flow of Fall River." This identical language was quoted with approval in the Anna McArthur Case, 3 Cal.(2d) 704, 713, 45 P.(2d) 807. After quoting the pertinent language in the various Crum and Albaugh appeals dealing with this issue, this court in the Anna McArthur appeal concluded as follows [3 Cal.(2d) 704, 714, 45 P.(2d) 807, 812]: "There can be but one conclusion drawn from the foregoing facts and the law as applied to said facts in the two Crum and Albaugh appeals—and that conclusion is that the respondent's remedy in this action is not an action for the apportionment of said waters, but one in damages suffered by respondent by reason of appellant's diversion of the waters of Fall River."

In the order of reversal in the Crum and Albaugh Cases (220 Cal. 295, 314, 30 P.(2d) 30, 39) it is stated: "For the foregoing

reasons the judgments appealed from are and each of them is hereby reversed and the cases remanded for a new trial on the issue of damages alone and in accordance with the views herein expressed." Substantially the same order was made in the three McArthur Cases [3 Cal.(2d) 704, 721, 765, 766, 45 P.(2d) 807, 816]. In the main opinion on the McArthur appeals, in addition it was stated [3 Cal.(2d) 704, 721, 45 P.(2d) 807, 816]: "As we view this case, all the issues have been determined, except the one issue of damages, and in the event of a retrial, the court will be limited to the determination of this one issue."

[3] A reading of the various prior opinions in these cases clearly establishes that in all of them it has been held that when a riparian owner diverts the entire flow of a stream away from another riparian to the latter's damage, and the entire flow has been devoted to a public use, the riparian owner who suffers damage has neither an action for an injunction nor for apportionment, but his sole and proper remedy is for damages. The prior opinions clearly establish that this conclusion follows whether or not the diverting riparian's use purports to be in the exercise of his riparian rights. These prior opinions clearly establish that if respondents have suffered material damage by reason of the diversion, the use by appellant must be held to be an excessive use, and since a public use has attached to the entire flow, respondents' remedy is for money damages.

It is obvious that if the diversion of Fall river by appellant has injured respondents by causing a depreciation in the market value of their riparian lands, that injury could be caused either by loss of the quantity of water necessary for their reasonable beneficial needs, actual or prospective, or by injury to the quality of the water in the pool. These two items of damage will be separately considered.

First, as to loss of quantity. It is clear that in these actions respondents must recover for their entire damage, inasmuch as the full flow of the Fall river has been devoted to a public use. It must therefore be determined not only whether the evidence discloses that there has been sufficient water in the pool since the diversion to meet all the immediate needs of respondents, but also whether there is a sufficient quantity to meet reasonable, beneficial, and prospective needs. On the prior appeals,

it was assumed that the construction of the dam at the rock reef would maintain the old level of the pool, and the causes were reversed by this court because the juries on those trials were not permitted to give any consideration to appellant's offer to permanently maintain the dam at the rock reef. On the present trial that offer was taken into consideration. The respondents frankly admit that since the construction of the dam in 1923 the pool has been maintained at its former level, and that since that time there has been sufficient water in the pool for all irrigation purposes for which respondents have desired to use the water. This concession is clearly in accord with the uncontradicted evidence. The evidence also shows, however, that since 1923 the riparians on the pool have pumped very little water therefrom. Respondents point out that the flow of Pit river at Young's Falls, the inlet to the pool, in the summer months, on occasion, falls to as low as 1.8 second feet, and averages around 8 or 10 second feet, and contend that such a small flow is not sufficient for the reasonable, beneficial, and prospective needs of the riparian owners of the pool. They point out that since the diversion the major source of supply to the pool has not been Pit river, but the McArthur canal and the Knoch pipe line, and these waters, they contend, cannot be considered a legal or dependable source of supply for the reason that these waters are waste waters which may be taken away at any time. Appellant, on this issue of quantity of water available, points to the uncontradicted evidence that since the diversion the flow at the rock reef, the outlet of the pool, has averaged 60 second feet. It is admitted that a 60-second foot continuous flow would be more than sufficient for all the irrigation needs, actual and prospective, of all the riparians on the pool. On this same issue appellant also urges that it is the law of these cases, as established on the prior appeals, that as to quantity of water respondents have suffered no damage. This last contention will be considered first.

On the prior appeals several of the opinions mentioned the fact that the evidence demonstrated that since the construction of the dam the level of the water in the pool has remained as it was before the diversion, and it was assumed in those opinions that the dam would continue to maintain the level of the pool, so that respondents would have available to them the same

quantity of water as existed before the diversion. A reading of those opinions, however, clearly demonstrates that in none of them was the merits of the dam to maintain the pool passed upon. This clearly appears in the Anna McArthur opinion, 3 Cal.(2d) 704, 720, 45 P.(2d) 807, 815, where, in interpreting the prior cases this court stated: "It is further evident from what we have said that neither at the second trial of the Crum and Albaugh Cases, nor at the trial of this case, were the merits of the dam erected by appellant at the rock reef in Fall river determined by the court. In fact, the presence of the dam was to all intents and purposes, ignored by the trial court at the trial of each of the cases. It has been assumed that its construction and maintenance in the manner heretofore described would maintain the level of Pitville pool at its original height, but that fact has never been definitely determined by the court. * * * We do not wish to be understood as foreclosing the parties hereto, in case of a further trial of this action, from litigating the effectiveness of said dam and operating gates, erected at said rock reef, to maintain the level of the water in Pitville Pool at its original height, without discharging therein a portion of the waters of Fall river."

[4] An examination of the prior appeals also demonstrates that it was assumed therein that the water impounded in the pool by the dam was largely Pit river water. In none of the prior cases was any attempt made to determine the exact source of the waters in the pool since the diversion. For the foregoing reasons it must be held that the point here involved has not been passed upon nor determined by the prior appeals.

[5-8] Turning now to the question as to what the evidence shows as to the quantity of water available to and the needs of respondents, we are of the opinion that the evidence in these cases amply supports the implied findings of the juries that as to quantity of water respondents have suffered material damage by reason of the diversion resulting in a material depreciation in the market values of their riparians properties. Before the diversion, in the summer months, respondents' lands were riparian to both the Fall and the Pit rivers. Fall river, the records show, had a constant flow where it emptied into the pool, in the summer months, of from 1,000 to 1,-

800 cubic feet per second, and averaging around 1,200 cubic feet per second. This was an entirely dependable source of supply. Of course, if Pit river furnished an equally dependable source of supply sufficient to supply all riparians on the pool with water for all of their actual and prospective reasonable and beneficial needs, then the taking of the Fall river water by appellant, under the new water doctrine of conservation in this state, would impose no legal liability on it. In that event, even if appellant were an appropriator (and appellant is a riparian), it could lawfully divert all water not reasonably necessary for the actual or prospective beneficial needs of respondents. *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 22 P.(2d) 5; *Peabody v. City of Vallejo*, 2 Cal.(2d) 351, 40 P.(2d) 486; *Tulare Dist. v. Lindsay-Strathmore Dist.*, 3 Cal.(2d) 489, 45 P.(2d) 972. But the evidence does not show that Pit river, in the summer months, furnishes sufficient water to meet the reasonable, beneficial needs, actual and prospective, of all riparians on the pool. The evidence shows quite the contrary. It is to be noted that in determining the needs of respondents consideration must be given not only to their present needs, but also to their prospective needs, for the reason that a public use has attached to the full flow of Fall river. It follows, as already pointed out, that for that reason, in these actions, respondents must recover for all damages suffered, both actual and prospective. That deprivation of water for reasonable, beneficial, prospective needs is actionable under the new water doctrine in this state has now been settled. *Tulare Dist. v. Lindsay-Strathmore Dist.*, supra, 3 Cal.(2d) 489, 531, 45 P.(2d) 972.

The evidence does disclose, as contended by appellant, that, at least since 1928, at all times there has flowed over the dam at the rock reef, the outlet of the pool, a quantity of water never falling below 46 cubic feet per second, and that the mean monthly flow at that point has been in excess of 60 cubic feet per second. If that quantity represented the true quantity of water flowing into the pool and legally available to respondents, then all of their arguments as to loss of quantity of water would be without merit. But the undisputed evidence shows, in fact one of appellant's own exhibits demonstrates (Defendant's Exhibit R), that at Pitville, the place where the Pit river flows into the pool, the estimated flow in May of

1934 dropped to 1.8 cubic feet per second; hardly enough to take care of the evaporation losses in the pool. The same exhibit shows that in the summer months the mean monthly flow into the pool at that point has frequently been 5 cubic feet per second or less, and averages around 8 or 10 second feet. It was stipulated on these trials that there are 3,068.21 acres of land riparian to the pool, all entitled to water therefrom. Obviously, the flow into the pool from Pit river is not sufficient to irrigate that quantity of land, particularly as the evidence shows that nearly all of the riparian land is best suited for the growing of alfalfa and other crops requiring large quantities of water for irrigation, and that without irrigation the lands are worth but \$15 to \$20 per acre.

The explanation of the difference between the inflow and outflow of the pool is found in the fact that respondents Luther and Roderick McArthur for many years have permitted waste water from the McArthur canal to flow into the pool, and that appreciable quantities of water have also drained into the pool from the Knoch irrigation system. The controversy between the parties to these appeals over the quantity of water in the pool largely turns upon whether the water from said two sources should be considered in estimating the dependable water supply available to respondents.

Based on its major contention that the waters from the McArthur canal must be considered as one of the dependable sources of supply for the pool, appellant predicates many arguments, all of which are unavailing if the major premise is unsound. Appellant contends that the flow from the canal must be considered in determining the available supply for all respondents; that instructions given to the jury to the contrary constituted reversible error; that the hypothetical question submitted to respondents' valuation witnesses ignored this source of supply, and therefore their opinions as to depreciation were based on an incorrect question; and that the damages as to Luther and Roderick McArthur must be reduced because of the existence of this available source of supply. All of these contentions, in our opinion, must fail for the reason that the waters from the McArthur canal and the Knoch pipe line are waste waters and cannot be considered as a dependable or legal source of supply upon which respondents are entitled to rely.

The McArthur canal was constructed over 30 years ago by the predecessors in interest of the respondents McArthur for the purpose of draining certain swamp lands. For many years, the McArthurs have diverted through this canal a definite quantity of water from the Tule river, a tributary of the Fall river. The water is conveyed through the canal to the lands of Luther and Roderick McArthur. At the present time, and for many years past, this Tule river water is and has been used by Roderick McArthur partially for power purposes and partially for irrigation purposes. The portion of the water used by Roderick McArthur for irrigation is used by him in irrigating portions of his lands riparian to the pool. A considerable quantity flows into the pool directly from the canal, and some water drains into the pool from such irrigation. The Luther McArthur water from this canal is piped across the pool and run into a ditch and is used for irrigating his lands riparian to the pool. Until 1924 the flow into this canal was quite large, but in that year appellant herein brought an action against the McArthurs to restrict them in the amount of their diversions. The judgment entered in that action established in Roderick and Luther McArthur a right by prescription to divert through the canal some 67 cubic feet of water in the manner and fashion as set forth in the decree. Both sides appealed, and on such appeals, the decree was affirmed. *Mt. Shasta Power Corp. v. McArthur*, 109 Cal.App. 171, 292 P. 549. The evidence reviewed by the appellate court in the opinion clearly establishes that the McArthurs' right to this water is predicated entirely on prescription. The uncontradicted evidence introduced on the present trials shows that Roderick and Luther McArthur, either individually or jointly, own 3,500 acres of land not riparian to the Fall, Pit, or Tule rivers, adjacent to the McArthur canal and capable of being irrigated therefrom. The evidence likewise shows that those lands are suitable for raising crops requiring irrigation. At the present time the McArthurs have elected to use the waters from the canal for irrigating their lands riparian to Pitville pool, but they lawfully may change the place of use at any time. Thus they lawfully could elect at any time to irrigate their nonriparian lands, in which event not one drop of water from the canal would drain into the pool.

[9-11] Appellant argues at great length that the McArthurs' use of the canal water must be held to be in the exercise of their riparian rights. This argument is predicated on the theory that the Tule river is a tributary of the Fall river, and the place of use is on lands riparian to the Fall river in the summer months. It is contended that the case is simply one where a riparian in the exercise of his riparian rights diverts water above his riparian lands for use thereon. If such were the fact, the water would have to be used on the riparian lands, and all waters not so used would have to be returned to the pool. The argument is without merit. It has been adjudicated between the McArthurs and appellant that the McArthurs' use of the canal water is based on adverse use for the statutory period. It has definitely and positively been determined that the right is a prescriptive and not a riparian right. *Mt. Shasta Power Corp. v. McArthur*, supra. That determination is res judicata as between Roderick and Luther McArthur and appellant, and stare decisis as between appellant and the other respondents. The contention that the above-cited case was decided under the belief that the McArthurs' Pitville pool lands were in a different watershed from the Tule river and were not riparian thereto, even if correct, would avail appellant nothing. If it be assumed that the McArthur Pitville pool lands are riparian to the Tule river, that would not determine that the diversion of the water by means of the canal was in the exercise of their riparian rights. It is obvious that under a proper state of facts even a riparian may gain a right by prescription to the use of the waters of a stream. The evidence reviewed by the appellate court in 109 Cal.App. 171, 292 P. 549, clearly indicates that the holding therein that the water right involved was based on prescription is the only reasonable holding that could have been made, and this is so whether or not the lands of the McArthurs on Pitville pool be considered to be riparian to Tule river.

[12,13] The right being a prescriptive one, it is a usufructuary right, not a part or parcel of any particular land. As long as the beneficial use is continued, the owners of the prescriptive right may change their place or character of use, provided vested rights are not injured thereby. *San Bernardino v. Riverside*, 186

Cal. 7, 28, 198 P. 784. The cases of Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 P. 767, and Scott v. Fruit Growers' Supply Co., 202 Cal. 47, 258 P. 1095, relied upon by appellant, merely state the settled rule that an appropriator may not change his place of use if such change would be injurious to others. No vested or other rights would be injured if the McArthur's should decide to change their place of use. The waste water draining or running into the pool has not as yet been put to a beneficial use by others. It follows, therefore, that the legal right to change the place of use exists. From what has been said it follows that in computing the quantity of water legally available to the respondents from the pool, including Roderick and Luther McArthur, the quantity of water draining or running therein from the canal should not and cannot be considered.

[14] The same legal situation exists as to the Knoch water. Apparently by agreement with appellant, the appellant permits a certain defined quantity of water to flow down the old channel of the Fall river to where it is piped across the pool and used by the Knochs to irrigate their lands riparian to the pool. From such irrigation there is drainage into the pool. The Knoch supply is obviously an artificial one and may be taken away by Knoch at any time.

The only other source of supply to the pool is Beaver creek, which furnishes a small supply, not to exceed 2 to 4 second feet, and on occasions it is entirely dry. The evidence shows that evaporation losses in the pool average over 2 second feet.

It should also be mentioned that upstream from the pool the riparian use of Pit river water is increasing, so that, in the course of time, even the small flow of that river will be decreased below its present flow. The evidence discloses that on Looseley pool, just upstream from Pitville pool, there is not at present, and for some time past has not been, sufficient water flowing in Pit river to fill the needs of riparians on that pool or to warrant the improvement of the riparian lands there located.

As already indicated, the parties stipulated that there are 3,068.21 acres of land riparian to the pool which are entitled to water therefrom. All but a small portion of that acreage is suitable for grow-

ing alfalfa and other crops requiring irrigation. Obviously a mean flow of around 10 second feet, a flow which is sometimes reduced to below 2 second feet, is not sufficient to meet all the irrigation needs, actual and prospective, of that acreage. Appellant points out that of the 3,068.21 acres, some 1,300 acres are already irrigated from various sources, and should be excluded from consideration in determining the needs of the riparians on the pool. The Knoch lands are irrigated from the Knoch pipe line; a source of supply that may be discontinued at any time. Knoch has an equal right with the other riparians on the pool to his correlative share of the water. Nearly 475 acres riparian to the pool are now being irrigated by Roderick and Luther McArthur from the canal, a use they are not legally bound to continue. These two respondents, for reasons already mentioned, are entitled to their correlative share of the water in the pool to irrigate their riparian lands. Albaugh irrigates a portion of his lands through the Wendt-Albaugh ditch, a gravity ditch leading from Looseley pool. As already indicated, the supply therefrom is uncertain and not sufficient for all riparian needs. He has the legal right to draw from the Pitville pool at any time. All of these areas were properly taken into consideration in ascertaining the areas entitled to irrigation from the pool.

[15] Appellant also objects to the hypothetical question submitted to respondents' valuation witnesses; it being appellant's contention that the question erroneously told the witness that there "are approximately 3000 acres of riparian land adjacent to the pool." The sentence is, of course, in accord with the stipulation, but appellant contends that the question was intended to convey to the witnesses the impression that approximately 3,000 acres were susceptible of irrigation from the pool, which appellant contends is not the fact. Appellant refers to some relatively small areas devoted to roads and buildings, and contends those areas are entitled to no water, and also refers to certain testimony indicating that certain portions of the riparian land are incapable of irrigation. A reading of the record convinces us that even if the question be interpreted as contended by appellant, it finds support in the evidence introduced by respondents. Civil engineer Man testified that within a hundred foot elevation from the pool

there were about 3,000 acres, all agricultural land. He testified in detail as to the acreage of each respondent under various lifts. Roderick McArthur testified that of the 3,068.21 acres riparian to the pool, all except a very small acreage was adapted for the growing of alfalfa. Respondents' witness Godfrey Inabnit, engineer and manager of the Grenada Irrigation District in an adjoining county, testified he had made a thorough investigation of respondents' lands to determine whether it was economically feasible to irrigate such lands by pumping from the pool. He testified that in his district, in territory substantially similar to that surrounding Pitville pool, water is regularly pumped with a 122-foot lift for irrigation purposes. He testified that nearly all of respondents' lands were suitable for the growing of alfalfa, and that this was particularly true of the higher bench land. He testified in detail as to the areas susceptible of irrigation from the pool at various lifts. All but a small portion of respondents' lands could be irrigated with a maximum lift of not over 100 feet. He testified that water could be pumped up to 150 feet from the pool, and that such a lift was economically feasible. All of the 3,068.21 acres riparian to the pool are under this 150-foot elevation.

[16] It is true that there was conflicting evidence as to the riparian area economically susceptible of irrigation, but this court cannot, of course, weigh conflicting evidence. In view of what is to be found in the record, we must hold that there is substantial credible evidence to support the view that there are substantially 3,000 acres of land riparian to the pool which it is economically feasible to irrigate therefrom, and which are of such a character as to require irrigation. Inabnit testified that 3 acre feet of water per acre per season would produce three good crops of alfalfa. Other testimony showed that 5 to 6 crops per year could be produced on the land if properly irrigated. This would require more water than Inabnit's minimum of 3 acre feet. Even to supply the minimum requirements of all riparians on the pool would require a continuous flow of between 25 to 30 second feet into the pool, and that is assuming the most perfect economic use with perfect rotation of use. Such estimate gives no consideration to evaporation or conveyance losses.

[17] In view of the foregoing it is obvious that the evidence supports respond-

ents' contention that they have suffered material damage by loss of the quantity of water in the pool.

We turn now to a discussion of depreciation in the market value of respondents' lands predicated on the theory that the diversion has resulted in pollution of the pool. The major contention of appellant in this regard is that there could be no pollution resulting from the diversion without evidence of an upstream flow of Fall river in the pool prior to the diversion, and that the evidence establishes a downstream flow in the pool. This argument based on the theory that there was a downstream flow in the pool is inconsistent with at least one other argument of appellant. If there is now and always has been a downstream flow in the pool, then part of Roderick and Luther McArthur's lands, all of tract 2 of Anna McArthur, and all of the Crum and Albaugh lands could not be in any way affected by the flows from the McArthur canal and the Knoch pipe line; these lands all being "upstream" from those sources of supply. However, the complete answer to this contention is that although appellant introduced evidence of a downstream flow, all of the prior decisions definitely determined the pool was a lake or reservoir, which, before the diversion, had two major sources of supply, Fall and Pit rivers, and one outlet; Pit river below the rock reef. In this lake or reservoir the waters of the two streams mingled indiscriminately to form the corpus of the waters in the pool. In the Crum and Albaugh v. Mt. Shasta Power Corp. appeal to this court, it was stated (220 Cal. 295, 300, 30 P.(2d) 30, 32): "We agree with plaintiffs that the evidence introduced on this trial, as well as the law of the case, as established on the prior appeals, fully establishes that Pitville pool is a natural reservoir, which is filled with water in the summer months from both the Pit and Fall rivers, and that in those months plaintiffs' lands are riparian to both streams. We are of the opinion that the evidence establishes that Fall river, in the summer months, in a state of nature, contributed a large quantity of water to this pool, which water mingled with and became an inseparable part of the corpus of the water in the pool. In other words, Pitville pool is a miniature lake in the summer months, its waters in that period consisting of Pit and Fall river waters, mingled indiscriminately."

[18, 19] A similar holding was made by the appellate court on the Crum appeal, where it was also held that the presence of a current in the pool was an immaterial factor; that the evidence showed the two streams mingled indiscriminately (117 Cal. App. 586, 596, 4 P.(2d) 564). In the Anna McArthur Case, 3 Cal.(2d) 704, 710, 45 P.(2d) 807, this court quoted with approval and adopted the language of the appellate court and of this court, above referred to. In view of these holdings, which have become the law of these cases, it is now too late for appellant to successfully urge that the evidence demonstrates a downstream flow. There is nothing in the evidence on the present trials to cause us to retract from our former holding. Contrary to appellant's contention, it was not necessary on the issue of pollution or on any other issue here presented for respondents to prove an "upstream" flow of Fall river; it was sufficient to show that the two streams mingled indiscriminately in the pool. This must now be taken as thoroughly established by the prior appeals. As a matter of fact if appellant is correct, that the pool always had a downstream flow, that would demonstrate that respondents' lands are not riparian to Fall river at all, and that contention has admittedly been thoroughly and completely refuted on each of the prior appeals. It has been the theory of respondents on all of the trials of these cases, including the instant ones, that Fall river, by flowing into the pool and mingling with the Pit river water, freshened the waters in the pool; that the freshening influence was lost by the diversion; that by reason thereof the waters now in the pool have been rendered stagnant, and the pool has been covered with weeds, slime, and moss, and a foul odor emanates from the pool; and that on occasions cattle have refused to drink therefrom. Substantially the same evidence was introduced by respondents on the present trial on this issue as was presented by them on the prior trials. Concerning this evidence, this court in *Crum v. Mt. Shasta Power Corp.*, 220 Cal. 295, 312, 30 P.(2d) 30, 38, after pointing out that a riparian owner, even as against another riparian, is entitled to a substantially unpolluted stream, stated: "We are of the opinion that the evidence in the present case offered on behalf of plaintiffs clearly shows that the quality of the water in Pitville pool has been materially impaired by the diversion and by the construction of the dam. The evidence

shows, without conflict, that the waters of Fall river have always been clear and pure, while the waters of Pit river have always been dark and murky. The evidence likewise shows that before the diversion the waters of Fall river rushed down into Pitville pool with a minimum flow of 1,000 second feet. The Fall river waters, as we have already held, mingled with the dark murky waters of Pit river to form the pool. The jury could have reasonably inferred that the Fall river waters freshened the water in the pool. Since the diversion, the freshening effect of the Fall river waters has been lost. Moreover, by the construction of the dam, obviously the flow of water through the crevice in the rock reef has been stopped, resulting in the Pit river water backing up. There was ample evidence introduced on behalf of plaintiffs to show that since the diversion the waters of Pitville pool have become stagnant; that the pool in the summer months is now covered with weeds, slime, and moss; and that a very undesirable odor now emanates from the pool, which is obnoxious to the senses for a distance of one-half mile from the water. There is also some evidence that since the diversion cattle will not drink the polluted water. There is ample evidence from which the jury could have found that these conditions did not exist before the diversion, and from which the jury could have inferred that the changed conditions were caused by the diversion and by the construction of the dam. It hardly need be added that, if such changed conditions resulted in a material impairment of the value of plaintiffs' lands, plaintiffs may recover therefor."

On the Anna McArthur appeal, 3 Cal.(2d) 704, 719, 45 P.(2d) 807, 815 this court quoted with approval the above language from the Crum appeal, and then concluded: "The foregoing statement correctly expresses our views respecting the issues now before us, and which are precisely like those determined by us in our former opinion from which said statement was taken."

[20] It is true that appellant introduced more evidence and new theories on the present trials on the issue of pollution than had been presented by it on the prior trials. Two chemists were produced who testified that from a chemical analysis the water in the pool was fit to drink. Scores of photographs showing horses and cattle apparently drinking from the pool after the

diversion were introduced. This, and the other evidence introduced by appellant on this issue, did nothing more than create a conflict in the evidence, which was resolved by the jury contrary to appellant's contentions. There can be no doubt, in fact, appellant admits, that the evidence thoroughly establishes that since the diversion there has been a marked increase in the weed growth in the pool, and that since the diversion in many years in the summer months the pool has been covered with weeds, slime, and moss. Appellant contends, however, that these conditions were due not to the diversion but to many years of subnormal run-off of Pit river. This argument is necessarily predicated on appellant's contention, already refuted, that before the diversion the Fall river water did not mingle with the Pit river water in the pool. The argument totally ignores the permissible inference that the Fall river water freshened the pool. Considerable credible evidence was introduced that since the diversion a foul odor has emanated from the pool. Various witnesses for respondents testified as to the preference of cattle and horses for other fresh and nonstagnant water. Several witnesses living on the pool testified that in the years since the diversion they have never seen cattle drink from the pool. As already held on the prior appeals, the juries were amply justified in inferring that these conditions were caused by the diversion and the construction of the dam, and that such changed conditions caused a material depreciation in the market value of respondents' lands. No useful purpose would be served in further recounting the evidence on these points; the record presents nothing more than the usual conflict.

[21-23] Only one other point in reference to pollution need be here discussed. Appellant contends that even if the pool was polluted by the diversion, such damage is not actionable for the reason that one riparian owner cannot maintain an action for damages against another based on pollution when the first riparian is making a proper riparian use of the waters of the stream. The juries were here correctly instructed that plaintiffs were entitled to have the waters come to them undefiled and unpolluted, unless such pollution "results from a reasonable enjoyment by the defendant of its rights as a riparian owner." The complete answer to this contention is that

appellant has devoted the entire flow of Fall river to a public use, which use, under the evidence already reviewed, and under the law of these cases as established on the prior appeals, must be held to be an excessive use. See *Crum v. Mt. Shasta Power Corp.*, 220 Cal. 295, 312, 30 P.(2d) 30; *McArthur v. Mt. Shasta Power Corp.*, 3 Cal. (2d) 704, 718, 45 P.(2d) 807. The point is without merit.

From what has already been said, it follows that the implied findings of the juries that respondents have suffered material damage by reason of the diversion, both by loss of quantity and impairment of the quality of the water, must be held to be sustained. All of appellant's contentions on these issues, whether based on the evidence, the hypothetical question, or the instructions, are without merit.

[24-29] The last major contention of appellant is that the verdicts are not supported by the evidence, and are excessive as a matter of law. Before directly discussing this subject, it should be pointed out that appellant on this point, as well as on several of the other points already discussed, has disregarded the rules of law applicable to appellate procedure. Appellant by argument based on its view of the evidence, by disregarding conflicting evidence, and by the contention that certain adverse evidence has been "completely destroyed," in its briefs makes a quite convincing showing on this issue. Of course, the jury is the sole judge of the effect, sufficiency, and weight of the evidence, and the sole judge of the credibility of the witnesses. Whatever our opinion may be as to the weight of the evidence, if there is material, credible evidence to support the verdicts, this court is without power to disturb them. As was said in *Crawford v. Southern Pacific Co.*, 3 Cal.(2d) 427, 429, 45 P.(2d) 183, 184: "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." These principles are elementary. See *Lin-*

demann v. San Joaquin Cotton Oil Co., 5 Cal.(2d) 480, 503, 55 P.(2d) 870; *Dunphy v. Dunphy*, 161 Cal. 380, 384, 3 L.R.A.(N.S.) 818, Ann.Cas.1913B, 1230; *Robinson v. Robinson*, 159 Cal. 203, 204, 113 P. 155. Although the verdicts herein are undoubtedly large, and although we have no hesitancy in stating that they are larger than we would have rendered had we been the trier of the facts, in reviewing the evidence, we are bound by the above rules.

Keeping these principles in mind, we turn to a discussion of the evidence here produced by respondents as to the amount of damage suffered by them. As already stated, these cases have been tried several times. The following table lists the verdicts rendered in these cases on these and on the prior trials:

Plaintiff	First Appeal	Second Appeal	Present Appeal
Crum	\$20,000	\$32,100	\$22,275
Albaugh	65,000	96,300	65,000
Anna McArthur	32,500		20,771
Luther McArthur	71,630		91,121
Roderick McArthur	37,500		56,388

[30] The measure of damages here involved is, of course, the depreciation in the market value of respondents' lands caused by the diversion. The following table shows this depreciation per acre as fixed by the juries on the present trials:

Plaintiff	Acreage	Average Award Per Acre
Crum	116	\$192
Albaugh	410	159
Anna McArthur	266	73
Luther McArthur	573	159
Roderick McArthur	330	170

[31] Respondents' witnesses testified in detail as to the character of the soil on re-

spondents' properties. These witnesses testified that practically the entire acreage was ideally suited for the growing of alfalfa, and that, properly irrigated, such lands should produce from 5 to 6 tons of alfalfa per acre per season. These witnesses testified that such lands, if assured of a dependable and sufficient water supply such as existed before the diversion, would be worth from about \$250 to \$400 or more per acre. They likewise testified that although there was at present sufficient water in the pool, that it was such an unreliable supply that it would not warrant the riparians in making extensive improvements on their properties. These witnesses pointed out that if all entitled thereto began to draw on the pool, and if the pool were deprived of the McArthur canal and Knoch pipe line water, there would be a grave deficiency; and it was their opinion that a prospective purchaser, in considering the market value of the lands, would be forced to consider them as practically dry lands without a dependable supply of water, worth but from \$15 to \$20 per acre. This conclusion is sound. With the Pit river constituting the only dependable source of supply, with the flow of that stream into the pool falling as low as 1.8 second feet, with increased riparian use of Pit river upstream, with there being an insufficient supply of water in the Pit river at Looseley pool, upstream from Pitville pool, for riparian requirements there, no purchaser would purchase respondents' lands for the purpose of growing alfalfa or any other crop requiring substantial irrigation.

The respondents called five valuation witnesses to testify as to depreciation in the McArthur Cases and four such witnesses in the Crum and Albaugh Cases. The following table graphically summarizes their testimony, showing the depreciation in value caused by the diversion as testified to by each of these witnesses:

Depreciation in value

Witness	L. McArthur	Rod. McArthur	A. McArthur	Crum	Albaugh
Looseley	\$180,000	\$125,000	\$76,352	\$36,540	\$100,000
Joerger	192,500	130,000	72,235		
Haynes	146,000	84,000	51,910	17,500	67,000
Anders	146,000	84,000	51,910	31,900	102,500
Opdyke	156,000	115,000	64,000	36,888	103,000
Amount of Judgment	\$ 91,121	\$ 56,388	\$20,771	\$22,275	\$ 65,000

As the above table indicates, the verdicts are all well within the estimates of the expert witnesses. With the sole exception of the witness Haynes as to depreciation of the Crum lands, all of the experts testified as to far larger depreciations in value than the verdicts under review. These witnesses were all well qualified to testify as to land values in that area. They were thoroughly familiar with land values throughout the Fall river valley, and particularly with land values around or near Pitville pool. They showed detailed knowledge of all sales of land within recent years about or near the pool. It is true that appellant on cross-examination asked the witnesses if they knew of various particular sales of farm lands in Pit and Fall river valleys where the sale price was between \$36 to \$100 per acre, and the witnesses admitted they did. Several of the witnesses pointed out that the Fall river valley properties involved in such sales were not comparable with respondents' properties, being much inferior in value. It is also true that included within the sales called to the attention of the valuation witnesses, were several sales of Pit river properties, including several purchases by respondents of some of the properties here involved, and that the top sale asked about by appellant was the purchase by Crum of his property in 1920 for about \$100 per acre. The witnesses knew of these sales but testified that these lands had been secured at bargain prices or on forced sales. The witnesses showed themselves as being thoroughly familiar with the background of those sales. On redirect examination these witnesses testified that they knew of other farm land sales in Pit and Fall river valleys of properties comparable with those of respondents, and that the prices secured for such lands were comparable with or higher than the values they had placed on respondents' lands. It cannot be held that the testimony of these witnesses is incredible or that it has been entirely destroyed. We must hold that such evidence is sufficient to support the verdicts. It is worthy of passing mention that on the present trials of the Crum and Albaugh Cases appellant introduced no evidence at all of the market values of these two respondents' properties, although such evidence had been introduced on prior trials.

[32] Appellant makes a strenuous assault upon the valuations placed on the properties of Luther and Roderick McArthur for the reason that a large portion of their lands riparian to the pool are now being

irrigated from the McArthur canal. It is contended that these lands are not "dry" lands. The answer to this contention has already been given. These two respondents own 3,500 acres of nonriparian land adjacent to the canal on which this prescriptive water could be used. In computing their damage it was not error to exclude this source of supply. A similar assault is made on the award in favor of Albaugh, and must fail for reasons already given. It is true that Albaugh irrigates a portion of his riparian lands from the Wendt-Albaugh ditch which has its source in Looseeley pool. That supply is uncertain and insufficient, and not to be compared with the copious, pure, and dependable supply of which Albaugh has been deprived.

[33] Another factor to which consideration must be given is that three successive juries have rendered substantial verdicts in the Crum and Albaugh Cases, and two successive juries have done likewise in the McArthur Cases. After each trial the trial judge denied motions for new trials. These factors are entitled to some weight on the issue as to whether the verdicts are excessive, and are of considerable weight in passing on the question as to whether the verdicts now under review were rendered under the influence of passion or prejudice.

In *Grant v. Los Angeles Transfer Co.*, 45 Cal.App. 731, 732, 188 P. 294, the court, in reference to a somewhat similar situation, stated: "Suffice it to say that we have presented to us here the fact that three juries and two trial judges have passed upon the case at different times, and that each and all of them have concluded that \$10,000 was not too great a verdict to be awarded herein. Under this state of the record, [coupled with other facts not involved on the instant appeals] * * * we think it would require an exceedingly strong case to move an appellate court to set aside the verdict for the reasons urged. It would be going far afield, in our opinion, in the face of these facts, to assume, as a matter of law, that all these—the three juries and two judges—were moved to reach their conclusions 'under the influence of passion or prejudice.' No such case is here presented."

The principles above enunciated have frequently been approved by many jurisdictions. Amply supported by many citations, the principles are thus stated in 4 *Corpus Juris* 867, § 2844: "As a general rule, after two or more successive and concurrent ver-

dicts, the appellate court will be strongly disinclined to interfere with the last verdict, and the findings under such circumstances are usually accepted as final, especially where the trial court approved all of the verdicts or the last verdict, or where at the last trial the case of the prevailing party was strengthened by additional and substantial evidence. 'To take this course', it has been said, 'is not to weakly permit or approve the doing of a wrong in the name of justice, but to recognize the proper functions of the court and the jury, and after exercising due caution to prevent injustice, places the determination of disputed questions of fact in the tribunal provided by our Constitution and laws' (*Carr v. American Locomotive Co.*, 31 R.I. 234, 242, 77 A. 104, Ann.Cas.1912B, 131)."

[34] The contention that on the first appeal of the *Crum* and *Albaugh* Cases substantially identical verdicts were held excessive, and that this has become the law of at least those two cases, is without merit. Although there is some language so indicating in the appellate court opinion, a careful reading of that opinion indicates that such language was predicated upon the assumption that as to quantity of water respondents had not been injured, for the reason that it was assumed the dam would always maintain the level of the pool. In the last opinion rendered in these cases [3 Cal.(2d) 704, 720, 45 P.(2d) 807] this matter was discussed at length, and it was unequivocally held that on none of the prior appeals had the merits of the dam been passed upon. This is a new factor, for the first time fully considered in this opinion. The point now being urged is, therefore, without merit.

[35] For the foregoing reasons it must be held that the verdicts are supported by the evidence, and that they are not excessive as a matter of law, and that the record does not show that they were rendered under the influence of passion or prejudice. We repeat that the credibility of witnesses and the weight to be given to the evidence are questions primarily for the trial court and not for this court on appeal.

[36] The other contentions of appellant are either repetitions in different form of points already discussed, or are so unsubstantial as not to require extended comment. In the *Crum* and *Albaugh* Cases, an attack is made on the arguments of respondents' counsel made to the jury. The questioned arguments had to do with an at-

tack made on the credibility of appellant's experts, with certain disparaging remarks concerning expert testimony generally, and with certain comments on the facts which appellant contends were not justified by the record. Several of the remarks were undoubtedly improper, but in view of the entire record, and in view of the careful instructions given by the trial court, both when the remarks were challenged, and at the time of instructing the jury, that they were the sole judges of the facts and credibility of the witnesses, and that they should decide the case on the evidence and not on the arguments, it cannot be held that the arguments constituted prejudicial or reversible error.

As to the varied arguments predicated on the giving or refusing of certain instructions, or upon the hypothetical question, most of the major objections have already been passed upon. The other arguments are so unsubstantial as not to require comment.

For the foregoing reasons, the judgments appealed from are, and each is hereby, affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; EDMONDS, J.; NOURSE, Justice pro tem.; STURTEVANT, Justice pro tem.



9 Cal.2d 729

**NELSON v. SUPERIOR COURT IN AND
FOR CITY AND COUNTY OF SAN
FRANCISCO.**
S. F. 15875.

Supreme Court of California.

Oct. 26, 1937.

Rehearing Denied Nov. 22, 1937.

I. Depositions ¶36, 58

An affidavit attached to notice to take deposition, addressed to secretary of City and County Employees' Retirement Board, stating that deposition of secretary "or his designated representative who is a witness and the only one who can establish facts material to the issue" was sought, but not setting forth further facts showing that secretary only could establish such facts, was

insufficient, and hence secretary could not be punished for contempt in disobeying subpoena duces tecum issued for taking of deposition (Code Civ.Proc. § 2021(6), as amended by St.1935, p. 394; § 2031).

2. Depositions ⇐36, 58

An affidavit for issuance of subpoena duces tecum in connection with taking of deposition specifying merely that witness should produce "the records, reports and X-rays which pertain to the examination, care and treatment" of party to action, did not satisfy statutory requirement that affidavit specify exact matters or things desired to be produced, and set forth in full detail the materiality thereof to the issues, and hence witness could not be punished for contempt for disobeying subpoena issued on such application (Code Civ.Proc. § 1985, as amended by St.1933, p. 1479).

3. Prohibition ⇐10(2)

Where affidavits accompanying notice to take deposition and application for issuance of subpoena duces tecum did not confer jurisdiction for issuance of subpoena because of noncompliance with statute, witness against whom subpoena was issued was entitled to writ of prohibition against punishment for disobedience of subpoena issued on such affidavits (Code Civ.Proc. § 1985, as amended by St.1933, p. 1479; § 2021(6), as amended by St.1935, p. 394; § 2031).

Application for writ of prohibition by Ralph R. Nelson, petitioner, against the Superior Court in and for the City and County of San Francisco, to avoid sentence of petitioner for contempt of court, on ground of petitioner's refusal to appear in answer to a subpoena to take a deposition.

Peremptory writ of prohibition granted.

Herbert E. Wenig, John J. O'Toole, City Atty., and Sylvain D. Leipsic, all of San Francisco, for petitioner.

William M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondent.

WASTE, Chief Justice.

Application for writ of prohibition. Petitioner is the secretary-actuary of the Retirement Board of the San Francisco City and County Employees' Retirement System. As such, it is his duty to supervise the compensation, medical care and hospitalization of city employees receiving injuries

arising out of and in the course of their employment, and to keep all the medical reports concerning such injuries. In an action brought on behalf of an injured employee of the city, petitioner refused to appear in answer to a subpoena to take a deposition. For such refusal he was adjudged to be in contempt of court, and is about to be sentenced for his disobedience of the court's process. He is here seeking by writ of prohibition to avoid the infliction of the penalty.

The facts: M. J. Dalton, a member of the San Francisco fire department, was seriously injured in 1936 when the fire truck upon which he was riding was struck by a street car operated at the time by the Market Street Railway Company. The medical reports of the treating and examining physicians, and the X-rays made, were sent to petitioner's office to be kept with other reports concerning the case of said Dalton. Subsequently, Dalton became mentally incompetent, and suit to recover damages for the personal injuries suffered in the collision was brought by his guardian ad litem against the railway company and the motorman of the colliding car. After the suit was brought, the Market Street Railway Company sought to take this petitioner's deposition. The affidavits of the secretary of the moving company defendant allege that the "corporation desires to take the deposition of Ralph R. Nelson (this petitioner), or his designated representative who is a witness and the only one who can establish facts material to the issue in said action"; "and desires that he produce all the records pertaining to the examination, care and treatment of M. J. Dalton, the plaintiff in the above entitled action, including all of the X-rays and X-ray reports and the reports of physicians or surgeons attending or treating said M. J. Dalton, which pertain to the examination, care and treatment of said M. J. Dalton, the plaintiff in the above entitled action; said evidence is material to the issues involved in said action. * * *"

Petitioner's refusal to obey the subpoena rests upon his contention that the affidavits for the issuance of the subpoena were insufficient to confer jurisdiction for its issuance. He contends, therefore, that the court lacks power to punish him for the alleged contempt.

[1] "The testimony of a witness in this State may be taken by deposition * * * 6. When the witness is the only one who

can establish facts or a fact material to the issue." Code Civ.Proc. § 2021 (as amended by St. 1935, p. 394). Does it sufficiently appear from the affidavits that petitioner is the "only one who can establish facts or a fact material" to the issue in the case? While in this instance the affidavit states the facts, does it meet the requirement of section 2031 of the Code of Civil Procedure that the affidavit served on the adverse party with the notice of the time and place of the examination must "show" that the case is one within the terms of section 2021, *supra*? As was said in *Hennessey v. Hall*, 14 Cal.App. 759, 762, 113 P. 350, 352, "there is an obvious and material distinction between showing a fact and stating it." See, also, *Irving v. Superior Court*, 79 Cal.App. 361, 364, 249 P. 236; *Cailleaud v. Superior Court*, 108 Cal. App. 752, 754, 292 P. 145. In *re Lee*, 41 Misc. 642, 85 N.Y.S. 224, is in point because of the similarity of language of the sections relating to the issuance of a subpoena duces tecum. The New York court said 41 Misc. 642, 85 N.Y.S. 224, at page 227: "There is a further objection, which strikes at the very root of the matter, and that is that no proper ground is shown for the issue of a subpoena duces tecum to produce the books for any purpose. * * * it is not sufficient merely to state that they are material, but the language of the rule is that the applicant must 'show' that they are material. This implies something more than the mere allegation of an affiant's belief that the books contain material entries. Facts must be shown upon which the court can see, at least presumptively, that the books and papers contain material entries." No such facts being shown upon the application for the subpoena, the order directing its issue was vacated and set aside. To the same effect as the foregoing cases is *Spalding v. Spalding*, 3 How.Prac. (N.Y.) 297, at pages 300, 301.

In the present case the affidavits do not, nor does either of them, disclose that petitioner, the one whose deposition is desired, is the only one who can establish the fact or facts sought to be discovered. Code Civ.Proc. § 2021, subd. 6 (as amended by St.1935 p. 394). In fact, the affidavit shows that the defendant "desires to take the deposition of Ralph R. Nelson (this petitioner), or his designated representative who is a witness and the only one who can establish facts material to the issue in said action."

[2] Furthermore, section 1985 of the Code of Civil Procedure (as amended by St.1933, p. 1479) requires that the application for issuance of a subpoena duces tecum "shall be accompanied by an affidavit specifying the exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to the issues involved in the case." The affidavit in this case merely designates the records, reports, and X-rays "which pertain to the examination, care and treatment" of plaintiff. There is, therefore, a complete failure to meet the requirement of section 1985.

[3] We deem further discussion of the affidavits unnecessary. For the reasons noted, they are insufficient to confer jurisdiction for the issuance of the subpoena petitioner is charged with disobeying. In *re Lee*, *supra*.

Let the peremptory writ of prohibition issue as prayed.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; NOURSE, Justice pro tem.



9 Cal.2d 743
CITY AND COUNTY OF SAN FRANCISCO
v. MARKET ST. RY. CO.
S. F. 14951.

Supreme Court of California.
Oct. 27, 1937.

1. Taxation ⇨61, 191

A franchise is "property," and subject to taxation, in absence of grant of exemption in franchise, and mere failure to provide expressly for taxation of franchise or of owner thereof on account of franchise is not an exemption from taxation.

[Ed. Note.—For other definitions of "Property," see Words & Phrases.]

2. Street railroads ⇨24(4)

Under constitutional provision for tax against street railways measured by gross receipts, in lieu of all other taxes and licenses, but not releasing railways from payment of "amount agreed to be paid or required by law to be paid for any special privilege or franchise," collection of licenses

or license taxes on street cars, provided for by part of franchises held by street railway and by general license tax ordinance as respects other franchises, was barred by payment of "in lieu" tax (St.1869-70, p. 481; St.1893, p. 288; St.1897, p. 135, § 1; St.1899, p. 252, § 6; St.1901, p. 265; St.1905, p. 777; Civ.Code, §§ 497, 508; Const. art. 13, § 14, as added in 1910, see St.1910, 2d Ex.Sess., p. 14).

3. Street railroads ⇄24(4)

Taxation ⇄200

Payments of percentages of gross receipts under statutes providing for grants of franchises to highest bidders are not "taxes" or "licenses" within meaning of constitutional provision for tax against certain companies, including street railway companies, "in lieu of all other taxes and licenses" (Const. art. 13, § 14, as added in 1910, see St.1910, 2d Ex.Sess. p. 14).

[Ed. Note.—For other definitions of "License" and "Tax; Taxation," see Words & Phrases.]

4. Street railroads ⇄24(4)

A street railway which paid constitutional tax measured by gross receipts, in lieu of all other taxes and licenses, was not liable to city and county for licenses or license taxes on street cars, notwithstanding that such licenses or license taxes were not taxes on property, since constitutional tax is in lieu of licenses and license taxes, as well as taxes on property (St.1869-70, p. 481; St.1893, p. 288; St.1897, p. 135, § 1; St.1899, p. 252, § 6; St.1901, p. 265; St. 1905, p. 777; Civ.Code, §§ 497, 508; Const. art. 13, § 14, as added in 1910, see St.1910, 2d Ex.Sess. p. 14).

5. Street railroads ⇄24(4)

Taxation ⇄200

The constitutional tax against certain companies, including street railway companies, measured by gross receipts in lieu of all other taxes and licenses, is in lieu of licenses and license taxes, as well as in lieu of taxes on property (Const. art. 13, § 14, as added in 1910, see St.1910, 2d Ex. Sess. p. 14).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the City and County of San Francisco against Market Street Railway

Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Prior opinion, 67 P.(2d) 89.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for appellant.

William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondent.

SEAWELL, Justice.

The City and County of San Francisco brought this action to recover from defendant Market Street Railway the sum of \$11,062.50, claimed to be owing to it "as and for a license tax" upon street cars operated by defendant in the city of San Francisco. The tax claimed is at the rate of \$15 per annum per car. The tax is payable quarterly. The recovery herein sought is for the year commencing July 1, 1926, and for the first quarter of the year commencing July 1, 1927.

Plaintiff city prosecutes this appeal from a judgment of nonsuit entered against it. It was the contention of defendant Market Street Railway, sustained by the court below, that the collection of the municipal taxes in question could not be had by virtue of the provisions of section 14, article 13, which was added to the Constitution in 1910 (see St.1910, 2d Ex.Sess. p. 14). Said constitutional provision (until 1933) provided for a tax measured by a percentage of gross receipts from operation to be paid by certain enumerated companies, including street railway companies. It further provided: "Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated [operative property] of such companies except as otherwise in this section provided; provided, that nothing herein shall be construed to release any such company from the payment of any amount agreed to be paid or required by law to be paid for any special privilege or franchise granted by any of the municipal authorities of this state." During the period herein involved the defendant paid to the state the sum of \$786,208.26 as a tax measured by its gross receipts. The question involved on this appeal is whether the "license tax" of \$15 a car per annum which the city seeks to collect is an amount "agreed to be paid or required by law to be paid" for the franchises under which the defendant operates its cars.

The contention of defendant, sustained by the court below, was that certain of the state laws under which the city was authorized to grant the franchises in question, and the municipal orders and ordinances by which said franchises were granted, provided for certain payments to be made during the life of the franchise, and measured by a percentage of the gross receipts from operation, as a purchase price for the franchise granted. It was the purpose of the above-quoted provision to save to municipalities the right to continue to collect these payments, defendant contends. The state laws also authorized the city to exact a license or license tax of the owners of street railways not to exceed \$50 per annum per car in the city of San Francisco, nor \$25 in other cities. This license tax is not within the saving proviso of section 14, article 13, defendant contends. That is, defendant draws a distinction between the purchase price of the franchise (an amount payable during the life of the franchise and measured by a percentage of the gross receipts from operation) and licenses or license taxes thereafter exacted of the owner of the franchise. Only sums due in the nature of purchase price payments are amounts "agreed to be paid or required by law to be paid *for*" a franchise, defendant contends.

The defendant operates cars in the city of San Francisco by virtue of 58 franchises, granted between 1876 and 1909. Said franchises were granted under statutes of 1869-70, 1893, and 1897 and under the 1900 charter of the City and County of San Francisco.

The first state statute conferring on municipalities the power to grant street railway franchises became effective in 1870. Stats.1869-70, p. 481. Under said acts bids were not required to be made to obtain franchises. The statute of 1893, however, required that franchises should be awarded to the highest bidder. Stats.1893, p. 288. The effect of this statute was to require a cash bid. But the act of 1897 (St.1897, p. 135, § 1) required the bid to be "for the payment in lawful money of the United States of a stated per cent. of the gross annual receipts of the person, partnership, or corporation, or other authority to whom the franchise is awarded, arising from its use, operation, or possession." The statute further provided that no percentage should be paid for the first 5 years succeeding the date of the franchise, but "thereafter such percentage shall be payable an-

nually, and shall in no case be less than three per cent per annum upon such gross receipts."

After 1900 the City and County of San Francisco granted franchises, to continue for a term of 25 years, under the San Francisco charter of 1900. Stats.1899, p. 252, § 6, in effect January 1, 1900. Said charter provided for award of the franchise to the person offering to pay the highest percentage of the gross receipts arising from operation. It further provided that no award should be made unless the stated percentage "offered to be paid for the franchise" should be at least 3 per cent. of such gross receipts during the first 5 years, 4 per cent. during the next 10 years, and 5 per cent. during the next 10 years.

The franchise statute of 1901 and 1905 (under which none of the franchises herein was granted) reverted to the system of a cash bid, but also required the successful bidder to pay 2 per cent. of gross annual receipts during the life of the franchise. Stats.1901, p. 265; The Broughton Act, Stats.1905, p. 777. The statutes of 1897, 1901, and 1905 repealed other acts inconsistent therewith.

The acts of 1893, 1897, 1901, and 1905 are all described in their titles as acts providing "for the sale" of franchises. They all provide for award of the franchise to the highest bidder, as does the 1900 charter of San Francisco. Neither said statutes, nor the provision of the charter providing for grants of franchises by the city and county (art. 2, chap. 2, § 6, St.1899, p. 252), contain any reference to payment of licenses or license taxes by franchise holders. The earlier statute of 1869-70, however, provided: "The owners of every such railroad shall pay to the authorities of the city, or town or county, as a license upon each car, such sum as said authorities may fix, not exceeding fifty dollars per annum in the city of San Francisco, nor more than twenty-five dollars per annum in other cities or towns. * * *

Sections 497 and 508, placed in the Civil Code in 1872 and remaining there today, also referred to license taxes. Section 497 provided for municipal grants of authority to lay street railroad tracks "under such restrictions and limitations, and upon such terms and payment of license tax," as the city "may" provide. Section 508 provided that "each street railroad corporation *must* pay to the authorities of the city, town,

county, or city and county, as a license upon each car, such sum as the authorities *may* fix, not exceeding fifty dollars per annum in the city of San Francisco, nor more than twenty-five dollars per annum in other cities or towns."

Acting under the above provisions in the statute and Code sections, the city in some cases placed express provisions in the orders and ordinances by which it granted franchises providing either for a "license" or "license tax" in the sum of \$15 per car per annum. In some instances it was provided that no greater sum should be exacted. In other cases the grant of the franchise provided that the owner thereof should pay a "license" or "license tax" in an amount to be provided by law or fixed by the board of supervisors. Twenty of the 58 ordinances granting franchises contained no reference whatever to a license, or license tax of any kind. As to those franchises which do not fix the amount of the license or license tax per car, the city claims the amount of \$15 per car under the provisions of its general license tax ordinance (ordinance 5132, n. s.) providing for license taxes upon numerous businesses and callings.

[1] Omitting from consideration for the moment the "in lieu" provision of the Constitution, there would seem to be little doubt that licenses or license taxes might be levied by the municipal authorities as respects franchises which are silent as to such exactions. A franchise is property, and subject to taxation in the absence of a grant of exemption in the franchise. Mere failure to expressly provide for taxation of the franchise or of the owner thereof on account of the franchise is not an exemption from such taxation. *City of Springfield v. Smith*, 138 Mo. 645, 40 S.W. 757, 37 L.R.A. 446, 60 Am.St.Rep. 569; *City of Wyandotte v. Corrigan*, 35 Kan. 21, 10 P. 99; *City of New Orleans v. Orleans R. Co.*, 42 La. Ann. 4, 7 So. 59, 21 Am.St. Rep. 365; *Newport News & O. P. Ry., etc., Co. v. Newport News*, 100 Va. 157, 40 S.E. 645.

As noted above, defendant street railway contends that amounts exacted per car as licenses or license taxes are not amounts "agreed to be paid or required by law to be paid for" the franchise within the meaning of section 14, article 13, Constitution; that said proviso was intended to preserve to municipalities only the right to continue to collect the percentage of gross receipts

bid for the franchise, and which constitutes a sort of purchase price therefor. In this analysis the state tax provided by section 14, article 13, Constitution, is "in lieu" of the license or license tax per car which the city seeks to collect herein, and the city is without right to demand payment thereof.

[2] Appellant city and county emphasizes the contractual nature of a franchise in asserting that its claim for \$15 per car per annum is an "amount agreed to be paid * * * for" the franchise. By accepting the franchise and commencing operations thereunder, and in some cases by written acceptance of the franchise filed with the authorities, the franchise grantee has bound himself to the terms of the grant, including provisions therein with regard to licenses and license taxes. However, even in the absence of provision for a tax or license in the grant of franchise, as in the case of 20 of the franchises held by defendant, the grantee, in the absence of express exemption from taxation in the grant, is subject to taxes in respect of this species of property, as of other types of property. Cases cited, *supra*. It may be questioned whether an obligation to pay a license or license tax may truly be said to be contractual when it will devolve upon the grantee of the franchise without regard to any provision therefor in the grant. It may, perhaps, be said to be contractual in the sense that it arises by virtue of the franchise grantee having accepted the franchise, which is a contract. *Tulare County v. City of Dinuba*, 188 Cal. 664, 670, 206 P. 983. But nevertheless we are of the view that license or license taxes are not amounts agreed to be "paid for" franchises within the meaning of section 14, article 13, Constitution. We shall discuss this proposition further after first noting respondent's contention that the license or license taxes claimed by the city are not "required by law" to be paid.

The statute of 1869-70 (page 483, § 10) provides that the owners of street railroads "shall pay" as a license upon each car such sum as the authorities "may fix," not exceeding \$50 a car in San Francisco. Section 508, Civil Code, provides that street railroad corporations "must pay" as a license upon each car, such sum as the authorities "may fix," repeating the \$50 limitation for San Francisco. (Italics ours.) In neither case is there any requirement that the municipal authorities fix any sum as a license or license tax, de-

fendant points out. However, the state provisions do require that franchise holders *shall* and *must* pay such sums, not exceeding the fixed limit, as the city authorities may fix as a license. We think it must be said that when the city has acted to fix the amount of this license or license tax, either by provisions of the order granting the franchise or by general ordinance, that the state law provisions "require" that the amounts thus fixed be paid. But although the amount of the license is "required by law to be paid," or is "agreed to be paid," we are of the view that it is not "paid for" the privilege or franchise within the constitutional saving proviso.

[3] There is a clear distinction between the amount agreed to be paid for property, or required by law to be paid for it, that is, the purchase price, and taxes thereafter levied upon it or exacted of the owner in respect of said property. This distinction exists even though the amount to be "paid for" the property is a percentage of the gross receipts from operation, payable during the life of the franchise. Payments of percentages of the gross receipts under the statutes providing for grants of franchises to the highest bidder are not taxes or licenses within the meaning of section 14, article 13, Constitution. *County of Tulare v. City of Dinuba*, 188 Cal. 664, 670, 206 P. 983. The titles of the acts of 1893, 1897, and 1901, *supra*, all describe said acts as providing for the *sale* of franchises. The acts in each case, and the San Francisco charter of 1900 also, provide for award of the franchise to the highest bidder, that is, for a sale of the franchise. A sale implies a purchase price, which has been variously set as a sum payable in cash upon the award of the franchise, as a percentage of the gross receipts from operation during the life of the franchise, or as a combination of both. The San Francisco charter of 1900 requires the percentage "offered to be paid for the franchise" to be at least 3 per cent. of the gross receipts from operation during the first 5 years. Neither said section of the charter (art. 2, c. 2, § 6) referring to the grant of franchises, nor the provisions of any of the above statutes providing for competitive bids and sale of the franchise, contain any reference to a license or license tax.

By virtue of the fact that the city is the seller of the franchise, under authority from the state, as well as the tax collect-

ing authority, the amount "paid for" the franchise, as well as the license or license tax per car, if collectible by the city, is due the same entity. And in some cases the grant of franchise has limited the amount which the city may thereafter collect per car. But the license or license tax does not thereby become an amount "paid for" the franchise. In regard to the sale of, and amount to be *paid for* the franchise, the requirement is for award to the highest bidder, with limitations under some of the statutes and under the charter as to the minimum bid which may be accepted. As to the license per car, authorized to be exacted under separate statutes, or, in the case of the San Francisco charter, under separate charter section, the law provides not a minimum, but a maximum beyond which the city cannot go in its exaction. The charge per car is described in the statutory provisions by which it is authorized to be exacted (Stats. 1869-70, pp. 481, 483, §§ 1, 10; sections 497, 508, Civ. Code) as a license tax and as a license. In its complaint the city prays for recovery of sums due "as and for license tax." We conclude that the amounts herein sued for are not amounts "agreed to be paid or required by law to be paid for" the franchises, within the proviso of section 14, article 13, Constitution, preserving to municipalities the right to collect such amounts.

As an additional argument in support of its contention, upheld by us, defendant has referred to the 1910 report of the commission on revenue and taxation, which framed the constitutional provisions. After pointing out that under the constitutional amendatory provisions street railways must pay to the state 4 per cent. of their gross receipts annually, the commission says: "Street car companies must pay, as now the 2% of their gross receipts to the cities under the Broughton Act [Stats. 1905, p. 777, one of the statutes providing for 'sale' of franchises, and for payment of percentage of gross receipts from operation to the local authority granting the franchise] for the enjoyment of their franchises in the public streets, and this is in addition to the 4% paid to the 'state.'" Page 18. Defendant states: "By the express mention of the fact that street car companies would remain under the obligation to pay pursuant to the Broughton Act and by refraining to state that such companies should likewise remain under the obligation to pay license taxes, the purpose to relieve street car companies of the

payment of license taxes is clearly exhibited."

[4, 5] Plaintiff suggests that the licenses per car remain collectible by the city notwithstanding section 14, article 13, Constitution, for the reason that said charges per car are not taxes "upon property." This contention has been decided adversely to plaintiff in several cases, in which it has been held that the gross receipts tax exacted under section 14, article 13, is in lieu of licenses and license taxes, as well as in lieu of taxes on property. *City of San Francisco v. Pacific Telephone & Telegraph Co.*, 166 Cal. 244, 135 P. 971; *Hartford Fire Ins. Co. v. Jordan*, 168 Cal. 270, 283, 142 P. 839; *Pacific Gas & Elec. Co. v. Roberts*, 168 Cal. 420, 143 P. 700.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; NOURSE, Justice pro tem.



23 Cal.App.2d 383

In re SMITH'S ESTATE.

Civ. 10647.

District Court of Appeal, First District,
Division 2, California.

Nov. 8, 1937.

1. Wills ⚡684(10)

Where testamentary trust provided for application of income, so far as in judgment of trustees it was deemed necessary, to support, maintenance, and education of issue of beneficiary, and that balance of income be paid to beneficiary, trustees' discretion with regard to amount of income necessary for support, maintenance, and education of beneficiary's issue could not be interfered with by court unless abused.

2. Wills ⚡684(10)

Where testamentary trust provided for application of income, so far as in judgment of trustees it was deemed necessary, to support, maintenance, and education of issue of beneficiary, and that balance of income be paid to beneficiary, and it appeared that beneficiary was providing for support of his child under orders of court in divorce action, contributing amounts of from \$30 to

\$75 per month, trustees did not abuse their discretion in determining that no additional amount was necessary for support, maintenance, and education of such child.

3. Wills ⚡684(10)

Where testamentary trust provided for application of income, so far as in judgment of trustees it was deemed necessary, to support, maintenance, and education of issue of beneficiary, and that balance of income be paid to beneficiary, court was not required, on petition of beneficiary's child for determination of her rights, to find amount necessary for support, maintenance, and education of beneficiary's child unless court found that trustees had abused their discretion in deciding that no further amount than child received under divorce decree was necessary.

4. Trusts ⚡324

In proceeding for settlement of trustees' account, cross-complaint filed by exceptor to account was properly stricken from files, since there is no provision for filing any pleading in such proceeding other than written exceptions to account (Probate Code, § 927).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

In the matter of the estate of Sidney V. Smith, deceased, wherein Elaine Grace Smith, by her guardian, Elaine Smith, filed a petition against the Bank of California and others and a cross-complaint against trustees named in the will of Sidney V. Smith, deceased. From a judgment determining the rights of Elaine Grace Smith, from orders settling the eighth and ninth accounts of the trustees, from an order settling the tenth account of the trustees, and from an order dismissing an order to show cause, petitioner appeals.

Affirmed.

Treadwell, Laughlin & Treadwell, of San Francisco, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, for respondents.

SPENCE, Justice.

Four appeals in the above-entitled cause have been presented herein on one set of briefs. The first appeal is from a judgment on the amended petition for the determination of the rights of Elaine Grace

Smith, a minor. The second appeal is from the orders settling the eighth and ninth accounts of the trustees. The third appeal is from the order settling the tenth account of the trustees. The fourth appeal is from the order dismissing an order to show cause.

The above-entitled cause was before this court on a former appeal. In *re Estate of Smith*, 4 Cal.App.(2d) 548, 41 P.(2d) 565. The trust provisions and the allegations of the amended petition are set forth in the opinion on the former appeal and need not be repeated here. It was there held that the probate court had jurisdiction of the controversy and that said court had erred in sustaining the demurrer to the amended petition. The order denying said amended petition was therefore reversed, with directions to overrule the demurrer. Thereafter the trustees answered, and a trial was had before the court sitting without a jury. Findings were made by the trial court and a judgment was entered thereon as follows: (1) That petitioner, Elaine Grace Smith, a minor, together with her brother and her sister, were the lawful issue of Sidney V. Smith, Jr., and Elaine T. Smith, and were entitled as such to all the rights conferred by the trust created by the last will and testament of Sidney V. Smith and were entitled to receive from the income of the trust the amount which in the judgment of the trustees was necessary for their support, maintenance, and education; (2) that petitioner recover her costs; and (3) that the court retain jurisdiction to give such further orders and directions as might be necessary to protect and enforce the rights of the parties under the trust. Of the appeals now before us, the first appeal above mentioned was taken by petitioner from "the whole of said judgment," excepting the affirmative portions thereof as above set forth.

The hearing upon the settlement of the eighth and ninth accounts of the trustees was had at the same time as the hearing on said amended petition. Prior to that time, petitioner, Elaine Grace Smith, had filed her "Answer and Objections to Accounts of Trustees." Said petitioner had also filed a "Cross-Complaint" against the trustees by which she sought to recover damages for the alleged violations by the trustees of their duties. Upon motion of the trustees, said cross-complaint was ordered stricken from the files. At the hearing upon the settlement of said accounts, certain corrections were made by the court as to each of said accounts and one order was made settling

the eighth account as corrected and a second order was made settling the ninth account as corrected. The second appeal above mentioned was taken from said orders settling said accounts.

Shortly after the entry of the judgment involved in the first appeal now before us, said petitioner obtained an order to show cause directing the trustees to show cause why they should not file a further account and why the court should not make a further order requiring the trustees to pay such sums as were necessary for the support, maintenance, and education of petitioner. Prior to the hearing on the order to show cause, the trustees filed their tenth account, and it appeared that the sum of \$75 per month had been paid by Sidney V. Smith, Jr., for the support of said petitioner as directed by an order made in the divorce proceeding between said Sidney V. Smith, Jr., and Elaine T. Smith. The court made its order correcting the tenth account and settling the same as corrected. The third appeal above mentioned is taken from said order. The court also made its order dismissing the order to show cause without prejudice and it is from said order that the fourth above-mentioned appeal is taken.

The trial court found that said petitioner was born on November 13, 1923. She was therefore ten years of age when the amended petition was filed in February, 1934. The trial court further found that at the time of the filing of said petition Sidney V. Smith, Jr., the father of petitioner, had been paying the sum of \$30 per month for her support pursuant to an order of the superior court made in the divorce action between petitioner's parents, but that said court had increased said amount to \$75 per month in April, 1934, which amount had since been paid by her said father. The court further found that said trustees had not abused their discretion and had not acted in violation of the terms of the trust.

[1,2] We are of the opinion that the findings are sustained by the evidence and that said findings support the judgment and orders as entered. The trust involved in these proceedings provided that the trustees should apply the income "so far as in their judgment they deem it necessary" to the support, maintenance, and education of the issue of Sidney V. Smith, Jr., by Elaine T. Smith. The balance of the income was to be paid to said Sidney V. Smith, Jr. The trustees were therefore given the power to determine the necessity for applying any

part of the income of the trust to the support, maintenance, and education of said issue, and we are of the opinion that there should be no interference by the courts with the exercise of that power except upon the showing of an abuse of discretion by the trustees. The trial court concluded that no abuse of discretion had been shown in the present case, and entered its findings and judgment accordingly.

All four appeals are argued together by appellant herein. As stated in appellant's reply brief: "All of the appeals are in the same matter and they are all for the purpose of reviewing the orders and decrees which have failed, as we claim, to make any adequate provision enforcing the right of the appellant to proper sums from the trust funds for her support, maintenance and education."

The main contention of appellant appears to be that the evidence was insufficient to sustain the findings of the trial court to the effect that the trustees had not abused their discretion. As above indicated, we are of the opinion that there is no merit in this contention. At all times in question, it appears that Sidney V. Smith, Jr., appellant's father, was providing for her support, maintenance, and education by payments made under the orders of the court in the divorce action. The amount so paid prior to 1934 was the sum of \$30 per month and the amount so paid since 1934 was the sum of \$75 per month. Said Sidney V. Smith, Jr., was also a beneficiary under the trust and was entitled to such income as was not deemed necessary by the trustees for the support, maintenance, and education of appellant and her brother and sister. While the amounts fixed in the orders of the court in the divorce action were not necessarily controlling and while the trustees might have deemed further sums to be necessary for appellant's support, maintenance, and education and might have paid said sums out of the income of the trust, the determination of the amount necessary for said

purposes was primarily for the determination of the trustees under the terms of the trust. Upon the record before us, we are satisfied that the trial court was justified in finding the trustees did not abuse their discretion in determining that no additional amount was necessary.

[3] Closely related to the foregoing contention and argued by appellant under the same heading is the contention that the trial court erred "in failing to find the amount necessary for her support, maintenance and education, and in failing in some appropriate manner to compel the trustees to observe her rights." We find no merit in this contention, as under the circumstances such findings and orders would have been required only in the event that the trial court had found that the trustees had abused their discretion.

[4] Most of the remaining points raised by appellant are disposed of by the discussion of the foregoing contentions. Appellant's contention relating to alleged error in denying a jury trial has been abandoned by appellant in her reply brief. There is but one further contention that requires comment. It is claimed that the court erred in striking the cross-complaint from the files. We are of the opinion that this contention is without merit. Said cross-complaint was filed in the proceeding for the settlement of the eighth and ninth accounts. Respondents have made several replies to this last-mentioned contention, but we believe it sufficient to point out that there is no provision for filing any pleading in a proceeding for the settlement of an account other than "written exceptions to the account." Probate Code, § 927. Said cross-complaint was therefore properly stricken from the files.

The judgment and orders appealed from are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

23 Cal.App.2d 358

**UNION SAFE DEPOSIT BANK v. CITY
OF CLOVIS et al.**

Civ. 1822.

District Court of Appeal, Fourth District,
California.

Nov. 6, 1937.

1. Municipal corporations Ⓒ580

Under provisions of Improvement Bond Act for sale of property for delinquent assessments and purchase thereof by city, city must pay amount bid for property on initial sale, and, if property is not redeemed or resold, and city has surplus unappropriated funds in its treasury, city should pay future assessments as they become due (St.1923, p. 304, § 12).

2. Mandamus Ⓒ96

Under Improvement Bond Act, bondholders can compel city to levy special tax only to pay the purchase price of property sold for delinquent assessments on its initial sale to city, and cannot compel payment of subsequent delinquencies or price on subsequent sales to city for subsequent delinquencies before redemption or resale (St.1921, p. 230, § 16(a); St.1923, p. 304, § 12).

3. Mandamus Ⓒ14(1)

The failure of tax collector to make demand on city council to levy tax to pay purchase price of property bid in by city at sale for delinquent assessments is no defense to proceeding to compel city to levy such tax, since tax collector has statutory duty of making such demand (St.1921, p. 230, § 16(a); St.1923, p. 304, § 12).

4. Mandamus Ⓒ96

An "initial sale" of property for delinquent assessments for purposes of Improvement Bond Act, such that city can be compelled to levy tax to pay purchase price therefor, means any sale where property passes from private to municipal ownership, and includes sale for subsequent delinquency after property is once sold to city and is redeemed by owner or resold by city (St. 1921, p. 230, § 16(a); St.1923, p. 304, § 12).

5. Mandamus Ⓒ96

Where city had raised by voluntary special assessments an amount equal to or greater than amount which bondholder could force it to raise by involuntary special assessment, bondholder was not entitled to writ

of mandate directing levy of involuntary special assessment (St.1921, p. 230, § 16(a); St.1923, p. 304, § 12).

6. Mandamus Ⓒ96

Where amount which city had raised by voluntary special assessments to pay purchase price of properties bought by city at sale for delinquent assessments exceeded purchase price of properties on initial and subsequent sales as shown by record, and city had stipulated for writ ordering it to turn such amount over to bondholders, bondholder was not entitled to writ of mandate requiring levy of involuntary special assessment to pay such purchase price (St.1921, p. 230, § 16(a); St.1923, p. 304, § 12).

7. Mandamus Ⓒ178

Where, according to figures derived from record, bondholder was not entitled to writ of mandate against city, but statements made by counsel indicated that such figures might be subject to challenge, and other questions could not be exactly determined from record, denial of writ would be without prejudice.

Original proceeding by the Union Safe Deposit Bank, petitioner, against the City of Clovis and others, respondents, to compel respondents to pay certain sums of money to petitioner and to require levy of tax.

Decree in accordance with opinion.

Wild, Everts & Carlson, of Fresno, for petitioner.

Arthur Frame, City Atty., of Clovis, for respondents.

MARKS, Justice.

This is an original proceeding seeking to compel respondents to pay to petitioner certain sums of money now in the city treasury of the City of Clovis, and to require respondent Hatch to demand of the respondent members of the board of trustees of the city that they levy, and to require them to levy, a tax for the purpose of paying for land purchased by the city at delinquent tax sales which occurred from June, 1924, to June, 1934, inclusive, in accordance with the provisions of the Improvement Bond Act of 1915.

The City of Clovis is a municipal corporation of the sixth class. F. L. Camp,

C. A. Booher, E. W. Burke, H. B. Owens, and T. R. Pendergrass compose its board of trustees. F. R. Redford is its city treasurer, and L. V. Hatch is its ex officio tax collector.

In 1920 and 1922 the City of Clovis took proceedings under the Improvement Act of 1911 (Stats.1911, p. 730, as amended) to improve certain of its streets. It issued bonds under the provisions of the Improvement Bond Act of 1915. Stats. 1915, p. 1441, as amended. The earlier bonds were known as "Series A" and the second issue as "Series B." Petitioner ultimately became the owner of these bonds. No question is raised as to the legality of the proceedings leading up to their issuance.

Defaults were made by numerous property owners in the two districts in the payments of their assessments, and their properties were sold to pay the delinquencies. Each year, commencing with the fiscal year 1923-1924 and ending with the fiscal year 1933-1934, the city levied a tax on all its taxable property to furnish money with which to make payments on the respective amounts for which the properties were sold. Some of the money thus collected was probably paid to the bondholders and the balance now remains in the city treasury in the two redemption funds.

To simplify the issues presented for our decision the parties filed a stipulation which, among other things, abandoned certain technical defenses, including the plea of the bar of the statute of limitations. The portions of the stipulations now important to this decision are as follows:

"That the respondent agrees to the issuance of the writ without costs against any of the respondents, requiring respondent to pay to the petitioner the sum of \$5,283.28 now in the redemption fund for Series 'A' and the sum of \$942.48 now in the redemption fund for Series 'B', the said amounts to be applied first upon the payment of accrued interest pro rata among all of the said bonds, the balance, if any, to be applied upon the principal pro-rate.

"That the question to be decided by the court is, whether or not the respondent shall be required to levy any further tax for the purpose of paying for lands purchased by said city at said delinquent tax sales from June 1924 to June 1934 inclu-

sive, in an amount equal to \$.10 for each \$100.00 valuation of said property after the maturity of said bonds and of said assessments."

Section 12 of the Improvement Bond Act (as amended by St.1923, p. 304) provides for the sale of property upon which there are delinquencies in the payments of assessments. At such sales the city becomes the actual or constructive purchaser of the property. It is provided that the city shall thereupon "pay and transfer into said redemption fund the amount of the delinquent assessment and of the delinquent interest thereon upon which said sale is made. * * * In the event of such purchase being made by the city and of any succeeding instalment of such assessment or of such interest not being paid in any future year, the property shall not be sold unless there has previously been a redemption from such sale or unless under the law it is then being sold for delinquent taxes. The city shall nevertheless, unless a resale has been made by it, from time to time when due pay and transfer into said redemption fund the amount of any such future delinquent assessment and interest pending redemption, and no redemption shall be made until any such subsequent payments, with interest and penalties, shall also be paid." The section further provides that, in the event there are no funds available to pay the amount for which the property was sold, the tax collector shall make demand upon the city council that a suitable amount be provided in the next tax levy to furnish funds with which to make such payments.

Subdivision (a) of section 16 of the same act (as amended by St.1921, p. 230) provides as follows: "The city council may, and in the event of demand by the tax collector therefor as provided in section twelve hereof must, at the time of fixing the annual tax rate and levying the taxes to be collected for general municipal purposes, levy a special tax upon the taxable property in the city for the purpose of paying for the lands purchased or to be purchased at such tax sales, but not to exceed for each local improvement ten cents on each one hundred dollars of assessable property. Such special tax shall be in addition to all other taxes levied for municipal purposes, and shall be computed, entered and collected in the same manner, and by the same persons and at the same time and with the same penal-

ties and interest as are other municipal taxes of said city."

The two sections of the Improvement Bond Act involved here have been rather thoroughly construed in the following cases: *American Company v. City of Lakeport*, 220 Cal. 548, 32 P.(2d) 622; *Union Safe Deposit Bank v. City of Menlo Park*, 3 Cal.(2d) 264, 43 P.(2d) 811; *Southern California Roads Co. v. County of San Luis Obispo*, 4 Cal.(2d) 220, 48 P.(2d) 34; *Griffith Company v. County of Los Angeles*, 4 Cal.(2d) 222, 48 P.(2d) 35; *Sawyer v. County of San Luis Obispo*, 4 Cal.(2d) 776, 48 P.(2d) 35; *Hammond v. City of Burbank*, 6 Cal.(2d) 646, 59 P.(2d) 495, 499; *Thompson v. City of Compton*, 6 Cal.(2d) 666, 59 P.(2d) 505; *City of Dunsmuir v. Porter*, 7 Cal.(2d) 269, 60 P.(2d) 836; *Kerr Glass Mfg. Corporation v. City of San Buena Ventura*, 7 Cal.(2d) 701, 62 P.(2d) 583, 585; *Thompson v. City of La Mesa*, 9 Cal.App.(2d) 542, 50 P.(2d) 504.

[1] It is now settled that section 12 of the Improvement Bond Act provides a plan for the sale of property for delinquent assessments; that the city shall pay the amount bid for the property on the initial sale; that, if the property be not redeemed or resold and if it has surplus unappropriated funds in its treasury the city should pay future assessments as they become due until the property is redeemed or resold. This section gives to the bondholder no power to compel the levy of a tax to pay delinquencies. His rights to force the city to use surplus unappropriated funds raised by general taxation to pay future assessments is not involved here. The City of Clovis has no such funds.

[2,3] Subdivision (a) of section 16 of the act places a duty on the city to levy a special tax not exceeding 10 cents on each \$100 assessed valuation of all the taxable property in the city with which to pay the amounts for which properties have been sold to pay initial delinquent assessments. This duty can be enforced by owners of bonds in proceedings of this character. Further it has been held that failure of the tax collector to make demand on the city council to levy the tax is no defense to the proceeding. The law places such duty on the tax collector, and the city cannot hide behind the failure of a city officer to perform a duty imposed upon him by law.

The law regards as done that which it especially requires to be done by the tax collector in making the demands.

The only question presented to us here which has not been flatly decided in the cases which we have already cited is: Where the city has bought properties for the initial delinquencies and, instead of paying subsequent assessments as they become due, has permitted the properties to be repeatedly sold for subsequent assessments as they become due and delinquent, can the bondholder compel the city to levy the special assessments to pay the amounts for which the properties were subsequently sold?

This question was approached but not decided in the case of *Hammond v. City of Burbank*, supra, where it was said:

"It must now be taken as settled, not only by the Lakeport decision, but also by the other cases subsequently decided, that section 16(a) is the only section imposing a mandatory duty to levy a tax, and it must necessarily follow that since that section provides the purpose for which that tax may be levied, that that purpose is exclusive, and that the city cannot be compelled to levy a tax other than as in that section provided.

"Under this interpretation it is obvious that petitioners' contention that the act provides for a flat limited guaranty for the full payment of the bonds cannot be sustained. All the act provides, so far as the mandatory duty of the city is concerned, is that the city create a revolving fund to assist in the purchase of the lands sold at delinquent tax sales. After referring to the two sections, this court in the Lakeport Case stated that 'the method employed by our statute is in effect an advancement of funds, which the city may normally be expected to recover upon resale of the lands secured at the delinquent sales' (220 Cal. 548, at page 562, 32 P.(2d) 622); in other words, the statute does not provide for any guaranty by the city but merely a loan of funds. See, also, *City of Pasadena v. McAllaster*, 204 Cal. 267, 267 P. 873; *Municipal Imp. Co. v. Thompson*, 201 Cal. 629, 258 P. 955. Petitioners strongly rely on certain language appearing in some of the cases such as: There is a mandatory duty on the part of the city 'to levy and collect said tax to pay the principal and interest on said bonds' (*Union Safe Deposit Bank v. City of Men-*

lo Park, supra, 3 Cal.(2d) 264, at page 266, 43 P.(2d) 811); a mandatory duty exists 'to pay overdue principal and interest on the bonds' (Southern California Roads Co. v. County of San Luis Obispo, supra, 4 Cal.(2d) 220, 48 P.(2d) 34); and similar language appearing in the other cases. These generalizations are not to be given the effect contended for. Although, in a general sense, it is true that the money raised by the 10-cent levy goes into the bond redemption funds, and so is ultimately applied to payment of the principal and interest on the bonds, the duty to levy the tax, under section 16(a), is not directly for that purpose but for the sole purpose of 'paying for the lands purchased * * * at such tax sales.' The general language used in the above cases was never intended to mean, and when read in connection with the points there under discussion cannot be interpreted to mean, that the city is obligated to levy taxes to pay for the principal and interest on the bonds. Such an interpretation would be entirely contrary to what was held in the Lakeport Case. The city undoubtedly has the power to transfer any available funds to the bond redemption funds, and unquestionably has the power to make the 10-cent levy in order to build up a fund to purchase lands at delinquent sales, but it can only be compelled to make the levy to raise money to pay for lands purchased at such sales, and for no other purpose."

In the same case it was further remarked that section 12 of the Improvement Bond Act provides: "That in the event the city becomes the purchaser, and a succeeding installment of the assessment is not paid, or interest is not paid, the property 'shall not be sold' again, unless there has been a redemption, but the city shall 'from time to time when due pay and transfer into said redemption fund the amount of any such future delinquent assessment and interest pending redemption.'"

In *Kerr Glass Mfg. Corporation v. San Buena Ventura*, supra, it is said:

"Preliminarily it must be said that the petitioner is not entitled to a direction for a levy of taxes sufficient to pay the delinquencies against the lands purchased by the city at delinquent tax [assessment] sales which occurred subsequent to the initial delinquencies which compelled the sale. It has so been decided in the case of *American Co. v. City of Lakeport*, 220

Cal. 548, 563, 32 P.(2d) 622, et seq. That case settled the interpretation of sections 12 and 16(a) of the Improvement Bond Act of 1915 (1923, p. 304, § 12; St. 1921, p. 230, § 16(a), to the effect that, if there are no surplus moneys available in the general fund, the city is not obligated to levy a tax for the purpose of procuring advances to the bond redemption fund wherewith to meet the amounts of assessment instalments falling due on the lands after the sale thereof to the city. The interpretation of those sections of the act by recent decisions limits the mandatory tax levy by the city to the 10-cent levy provided by section 16 (a). [Citing cases.]

"More recently in the case of *Hammond v. City of Burbank*, 6 Cal.(2d) 646, 59 P.(2d) 495, it was determined that not only was the 10-cent levy the only mandatory levy provided by the Improvement Bond Act of 1915, but that the purpose of the levy as provided by the act is limited and exclusive; that is, that the tax realized from the 10-cent levy may be used only to provide advances to pay the purchase price (the amount of the initial delinquent improvement assessment instalment, penalties, and costs) of the lands sold to the city on delinquent tax sales."

The last-cited case would be decisive of the question we are considering if it there clearly and affirmatively appeared that the property had been sold to the city for delinquencies occurring after the initial sale. While that fact is intimated and inferred it does not necessarily affirmatively appear.

[4] To decide the question we must advert to the language of section 12 and subdivision (a) of section 16 of the Improvement Bond Act. The proviso requiring the tax collector to make the demand for the levy of the special tax occurs in the sentence of section 12 dealing with the initial sale of the property. It does not again appear in the section. The section further provides that after the initial sale and before redemption the property shall not be again sold unless, under the law, it is being sold for delinquent taxes. Subdivision (a) of section 16 makes the levy of the special tax dependent on the demand of the tax collector. As this demand should be made under the provisions of section 12 only on the initial sale of property, and as that section does not contemplate subsequent sales of property already sold to the city, except as already

pointed out, it seems rather obvious that the levy of the special tax can only be enforced by a bondholder to pay the purchase price of property on its initial sale to the city. We take it that initial sale should be held to mean any sale where property passes from private to municipal ownership. If property is once sold to the city, is redeemed by the owner or resold by the city, and is again sold for a subsequent delinquency, both sales should be held to be initial for the purposes of the Improvement Bond Act.

The facts before us, as nearly as we are able to determine from the record, show the following as to "Series A" bonds: The total of the selling prices of the delinquent properties, including the initial and subsequent sales is about \$16,768.49. The total of the selling prices for initial delinquencies is about \$4,084.24. Under the stipulation it appears that there is the sum of \$5,283.28 in the redemption fund, largely raised by voluntary special assessments, with which to pay the obligation of the city in the sum of \$4,084.24.

[5] With reference to the bonds of series A, as it seems evident from the record that the city has raised by voluntary special assessments an amount equal to or greater than the amount which petitioner could force it to pay by means of an involuntary special assessment, assuming that such amount could be so raised, it should follow that petitioner is not now entitled to a writ directing the levy of an involuntary special assessment. As by means of voluntary assessments the city has raised and paid, or in this proceeding will be required to pay, all that it could be required to raise and pay by an involuntary assessment (probably) there is no obligation on its part to pay the debt again.

[6] The following facts appear as nearly as we are able to determine from the record before us as to the "Series B" bonds: The total for which the properties were sold to the city on initial and subsequent sales is about \$3,684.94. The total sum for which these properties were sold on initial sales is about \$1,054.71. It is stipulated that the sum of about \$3,690.92 has been raised by voluntary special assessments to pay the purchase price paid by

the city for the properties sold to it. As this sum exceeds not only the total of the initial sales prices but the total of the initial and subsequent prices, petitioner should not now be entitled to a writ directing the levy of an involuntary special assessment to pay obligations already liquidated or to be liquidated in this proceeding.

[7] While we believe the figures we have just detailed are correctly arrived at on the record before us, from the statements made by counsel orally and in their briefs, we are not convinced that on further examination of the city's books and records they may not be challenged. For instance, it is admitted that some property was redeemed after sale. It may be true, and probably is, that some of it was sold to the city a second time. If this is true, we have not been able to segregate these second "initial sales" from what we have termed subsequent sales. There are other questions which we may not have been able to exactly determine from the record here. For these reasons we believe that the denial of the peremptory writ of mandate requiring respondents to levy an involuntary special assessment should be without prejudice.

It is ordered:

That that portion of the petition seeking a peremptory writ of mandate requiring respondents to levy a special assessment on all the taxable property in the city is denied without prejudice.

That in accordance with the stipulation of the parties a peremptory writ of mandate issue directing respondents "to pay to the petitioner the sum of \$5,283.28 now in the redemption fund for Series 'A' and the sum of \$942.48 now in the redemption funds for Series 'B', the said amounts to be applied first upon the payment of accrued interest pro rata among all of the said bonds the balance, if any, to be applied upon the principal pro-rate."

That the alternative writ of mandate be otherwise discharged.

That petitioner pay the costs of this proceeding.

We concur: BARNARD, P. J.; JENNINGS, J.

23 Cal.App.2d 336

**STARKWEATHER et al. v. HESSION
et al.**

Civ. 5735.

District Court of Appeal, Third District,
California.

Nov. 2, 1937.

Automobiles ⇨181(1, 2)

Where plaintiff and defendant, after having attended football game in automobile of defendant's father for which gasoline had been furnished by defendant's father, decided to drive to another city under agreement that one would pay ferry toll one way and the other the return toll, and a collision occurred because of defendant's negligence at beginning of such drive, plaintiff was not a "passenger" but a "guest" within Vehicle Code, and not entitled to recover for injuries sustained in collision, in absence of willful or wanton negligence (St.1931, p. 1693, § 143¾, now St.1935, p. 154, § 403).

[Ed. Note.—For other definitions of "Guest" and "Passenger," see Words & Phrases.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by John Starkweather, a minor, by Estelle Starkweather, his guardian ad litem, and Estelle Starkweather, against Jess Hession and others. From a judgment in favor of the plaintiffs, the defendants appeal.

Judgment reversed.

Gerald M. Desmond, of Sacramento, for appellants Hession.

Cooley, Crowley & Supple, of San Francisco, for defendants Horner.

Butler, Van Dyke & Harris, of Sacramento, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment rendered against the defendants. The only question involved is whether or not at the time of the accident John Starkweather, one of the plaintiffs, was or was not a guest of Jess Hession Jr., the driver of the car involved in the accident, within the meaning of the so-called guest law.

The trial court held that Starkweather was not a guest. This holding is challenged in this appeal as being unsupported

by the evidence. The facts of the case are substantially as follows:

In 1934, the football game between Stanford University and the University of California was to be played at Berkeley on the 24th of November. At that time plaintiff John Starkweather and defendant Jess Hession, Jr., were students in the Sacramento schools. The boys were friends of several years' standing, and prior to this trip they, together with several other young men about their age, had tentatively arranged a trip to Berkeley for the purpose of seeing the football game. They originally planned to make the trip by river boat, but that plan was abandoned. It was then that Starkweather and Hession, Jr., arranged to drive to Berkeley in the automobile of Mr. Hession, Sr., the father of defendant, provided that the son could secure permission from his father to use the car. Permission was obtained, and on the morning of November 24th, the two young men started out by automobile for Berkeley, and with a credit card belonging to the father, which he had given to his son for the purchase of the necessary gas and oil. A third person accompanying the boys on the way to Berkeley paid the toll charge at the Carquinez bridge. After arriving in Berkeley, Hession, Jr., filled the gas tank, using the credit card given him by his father. The boys saw the game, but were not together that night nor the following day. On Monday morning, November 26th, they left Berkeley to go to San Francisco. The testimony shows that before starting it was agreed that one would pay the ferry toll one way and the other the return toll.

Shortly after starting their trip to San Francisco in the Hession automobile, with Hession, Jr., driving, the car was involved in a collision, resulting in an injury to John Starkweather. It was conceded at the trial that the accident was caused by negligence on the part of the driver of the Hession car.

The court found the foregoing to be the facts, and, further, that John Starkweather was riding in the automobile as a passenger and not as a guest.

Appellants question the finding of the court that Starkweather was not a guest at the time of the accident, and it is this holding that is challenged in this appeal as being unsupported by the evidence.

In the solution of this matter we need not go into an elaborate discussion of the

law. The Supreme Court has recently passed upon this question, and we believe that the facts in this case bring it clearly within the ruling as therein laid down. In justice to the trial court and counsel, we may remark that the three cases here relied upon had not been decided when the instant case was under consideration. These recent cases, *McCann v. Hoffman* (Cal.Sup.) 70 P.(2d) 909, 913; *Walker v. Adamson* (Cal.Sup.) 70 P.(2d) 914, and *Rogers v. Vreeland*, 16 Cal.App.(2d) 364, 60 P.(2d) 585, completely answer the question here presented.

In *McCann v. Hoffman*, *supra*, the court held that: "Where a special tangible benefit to the defendant was the motivating influence for furnishing the transportation, compensation may be said to have been given. But it is not given where the main purpose of the trip is the joint pleasure of the participants. The payment of a portion of the expense, as for gasoline and oil consumed on the trip, is merely incidental and does not constitute the moving influence for the transportation. The provocation for the offer of transportation remains the joint social one of reciprocal hospitality or pleasure."

In *Walker v. Adamson*, *supra*, plaintiff and defendant were business associates and jointly owned income-producing real property. The two made several trips each year to their properties to supervise construction, repair, and the opening of the houses for the rental season. Each owned an automobile, and it was their custom to alternate the use of these cars on these trips. On the trip in question, made for the purpose of taking hardware and other material to carpenters who were engaged in constructing a guest cottage, and for the purpose of supervising the construction of repairs, Mrs. Adamson drove her automobile, and at the commencement of the trip Dr. Walker gave her \$50 to be used for the purpose of defraying expenses of the trip. Under these circumstances, plaintiff was held to be a passenger and not a guest.

In the case of *Rogers v. Vreeland*, *supra*, plaintiff and defendants were on a trip to see the wild flowers in the San Joaquin valley, and prior to the commencement of the trip, an oral agreement was entered into between them that the plaintiffs would pay their share of operating the automobile and their share of any other expenses of the trip.

The court held that the trip was taken by defendant as an act of hospitality, and not as a part of respondent's business or with an eye to his own profit for material benefit. Although no petition for a hearing in the Supreme Court was asked or granted in the case of *Rogers v. Vreeland*, nevertheless, in *McCann v. Hoffman*, *supra*, the court definitely approves the decision in *Rogers v. Vreeland*.

In view, therefore, of the foregoing cases, we are of the opinion that plaintiff herein was a guest as defined in section 1433½, Statutes of 1931, page 1693, now section 403 of the Vehicle Code (St.1935, p. 154), and not a passenger, as these terms are defined in the Restatement of the Law of Torts, § 490.

The judgment is therefore reversed.

We concur: THOMPSON, J.; PLUMMER, J.



23 Cal.App.2d 319

SONTAG et ux. v. DENIO et al.

Civ. 5933.

District Court of Appeal, Third District,
California.

Oct. 29, 1937.

1. Appeal and error ⇨917(1)

In determining merits of demurrer to complaint, court of appeal must assume that facts related in complaint are true.

2. Attorney and client ⇨123(2)

Under equitable principle that he who seeks equity must do equity, clients' complaint to annul deed to their attorneys and to set aside attorneys' judgment foreclosing deed as a mortgage, on ground of extrinsic fraud, should allege that clients were willing to tender to attorneys amount of fees which were admittedly due to attorneys.

3. Judgment ⇨443(1)

Ordinarily, equity will relieve against judgment obtained by extrinsic fraud.

4. Attorney and client ⇨123(2)

A complaint to annul deed and to set aside judgment foreclosing deed and mortgage, alleging that defendants were plain-

tiffs' attorneys, and that they induced plaintiffs not to defend action to foreclose as a mortgage a deed which plaintiffs had given to defendants to defeat plaintiffs' creditors, by representing that defendants would thereafter on request reconvey the property to plaintiffs, sufficiently alleged fiduciary relationship of attorneys and clients and conduct of attorneys amounting to extrinsic fraud, to state a cause of action.

5. Judgment ⇨407(1)

Plaintiffs' failure to avail themselves of remedies provided by statute for relief from alleged invalid judgments rendered in foreclosure and injunction proceedings should not prevent them from maintaining equitable action to set aside judgments on ground of extrinsic fraud (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

6. Judgment ⇨407(1)

The remedies provided by statute and by ordinary suit in equity for relief from judgment procured by alleged fraud are entirely distinct and cumulative (Code Civ. Proc. § 473, as amended by St.1933, p. 1851).

7. Judgment ⇨442

Ordinarily, court of equity will not grant relief to either party to action to set aside judgment procured by fraudulent collusion between them.

8. Judgment ⇨443(2)

Where parties to fraudulent transaction occupy fiduciary relationship of client and attorney and client relies upon advice of counsel with relation thereto, client is not in *pari delicto* with attorney, and attorney is deemed more culpable than client, and equity can relieve client from burden of unjust and fraudulent judgment thus procured.

9. Judgment ⇨511

A judgment cannot be collaterally attacked on ground of intrinsic fraud.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Suit by M. Burnett Sontag and wife against E. C. Denio and others, individually and as copartners doing business under the firm name and style of Denio, Hart, Taubman & Simpson, and others. From the judgment the plaintiffs appeal.

Reversed, with direction.

Pease & Dolley and Adolph H. Levy, all of Los Angeles, for appellants.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondents.

Mr. Justice THOMPSON delivered the opinion of the Court.

The plaintiffs have appealed from a judgment which was rendered against them following an order sustaining defendants' demurrer to the complaint without leave to amend the pleading. The complaint alleges fraud on the part of the defendants in procuring from the plaintiffs a deed of conveyance to their real property and extrinsic fraud in preventing them from appearing or answering a complaint filed by the defendants in a proceeding to declare the deed to be a mortgage and to foreclose that instrument. The complaint in this action seeks to annul the deed and to set aside the judgment of foreclosure on the ground of extrinsic fraud. The demurrer was sustained on the theory that the complaint affirmatively shows that the plaintiffs and defendants were guilty of collusion and fraud in the transaction which is involved to defeat a creditor of plaintiffs, and that since they were in *pari delicto* a court of equity will not interfere. The refusal to accept jurisdiction is based on the maxim that "he who comes into a court of equity must come with clean hands."

The complaint alleges that the plaintiffs, who are husband and wife, are the owners of four parcels of land in Los Angeles county of the value of \$20,000, subject to a mortgage of \$4,000; that the defendants Denio, Hart, Taubman & Simpson constitute a law firm which is engaged in practicing law at Los Angeles; that they were employed by the plaintiffs as their attorneys in the entire transaction concerning the real property which is involved in this suit, and that a confidential relationship thereby existed between the parties to this action with relation thereto; that plaintiffs are indebted to their said attorneys for services performed in the sum of \$400 and no more; that on November 17, 1933, a judgment for the sum of \$10,000 was rendered in a suit against plaintiffs in the superior court of Los Angeles county, in which said attorneys appeared for the plaintiffs; that prior to the docketing of that judgment their said attorneys advised plaintiffs to convey to them the real property so as to defeat the \$10,000 judgment, and that the attorneys stated to plaintiffs that they would represent to the creditor that the conveyance was made to them in consideration of legal services performed of the value of \$7,500;

that said last-mentioned claim of \$7,500 is fictitious; that, in compliance with the advice and representations on the part of their attorneys that they would hold the title to the property "for the account and benefit of the plaintiffs and reconvey the same to plaintiffs upon request," a deed of conveyance of the property was duly executed and delivered to Geo. A. Hart, one of the attorneys, on December 9, 1933, but that plaintiffs continued to hold possession of the property and to collect all rents therefrom, until recently when they were restrained in a subsequent suit by defendants from collecting rents; that on May 15, 1934, the \$10,000 judgment against the plaintiffs was vacated, and thereafter, on demand of the plaintiffs, the properties were reconveyed to them by deed from Geo. A. Hart, dated December 18, 1934, but that plaintiffs failed to record the deed; that in January, 1935, the Indemnity Insurance Company of North America brought suit against the plaintiffs in Los Angeles county and attached their said real property; that the defendants continued to represent plaintiffs in that action, and then induced them to deliver to the defendant George A. Hart the unrecorded reconveyance deed to their properties; that they would "hold the real property herein described and assert their fictitious rights in and to the same under the deed" to Hart dated November 19, 1933, "and that they would upon request of M. Burnett Sontag reconvey the property to him or his nominee"; that, relying upon the representations of their attorneys, plaintiffs did surrender and deliver to the said Hart the unrecorded deed on January 15, 1935; that thereafter the attorneys represented to plaintiffs that, in order to defeat the claim of the insurance company against plaintiffs, it would be necessary for them to bring a friendly suit against plaintiffs to declare the deed to their properties to be a mere equitable mortgage to secure the fictitious claim for fees in the sum of \$7,500 and to foreclose that mortgage, and advised the plaintiffs not to appear or answer that complaint, but on the contrary permit judgment to be rendered against them by default, but that the said Hart would thereafter, upon request, reconvey the property to plaintiffs; that, relying on the representations made by their attorneys, the plaintiffs failed to appear or answer in the foreclosure suit, and judgment was rendered against them for the sum of \$7,500 and the property was sold to the defendants at foreclosure sale pursuant to law to satisfy the judgment;

that thereafter the defendants informed plaintiffs that, to make it appear to the insurance company that defendants were the bona fide owners of the land, it would be necessary for them to assert a right to collect the rents from the property, and to the possession thereof, and accordingly an action was brought and a judgment rendered against plaintiffs in July, 1935, restraining them from asserting possession or collecting rents from the property; that the plaintiffs then, for the first time, discovered that the defendants were wrongfully claiming absolute title to the property, and plaintiffs then demanded of the defendants a reconveyance thereof, which was refused. This suit was commenced November 30, 1935. A demurrer was filed on the ground that the complaint fails to state facts sufficient to constitute a cause of action. The demurrer was sustained without leave to amend. From the judgment which was accordingly rendered the plaintiffs have appealed.

[1] For the sole purpose of determining the merits of the demurrer, we must assume that the facts related in the complaint are true. We realize that a very different set of facts may appear from an answer or from proof adduced at the trial.

[2] From the preceding statement of the allegations of the complaint it appears that the pleading does state a cause of action based upon extrinsic fraud to rescind the deed of conveyance, set aside the judgment of foreclosure, and to declare that the defendants hold the real property in trust for the benefit of plaintiffs, except that the complaint probably should allege that plaintiffs have offered to do equity or are willing to tender to the defendants the amount of fees which are due to them. The complaint admits that plaintiffs actually owe the defendants \$400 as attorneys' fees. This suggestion is in compliance with the equitable principle that "he who seeks equity must do equity."

[3,4] The complaint clearly alleges a fiduciary relationship of attorneys and clients between plaintiffs and defendants in the transaction which is involved. The complaint also clearly alleges facts which amount to extrinsic fraud consisting of conduct on the part of plaintiffs' attorneys which, if true, prevented them from appearing or answering in the foreclosure suit, and which precluded them from participating in the trial of that case. That conduct amounts to extrinsic fraud against which equity will ordinarily relieve the injured

party. *Jeffords v. Young*, 98 Cal.App. 400, 404, 277 P. 163; *Baker v. Baker*, 217 Cal. 216, 18 P. (2d) 61.

[5, 6] The fact that the plaintiffs failed to avail themselves of the remedy provided by section 473 of the Code of Civil Procedure, as amended by St. 1933, p. 1851, to relieve them from the alleged invalid judgment which was rendered in the foreclosure procedure, or the injunction proceeding, does not prevent them from maintaining this equitable action. The remedies for relief from a judgment procured by alleged fraud provided by section 473, as amended, and an ordinary suit in equity are entirely distinct and cumulative. The failure to resort to the first-mentioned remedy does not necessarily bar the right to maintain an equitable action under the circumstances of this case. *Jeffords v. Young*, supra.

[7] The demurrer was sustained and the judgment was rendered in this case on the theory that the plaintiffs and defendants entered into collusion and wrongfully participated in the transactions described in the complaint for the purpose of defrauding the creditors of the plaintiffs. It is true that ordinarily a court of equity will not grant relief to either party to an action to set aside a judgment which has been procured by fraudulent collusion between them. *Fonner v. Martens*, 186 Cal. 623, 200 P. 405; *Bruno v. Guglielmo*, 113 Cal. App. 148, 297 P. 967; *Mitchell v. Cline*, 84 Cal. 409, 24 P. 164; *Bancroft v. Bancroft*, 178 Cal. 359, 173 P. 579, L.R.A. 1918E, 1029; 1 Black on Judgments (2d Ed.) p. 448, § 294.

[8] There appears to be a well-recognized exception to the rule last stated. When the parties to the fraudulent transaction occupy a fiduciary relationship in regard thereto, such as client and attorney, and the client relies upon the advice and counsel of his attorney with relation thereto, it is held that the client is not in *pari delicto* with his attorney. Under such circumstances the attorney is deemed to be more culpable than his client, and equity may then relieve the client from the burden of an unjust and fraudulent judgment thus procured. *Clark v. Millsap*, 197 Cal. 765, 783, 242 P. 918, 925. In the case last cited, which was a suit instituted by a client against her attorney to compel an accounting of moneys turned over to him to defraud her creditors, the court said:

"The commonplace maxims of equity, 'He who seeks equity must do equity' and 'He

who comes into a court of equity must come with clean hands,' have no application to the facts adduced in the instant case. Certainly the law will not hold a client in *pari delicto* with her attorney, who, acting under his influence and advice, places her property in his name and possession for purposes of concealment. As between the two, the client is not, in the eyes of the law as culpable as the legal adviser. *Herrick v. Lynch*, 150 Ill. 283, 37 N.E. 221 lays down the true rule in such cases. It is there said:

" 'We do not think, however, that under the circumstances there should be an application of that rule of equity which denies relief to one party against another when both have been engaged in a fraudulent transaction. The parties were not in *pari delicto*. One was legal adviser; the other client. The advice of the former being adopted, he procured title to the latter's interest in valuable real estate. Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract which is illegal and contrary to public policy, and to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices.' "

The confidential relationship which existed in the present case was not involved in any of the cases above cited upon which the respondents rely in support of the equitable doctrine which denies relief to parties to an illegal or fraudulent transaction who are in *pari delicto*. In the case of *Fonner v. Martens*, supra, 186 Cal. 623, at page 628, 200 P. 405, 408, the court says: "The relations of the parties were not confidential." In the case of *Bruno v. Guglielmo*, supra, it appears that a nonsuit was granted because no fraud was proved at the trial. The purchaser of land at a foreclosure sale had not refused to keep his promise to reconvey the land to the owner thereof. He had not been asked to do so. The court says: "There is nothing tending to indicate that the judgment was entered contrary to such understanding of the parties, that the mortgagee would decline, or had been requested, to reconvey at the time agreed upon, nor that the mortgagors would be precluded from demanding a reconveyance in appropriate proceedings."

[9] In the case of *Bancroft v. Bancroft*, supra, the question of confidential relations between an attorney and his client was not involved. That fact alone distinguishes that case from the present one. There was no

extrinsic fraud in the Bancroft Case. The wife was present with her attorney at the hearing of the divorce case. It is true that the husband falsely testified at the trial regarding material matter, but that has been held to be intrinsic fraud, rather than extrinsic fraud. A judgment may not be collaterally attacked on the ground of intrinsic fraud. *Pico v. Cohn*, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159; *Hanley v. Hanley*, 114 Cal. 690, 46 P. 736; *Clavey v. Loney*, 80 Cal.App. 20, 251 P. 232; 15 Cal.Jur. p. 18, § 124.

The judgment is reversed, and the court is directed to permit the appellants to amend their complaint as suggested herein.

We concur: PULLEN, P. J.; PLUMMER, J.



23 Cal.App.2d 342

CLINTON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 11671.

District Court of Appeal, Second District,
Division 1, California.

Nov. 4, 1937.

1. Grand jury ⇨25

Statutes dealing with the duties and authority of grand juries imposes duties as distinguished from rights upon the grand jury and upon the individual members of such grand jury, but do not grant any rights either to the grand jury or to an individual member thereof (Pen.Code, §§ 894-940, as amended).

2. Grand jury ⇨25, 29

The grand jury can function only as a body under and according to and within the limitation of its legal authority, and a member is without authority to perform any act as a grand juror except the performance of those official duties imposed by law and at a regular and valid session of the grand jury (Pen.Code, §§ 894-940, as amended).

3. Grand jury ⇨29, 33

The grand jury can function legally only when in official session with a quorum present and under provisions of the statute "shall determine the rule of its proceedings"

(Pen.Code, § 904, as amended by St.1933, p. 953).

4. Grand jury ⇨33

Questions presented to grand jury are addressed to its judgment and discretion, and the law contemplates that such questions will be finally decided by the grand jury as an official body and not merely by one of its members (Pen.Code, §§ 894-940, as amended).

5. Mandamus ⇨24

Under statutes relating to duty and authority of grand juries, mandamus would not lie to compel superior court to issue order directing the grand jury to hear testimony and to receive evidence in the manner in which petitioner, a grand juror, might choose to present it, since an attempt to control or direct the judgment or discretion of grand jury by writ of mandate is without legal sanction (Pen.Code, §§ 894-940, as amended, and § 903, as amended by St. 1933, p. 525).

Petition by Clifford E. Clinton for a writ of mandate directed to the Superior Court of the State of California in and for the County of Los Angeles, and Emmet H. Wilson, Judge of the aforementioned court.

Petition denied.

A. Brigham Rose, of Los Angeles, for petitioner.

PER CURIAM.

In the petition herein for a writ of mandate, the petitioner alleges, among other things, that he is a member of the grand jury of the Superior Court in and for the County of Los Angeles; that "pursuant to his oath as a Grand Juror as defined in the Penal Code, § 903 (as amended by St.1933, p. 525) requiring him to diligently inquire into offenses of which he shall have or can obtain legal evidence, regularly moved before the Grand Jury for a time to be fixed for the presentation of evidence in support of certain charges that he had outlined to the said Grand Jury"; that (quoting from the petition), when "it became evident that the case Petitioner and Plaintiff was in the process of presenting involved corruption in high places, and at that point in the presentation already the opening wedge had been driven and inquiry had already commenced into the activities of a deeply entrenched and highly organized politically protected combination dealing in

the pollution of our government and the protection of vice and corruption, immediately a concerted effort on the part of certain of the Respondents and Defendants herein was initiated to stifle your Petitioner and Plaintiff's proceeding with his case and choking off all further inquiry into the said matters. In this regard your Petitioner and Plaintiff respectfully submits that no investigation in the sense of an 'investigation' was necessary or requisite. All that your Petitioner and Plaintiff required and requires to proceed with the presentation of his case is the bringing before the Respondent and Defendant body of various witnesses whose names and identity are known to your Petitioner and Plaintiff." In that connection petitioner further alleges that as a part of the so-called "stifling process" (again quoting from the petition), "the District Attorney, aided and abetted by four deputies, proceeded to insist that the taking of testimony cease and that your Petitioner present a full statement to the Criminal Complaints Committee, so-called, of the Grand Jury of all the matters that he intended to establish by the witnesses and to specifically name all of the witnesses and what the witnesses will testify to in advance."

The petition further sets forth that the grand jury "insisted that the proceedings be tabled and that your Petitioner and Plaintiff be required to disclose to certain of the Respondents and Defendants the names of all the witnesses intended to be brought forth, together with a full statement of what each of said witnesses would testify to, which your Petitioner and Plaintiff respectfully submits is contrary to law and would merely result in practically stifling your Petitioner and Plaintiff's attempted proceeding." And, furthermore, it is alleged that certain members of the grand jury are disqualified and "that their connections to the persons involved in the presentation of your Petitioner and Plaintiff's case is inimical and in derogation of the right of your Petitioner and Plaintiff herein to present his case to the Respondent and Defendant body without informing prejudiced jurors."

In other words, briefly, it appears from the record that petitioner herein, who is a member of the grand jury, had a matter which he wished to submit to the grand jury, which matter is referred to as "his case" and which, it appears, he was determined to present to the grand jury in **his own way and as he desired and accord-**

ing to his own opinion and sole judgment. To this demand, it appears from the record, either directly or by reasonable inference, the grand jury, as such, declined to accede, whereupon petitioner herein sought a writ of mandate in the Superior Court to compel the grand jury to hear "his case." The Superior Court denied the writ.

Petitioner now seeks a writ of mandate to compel the Superior Court to issue its order directing the grand jury to hear the testimony and to receive the evidence in the manner in which petitioner herein may choose to present it to such grand jury.

[1-4] Although the petition consists in the main of conclusions and opinions, it is unnecessary to pass upon its sufficiency, for it is at once obvious that petitioner's effort to either control or direct the judgment and discretion of the grand jury by writ of mandate is without legal sanction. Petitioner's contentions find no support in the law.

It is apparent from the petition that petitioner is laboring under an erroneous conception of the function, the duty, and the authority of the grand jury, the relation each member bears to the whole thereof, as well as the duty and the limitation of authority of its individual members. For example, petitioner alleges, again quoting from the petition, that "Your Petitioner and Plaintiff verily believes that under his oath as a Grand Juror it is his duty to present to the Respondent and Defendant body qualified to hear the same, the evidence that will support the general case * * * That your Petitioner and Plaintiff, as a matter of law, is entitled to the process of this Court to bring witnesses before the Respondent and Defendant body that is qualified to hear the same and that the attempts to stifle the proceedings as hereinbefore alleged are contrary to law and interfere with the *rights* and duties of your Petitioner and Plaintiff herein." (Italics added.) The law with respect to grand juries is to be found in sections 241 to 243, inclusive, of the Code of Civil Procedure, which deal with the impaneling of the grand jury, and sections 894 to 940, inclusive, of the Penal Code (as amended), which deal with the duty and corresponding authority of the grand jury. These provisions impose *duties*, as distinguished from *rights*, upon the grand jury and upon the individuals as members of such grand jury, but do not in a legal sense grant any

rights either to the grand jury or to an individual member thereof. The grand jury can function only as a body under and according to and within the limitation of its legal authority. A member of a grand jury is without authority to perform any act as a grand juror except the performance of those official duties imposed by law and at a regular and valid session of the grand jury. Beyond that, such member has no official standing, and, in effect, is a legal nonentity. The grand jury can function legally only when in official session with a quorum present and, under the provisions of section 904 of the Penal Code (as amended by St.1933, p. 953), "shall determine the rule of its proceeding." Obviously, questions presented to a grand jury are addressed to its judgment and discretion, in connection with which, from the very nature of things, differences of opinion may arise. The law clearly contemplates that such questions shall be decided by the grand jury as an official body and shall not be decided merely by one of its members. The determination by the grand jury of the questions involved in connection with the matter about which petitioner complains, is final.

[5] To the extent that the petition for a writ of mandate in the Superior Court was denied, such action by said court in denying the same was proper.

For the foregoing reasons, the petition herein is denied.



23 Cal.App.2d 307

WHITE v. BRINKMAN et al.

Civ. 10548.

District Court of Appeal, First District,
Division 2, California.

Oct. 28, 1937.

1. Malicious prosecution ☞8

In action for malicious prosecution, liability for damages cannot be made to rest on mere conspiracy, the gravamen of the action being the malicious prosecution of the criminal charge without probable cause.

2. Malicious prosecution ☞42

Officers exercising judicial or quasi judicial powers in performance of their duties

are immune from civil liability in action for malicious prosecution.

3. Malicious prosecution ☞18(1), 27

One knowingly pressing a baseless criminal charge acts without probable cause and is guilty of malice per se.

4. Malicious prosecution ☞16, 49

A malicious prosecution is one begun in malice without probable cause to believe the charge can be sustained, and a complaint to enforce liability for such prosecution is properly confined to a statement of those substantive elements.

5. Pleading ☞35

In complaint to enforce liability for malicious prosecution, averments of conspiracy and of knowledge of falsity of charge are to be treated as surplusage.

6. Judges ☞36

The exemption of judicial or quasi judicial officers from civil liability for acts done in performance of their official duties applies even despite malicious or corrupt conduct in exercise of jurisdiction.

7. District and prosecuting attorneys ☞10

District attorneys and public prosecutors are vested with certain quasi judicial powers, and in the official exercise of those powers they enjoy immunity from civil liability.

8. Pleading ☞36(2)

In action for malicious prosecution plaintiff was bound by allegations of his complaint that ex officio prosecuting attorney of city acted in official capacity, and could not contend that he acted in excess of any judicial power exercisable by him as public prosecutor.

9. Malicious prosecution ☞42

Action for malicious prosecution could not be maintained against chief building inspector, city manager, and ex officio prosecuting attorney of city on theory that they maliciously instituted prosecution against plaintiff for an alleged violation of city building ordinance, since such officers were exempt from civil liability, even if there was an error in judging the property to be inside instead of a few feet outside the municipal boundary.

10. Malicious prosecution ☞51

In action for malicious prosecution, allegation that prosecution was dismissed upon motion of prosecuting attorney was in-

sufficient to show that prosecution was finally terminated so as to authorize maintenance of the action for malicious prosecution (Pen.Code, § 1387 and §§ 1381-1389, as amended).

11. Criminal law ⇨180

Dismissal of action charging a misdemeanor is not bar to another prosecution for same offense unless the dismissal was necessitated by statute making dismissal of misdemeanor case mandatory when case, not postponed on defendant's application, is not brought to trial within 30 days after filing complaint (Pen.Code, § 1387 and § 1382, subd. 3, as amended by St.1931, p. 2479).

12. Malicious prosecution ⇨49

In action grounded on malicious prosecution not only must the complaint allege that prosecution was with malice and without probable cause, but it must also adequately aver final determination of prosecution in plaintiff's favor.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Action by Millar White against A. L. Brinkman and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Frank W. Creely, of Oakland, for appellant.

Carleton L. Rank, of Oakland, for respondent Mark Roth, Jr.

Fred C. Hutchinson, City Atty., and John D. Phillips, Asst. City Atty., both of Berkeley, for respondents A. L. Brinkman and Hollis R. Thompson.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakley, Deputy Dist. Atty., all of Oakland, for respondent Arthur Sherry.

JOHNSON, Justice pro tem.

This is an action in which plaintiff seeks recovery of damages for alleged malicious prosecution; and plaintiff's appeal is from a judgment against him entered upon an order made March 27, 1937, sustaining demurrers interposed separately by the five individually named defendants. In advance of such order, the plaintiff had on March 4th voluntarily dismissed the action as against the defendant Maryland Casualty Company; and by stipulation paragraphs

IV and XVIII of the complaint relating to that defendant had been stricken out. The fictitiously named defendants are to be treated as nonexistent for the purposes of this appeal. While the demurrers to the complaint were both general and special, the fundamental question is whether the complaint states a cause of action against the defendants or any of them. According to the complaint, plaintiff was at all times mentioned a duly licensed building contractor engaged in business as such in Contra Costa and Alameda counties. The defendant Brinkman was the chief building inspector, and the defendant Thompson the city manager of the city of Berkeley in Alameda county, the city manager being the person in authority over the chief building inspector.

The defendant Sherry was a deputy district attorney of Alameda county and ex officio prosecuting attorney for the city of Berkeley. The defendants Roth and Kneiss are not made defendants in any official character.

The complaint charges that at divers times between December 7, 1936, and February 2, 1937, the three public officers and the defendants Roth and Kneiss maliciously engaged in a conspiracy to injure plaintiff in his social and business relations; and to that end caused plaintiff to be arrested on a charge of having committed a misdemeanor in violating a certain provision of ordinance No. 1473 N. S. of the city of Berkeley. In this respect it is averred that the arrest was made under a warrant issued by the judge of the justice's court of the city of Berkeley, and founded on a complaint verified by the oath of the defendant Brinkman made before the defendant Sherry. In that complaint it was charged that on February 1, 1937, in the city of Berkeley, the plaintiff, White, violated section 2801 of said ordinance by causing "an excavation to be made on his own property without having protected said excavation so that the soil of the adjoining property would not cave-in and settle." In respect of this charge, the plaintiff alleges that he did not make any excavation on February 1, 1937; that he did not own any property in the city of Berkeley, and that he had not violated any of the terms and provisions of the municipal ordinance "in the manner or as alleged in said complaint."

Plaintiff's complaint further states that, under the authority of the warrant of arrest, he was taken into custody by the police

on February 4 and, after being booked on the charge, was held in the station for about half an hour until he furnished bail for his release in the sum of \$200. Thereafter on that day he was arraigned in the justice's court; and, upon pleading that he was not guilty, he demanded a jury trial, which was set for February 15. Meanwhile, the action against plaintiff was on February 11 dismissed by the court on motion of defendant Sherry, the official prosecuting attorney.

Plaintiff charges that the acts of the defendants in causing his arrest and imprisonment were malicious and without probable cause; and his prayer is for \$345 as special damages, together with \$60,000 as exemplary and punitive damages.

The order sustaining the demurrers to plaintiff's complaint allowed ten days for amendment; but, the right of amendment having been renounced by plaintiff in order to facilitate his intended appeal, judgment was entered against him on April 2.

So far as the defendants Roth and Kneiss are concerned, no specific charges are made against them in plaintiff's complaint, except that those defendants are in effect said to have joined with the three public officers in a common plan, maliciously and without probable cause, to bring about the arrest of plaintiff for the misdemeanor charged in the complaint filed by Brinkman as chief building inspector. The defendants Brinkman, Thompson, and Sherry have joined in a brief in support of the judgment in their favor, and a separate brief has been filed by the defendant Roth. In the absence of any on behalf of the defendant Emily Kneiss, it is presumed that she stands in the same position as her codefendant Roth.

[1, 2] In cases of this character liability for damages cannot be made to rest on mere conspiracy. The gravamen of the action is the malicious prosecution of the criminal charge without probable cause. *Dowdell v. Carpy*, 129 Cal. 168, 171, 61 P. 948; *Andrews v. Young* (Cal.App.) 69 Pac. (2d) 891. In regard to the liability of the three officers, counsel for plaintiff recognizes that, for reasons of public policy, officers exercising judicial or quasi judicial powers in the performance of their duties are immune from civil liability. But laying stress upon an allegation in the complaint that the charge of violation by plaintiff of the municipal ordinance was wholly false, malicious, and unfounded, and was known

to be so by each and all of the defendants, plaintiff insists that the officers were acting wholly without jurisdiction, and are no more entitled to exemption from civil liability than if they were acting in a strictly private and personal capacity.

[3] It must be remembered, however, that the complaint expressly alleges that Brinkman as chief building inspector, Thompson as city manager, and Sherry as ex officio prosecuting attorney of Berkeley, acting in concert with the other defendants, cause the alleged malicious prosecution of the charges against plaintiff. It was thus in their official capacities that in this action the officers were charged with wrongdoing and brought into court. The naked statement that an official acting in the exercise of quasi judicial powers caused the institution of a criminal prosecution on a complaint which he knew to be false is but tantamount to a repetition of a previous statement that he acted maliciously and without probable cause. The element of probable cause is to be viewed subjectively as well as objectively. Its presence involves consideration not only of the actual facts of the case, but the facts and circumstances as comprehended by the mind of the actor according to his honest and reasonable belief. One knowingly pressing a baseless criminal charge acts without probable cause, and is guilty of malice *per se*. *Bowie v. Stackpole*, 119 Me. 333, 335, 111 A. 409; *Linitzky v. Gorman* (City Ct. N.Y.) 146 N.Y.S. 313, 318; *Parker v. Huntington*, 2 Gray (68 Mass.) 124, 128. As is said in *Burt v. Smith*, 181 N.Y. 1, 5, 73 N.E. 495, 496, 2 Ann.Cas. 576: "While malice is the root of the action, malice alone, even when extreme, is not enough, for want of probable cause must also be shown. Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of. The want of probable cause does not mean the want of any cause, but the want of any reasonable cause, such as would persuade a man of ordinary care and prudence to believe in the truth of the charge. Probable cause does not necessarily depend upon the actual guilt of the person prosecuted, but may rest upon the prosecutor's belief in his guilt, when based on reasonable grounds. One may act on what appears to be true, even if it turns out to be false, provided he believes it to be true and the

appearances are sufficient to justify the belief as reasonable. Belief alone, however sincere, is not sufficient, for it must be founded on circumstances which make the belief reasonable. If probable cause exists, it is an absolute protection against an action for malicious prosecution, even when express malice is proved."

[4,5] A malicious prosecution being one begun in malice without probable cause to believe the charge can be sustained, a complaint to enforce liability for such prosecution is properly confined to a statement of those substantive elements. Averments of conspiracy and of knowledge of the falsity of the charge, and the salting and peppering of the declaration with vituperative epithets, may serve for embellishment, but contribute no substantial increment to the cause pleaded. In the conduct of a trial, evidence of conspiracy and knowledge of falsity of the charge may be relevant in proof of lack of probable cause and of malice; but for purposes of pleading such evidentiary averments add nothing material to the statement of the case, and are to be treated as surplusage.

[6] We are brought then to the inquiry whether the complaint, stripped of its non-essentials, was amenable to the demurrers of the public officials. The exemption of judicial or quasi judicial officers from civil liability for acts done in performance of their official duties has been established not primarily for the protection of such officers, but as a settled rule of public policy for the protection of the public, and the better assurance of fair and impartial administration of justice, **without fear or favor**, in the protection of **life and property**. The immunity applies even despite malicious or corrupt conduct in the exercise of jurisdiction. A leading authority on the subject is the historic case of *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646. And the subject has been so fully treated in *Yaselli v. Goff* (C.C.A.) 12 F.(2d) 396, 56 A.L.R. 1239, affirmed in 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395, and by our own court in *Pearson v. Reed*, 6 Cal.App.(2d) 277, 44 P.(2d) 592, as to require no elaboration here.

[7] District attorneys and public prosecutors are vested with certain quasi judicial powers; and in the official exercise of those powers they enjoy civil immunity as fully as judges themselves, even though they act with evil motives or corruptly. Says the

court in *Smith v. Parman*, 101 Kan. 115, 116, 165 P. 663, L.R.A.1917F, 698: "The public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up performs much the same function as a grand jury. If, while he has a question of that kind under advisement, he is charged with notice that he may have to defend an action for malicious prosecution in case of a failure to convict, his course may be influenced by that consideration, to the disadvantage of the public. * * * We think the reason for granting immunity to judges and grand jurors applies with practically equal force to a public prosecutor in his relations to actions to punish infractions of the law. There is no great danger that abuse of power will be fostered by this exemption from civil liability, for the prosecutor is at all times under the wholesome restraint imposed by the risk of being called to account criminally for official misconduct * * * or of being ousted from office on that account." In the same strain the Supreme Court of Wisconsin in *Re Bentine*, 181 Wis. 579, 587, 196 N.W. 213, 214, 216, quoted from *Wight v. Rindskopf*, 43 Wis. 344, 354, the following passage: "A public prosecutor is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty."

And in *Pearson v. Reed*, 6 Cal.App.(2d) 277, 287, 44 P.(2d) 592, 597, the court, in reversing three separate judgments against the city prosecutor of Los Angeles and ordering a dismissal of the action, spoke as follows: "The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. Not only would the prosecutor himself be subjected to groundless suits, but his deputies likewise would be accused. The apprehension of such consequences would tend toward great uneasiness and

toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement. We are well aware of the fact that in thus shielding the public prosecutor against actions of this sort the rule may work hardship and injustice in individual cases. But there is no middle ground to be occupied in the matter; either all such suits are to be tolerated or none. We are confronted with the not unusual situation that calls for the subordination of the rights of the few to the interests of the whole body of the public. The doctrine of immunity is not for the benefit of the few who might otherwise be compelled to respond in damages. It is for the benefit of all to whom it applies, that they may be free to act in the exercise of honest judgment, uninfluenced by fear of consequences personal to themselves. This again is not for their personal advantage or benefit. It is only that they may be enabled to render a better public service."

Reference may be made further to Kittler v. Kelsch, 56 N.D. 227, 216 N.W. 898, 56 A.L.R. 1217, and the numerous cases there reviewed.

[8,9] Plaintiff argues that the defendant Sherry did not act officially, but utterly in excess of any judicial powers exercisable by him as a public prosecutor. We are of the opinion, however, that plaintiff is bound by the allegations of his own complaint in that respect, and that the assertions there made cannot reasonably be construed to be anything but an attack upon Sherry, and the other two officers also, for alleged wrongdoing in their official capacities.

Concerning the defendants Brinkman and Thompson, little more need be said. In the complaint it is stated that the ordinance in question is one regulating, among other things enumerated, the erection, construction, enlargement, alteration, and repair of buildings or structures; providing also for the issuance of permits therefor; establishing fire districts, and authorizing penalties, for violation of its provisions. The special grievance of plaintiff against Brinkman is that he, acting as chief building inspector of the municipality, verified the complaint against plaintiff. Unquestionably part of the duty of such officer would be to see that the requirements of the or-

dinance were being observed. In determining whether in a particular piece of construction work there is such a departure from the prescribed regulations as to constitute a misdemeanor, the inspector is assuredly exercising a quasi judicial function, just as would a district attorney or a public prosecutor under like circumstances. There may have been some mistake in giving the situs of plaintiff's property a location within the boundaries of the city of Berkeley. Plaintiff's complaint seems carefully to evade fixing the exact location; but a mere error in judging an excavation to be inside, instead of perchance a few feet outside, the municipal boundary, would not divest a quasi judicial public servant of the immunity with which, in the public interest, the law clothes him. In this connection attention may be drawn to the ruling in *Proctor v. Justice's Court of the City of Berkeley*, 209 Cal. 39, 285 P. 312, declaring the jurisdiction of that court to be coextensive with the jurisdiction of the justice's court of Oakland township.

The defendant Thompson is joined as a tort-feasor in his capacity as city manager. The city charter is a state statute of which judicial notice may be taken; and in the defendant's brief there is quoted section 28 of the charter. That section makes the manager responsible to the council for the efficient administration of all the affairs of the city. And with him rest the power and the duty "to see that all laws and ordinances are duly enforced," he being "declared to be beneficially interested in their enforcement, and to have the power to sue in the proper court to enforce them." As the chief executive and person in authority over the building inspector, he stands alongside Brinkman, and is favored with the same immunity. As an illustration of the application of the general rule, reference may be had to *Downer v. Lent*, 6 Cal. 94, 65 Am.Dec. 489, an action brought by a pilot whose license had been revoked by the pilot commissioners, and, as was alleged, wrongfully and maliciously. The plaintiff had judgment which, however, was reversed on appeal; the court holding that the commissioners were intrusted with certain duties, the performance of which required the exercise of judgment. "Whenever, from the necessity of the case," said the court, "the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an errone-

ous judgment." So in *Turpen v. Booth*, 56 Cal. 65, 38 Am.Rep. 48, exemption was extended to grand jurors, however erroneous their actions may be and however malicious their motives.

The principle is one so well established as to have become elementary; and it affords protection in general to officers and public servants exercising judgment and discretion in the discharge of their duties, howsoever they may be called. Among those in whose behalf the rule has been successfully invoked have been members of a board of health, county supervisors, food inspectors, registrars of voters, election inspectors, and other officers and commissioners charged with duties of various kinds involving judgment and discretion.

The plaintiff would lay emphasis on *Carpenter v. Sibley*, 153 Cal. 215, 94 P. 879, 15 L.R.A.(N.S.) 1143, 126 Am.St.Rep. 77, 15 Ann.Cas. 484; but there, as stated in *Pearson v. Reed*, *supra*, the question of immunity was not raised, and accordingly that case is a vain crutch for plaintiff to lean upon.

[10,11] The defendants Roth and Kneiss have no official character; and, being sued in *propria persona*, they are shielded by no rule of immunity. But one of the essentials of artful pleading of such cause is an averment of termination of the prosecution in favor of the accused in such manner as not to be legally susceptible of revival. Plaintiff does not allege in terms in his complaint that the prosecution was finally terminated in his favor. He contents himself with declaring that on February 11, 1937 (which was in advance of the day set for trial), "the case was dismissed, upon motion of the said defendant Arthur Sherry, by the said Oliver Youngs as Judge of the Justice's Court of the City of Berkeley." Such dismissal might cast some implication of want of probable cause in the first instance, but the averment falls short of pleading a complete and final determination of the proceeding in favor of the accused beyond susceptibility of revival. In dealing with this point plaintiff pins his faith upon section 1387 of the Penal Code. As was pointed out, however, in *People v. Hrbak*, 85 Cal.App. 301, 259 P. 353, and given concurrence in *People v. Zadro* (Cal. App.) 66 P.(2d) 1204, that section is limited in its application to orders for dismissal provided in the same chapter of the Code,

being chapter 8 of title 10, sections 1381 to 1389. So under section 1387 dismissal of an action charging a misdemeanor is not a bar to another prosecution for the same offense, unless the dismissal was necessitated by the terms of subdivision 3 of section 1382, added by amendment made in 1931 (St.1931, p. 2479). That amendment makes dismissal of a misdemeanor case mandatory when, in the absence of postponement upon the application of the defendant, the case is not brought to trial within thirty days after the filing of the complaint. The dismissal in question was of course not under that subdivision, and hence raised no bar.

The plaintiff relies upon *Donati v. Righetti*, 9 Cal.App. 45, 97 P. 1128, and *Re Harron*, 191 Cal. 457, 217 P. 728. In *Donati v. Righetti* (decided in 1908) what is said incidentally at page 49 of 9 Cal.App., at page 1130 of 97 P., concerning dismissal of a misdemeanor case, overlooks the limited scope of section 1387. In the *Harron* Case we fail to find anything in support of plaintiff's contention. The proceeding was one in habeas corpus after trial and conviction on a charge of battery. The petitioner was seeking relief upon the contention that, in the case resulting in his conviction, he had been placed a second time in jeopardy for the same offense previously charged against him in a proceeding which had been dismissed without a trial. That argument was rejected in the court's concise statement (191 Cal. 457, at page 469, 217 P. 728, 733) that "the plea of once in jeopardy contemplates that the trial asserted as a bar must at least have been entered upon. Here there was no trial under the first complaint."

[12] In an action grounded on malicious prosecution not only must the complaint allege that the prosecution was with malice and without probable cause, but it is equally essential that there be an adequate averment of final termination of the proceeding in favor of the plaintiff. A complaint deficient in that particular is amenable to a general demurrer.

For the reasons stated we conclude that the judgment was properly entered in favor of the defendants, and it is therefore affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

23 Cal.App.2d 332

NEWMAN et al. v. SUNDE et al.**Civ. 11548.**District Court of Appeal, Second District,
Division 2, California.

Oct. 29, 1937.

Rehearing Denied Nov. 22, 1937.

Hearing Denied by Supreme Court
Dec. 27, 1937.**1. Appeal and error ⇨927(3)**

In reviewing a judgment predicated upon the granting of a motion for nonsuit, the reviewing court must view the evidence most favorable to plaintiffs.

2. Automobiles ⇨244(28)

Evidence that vacuum cleaner salesman, whose negligent operation of automobile caused pedestrian's death, was on his way home from former customers' house where he had gone for sole purpose of inquiring about progress being made in building of a fishing boat and while waiting had made adjustment on cleaner which they had purchased, was insufficient to authorize finding that salesman was acting "within scope of his employment" in driving automobile at time of accident, and hence his employer was not liable for death.

[Ed. Note.—For other definitions of "Scope of Employment," see Words & Phrases.]

3. Appeal and error ⇨205

Where a question to which an objection is sustained does not itself indicate that answer would be favorable to party seeking to introduce the testimony, ruling will not be reviewed unless an offer of what was proposed to be proven was made to trial court so that reviewing court can determine whether proposed evidence would have been material and beneficial to party offering it.

4. Appeal and error ⇨205

On appeal from judgment of nonsuit for employer in death action against salesman and his employer, the reviewing court would not consider whether trial court's ruling sustaining his own objection to question of plaintiffs' counsel asking salesman what some of his instructions were was prejudicially erroneous where no offer of what was proposed to be proven was made, since question itself did not indicate that answer would be material and beneficial to plaintiffs.

Action by Rose K. Newman and another against Myron D. Sunde and Sears, Roebuck & Co. From a judgment for the second named defendant, after granting that defendant's motion for a nonsuit, plaintiffs appeal.

Affirmed.

James M. Carter, Kiggins & Hoffman, for appellants.

Arthur L. Syvertson, for defendant.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, Vernon W. Hunt, for respondent.

McCOMB, Justice.

This is an appeal by plaintiffs from a judgment in favor of defendant Sears, Roebuck & Co. after the trial court granted said defendant's motion for a nonsuit in an action to recover damages for the wrongful death of Samuel M. Newman, deceased. Plaintiffs are decedent's only heirs at law.

[1] Viewing the evidence most favorable to plaintiffs, as we must in reviewing a judgment predicated upon the granting of a motion for a nonsuit (Montgomery v. Nelson, 211 Cal. 497, 499, 295 P. 1034), the material facts are these:

Defendant Myron D. Sunde was a commission salesman, selling vacuum cleaners for his codefendant, Sears, Roebuck & Company, both inside and outside of their store. Most of his time was spent on the outside soliciting sales.

[2] March 17, 1936, he left Sears, Roebuck & Co. store at approximately 1:10 p. m. to call upon prospective customers. At about 5:00 p. m. he finished his last call, having collected from a customer the down payment on a vacuum cleaner previously sold the party. He then decided to make a personal call on some friends by the name of Shevrick, as he was interested in purchasing a rug owned by them. He arrived at their house between 5:15 and 5:30, where he remained for about twenty minutes. After completing his visit with the Shevricks he decided to stop at the home of parties by the name of De Chazo. In February of 1936 he had sold the De Chazos a vacuum cleaner and at that time had learned that Mr. De Chazo was building a fishing boat, on the initial trip of which Mr. De Chazo invited him to be his guest. It was defendant Sunde's sole purpose in visiting the De Chazos' home to inquire

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

about the progress being made in the building of the boat. While waiting for Mr. De Chazo to arrive home, he made an adjustment upon the vacuum cleaner which they had purchased. He remained at their home until about 7:00 p. m., at which time he left, and shortly thereafter while on his way home so negligently operated his automobile as to collide with Samuel M. Newman, who died as a result of the injuries he received.

The questions necessary for us to determine are these:

First. Was there sufficient evidence to raise an issue for the jury upon the question of whether or not defendant Sunde was acting within the scope of his employment in driving his automobile at the time of the accident, which resulted in Samuel M. Newman's death?

Second. During the course of defendant Sunde's examination the following took place:

"Q. But in the sales meetings you would be given instructions by the supervisor, would you? A. Regarding what do you have in mind?"

"Q. That is what I am asking you. Would you be given instructions in the course of those meetings? A. Yes, necessarily."

"Q. What were some of those instructions?"

"The Court: That may be very interesting, but what are you driving at?"

"Mr. Kiggins: We are asking what some of the instructions are."

"The Court: I am going to interpose the objection that it is wholly immaterial to the issues involved in this case, and sustain the objection. Let us get through with this matter."

Was the trial court's ruling prejudicially erroneous?

The first question must be answered in the negative. In the case of Helm v. Bagley, 113 Cal.App. 602, 298 P. 826, plaintiff was injured in an automobile collision. The action was against Bagley, the driver of one of the cars, and his employer, the Easy Housekeeping Shop. The evidence showed that Bagley was the district manager of the Easy Housekeeping Shop and had charge of several branch stores in the city of Los Angeles. He received a salary and commission on sales, together with an

allowance of \$50 per month for the use of his car when on the business of his employer. Bagley had no regular hours of work and sometimes worked at night. The accident occurred between 5:30 and 5:45 p. m. when he was on his way home from one of the branch stores in his district. It was his habit to carry samples of merchandise handled by his employer with him and at the time of the accident he had some vacuum cleaner attachments with him, which belonged to his employer. In affirming a judgment of nonsuit entered in favor of Bagley's employer, Mr. Justice Marks says, 113 Cal.App. 602, at page 605, 298 P. 826, 827: "We think it is clear from the evidence in this case that Bagley was not acting for his employer and within the scope of his employment at the time of the accident in returning to his own home for his dinner. He was in his own automobile and on his own business, which in no manner pertained to the business of his employer. He had stepped aside from his employer's business and had entered upon the performance of an independent purpose of his own."

It thus appears that Helm v. Bagley is squarely in point with the instant case and it impels us to the conclusion that at the time of the unfortunate accident, which resulted in Mr. Newman's death, defendant Sunde was not acting within the course or scope of employment as an employee of defendant Sears, Roebuck & Co., since at the time of the accident he had departed from the pursuit of his employer's business and was engaged on matters entirely personal to himself.

[3,4] The second question presented by plaintiff will not be considered by this court for the reason that it is the established law of this state, where a question to which an objection is sustained does not itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal by an appellate court, an offer of what is proposed to be proven must first be made to the trial court so that the reviewing court can determine whether the proposed evidence would have been material and beneficial to the party offering it. Abrams v. Hubert, 10 Cal.App.(2d) 404, 407, 51 P.(2d) 884. In the present case the question did not indicate that the answer would be either material or beneficial to plaintiff nor was any offer of proof made.

We have been materially aided in disposing of this appeal by the able and exhaustive briefs filed by counsel for both parties.

For the reasons hereinbefore set forth the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



23 Cal.App.2d 354

STEEL et al. v. HADSELL et al.

HADSELL et al. v. BAILEY et al.

Civ. 1685.

District Court of Appeal, Fourth District,
California.

Nov. 6, 1937.

1. Vendor and purchaser ⇨244

Mortgagee's testimony by deposition that he received nothing for executing deed of mortgaged land to another than mortgagor after latter's payment of note secured by mortgage and made deed to grantee because he was an attorney for lot owners to whom mortgagors conveyed interest in mortgaged lots supported trial court's finding that such attorney against whom mortgagors filed cross-complaint for reconveyance of their interest in mortgaged lots in suit to cancel their deed to mortgagee was not innocent purchaser for value (Civ.Code, § 2925).

2. Mortgages ⇨226

As one to whom mortgagee conveyed interest in lots conveyed to him as security for note after payment thereof by mortgagors without consideration because grantee was attorney for lot owners having interests in lots conveyed was not innocent purchaser thereof for value, he cannot complain of judgment requiring him to reconvey to mortgagors or pay them value of interest conveyed to him (Civ.Code, § 2925).

3. Mortgages ⇨226

A judgment requiring mortgagee's grantee to reconvey interest in lots to mortgagors after latter's payment of note secured by their deed to mortgagee should fix exact interest to be reconveyed.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Arthur B. Steel and others, for themselves and all others similarly situated, against R. J. Hadsell, his wife, and E. R. Bailey and others, in which defendant Hadsell filed a cross-complaint against defendant Bailey and Alva D. McGuire. From a judgment for cross-complainant against cross-defendant McGuire, the latter appeals.

Reversed, with instructions.

Benshoof & McGuire, of Riverside, for appellant.

Best & Best and Albert Ford, all of Riverside, for respondents.

MARKS, Justice.

This is an appeal by Alva D. McGuire from a judgment which required him to reconvey to R. J. Hadsell and Sadie J. Hadsell interests in two lots near Lake Elsinore in Riverside county, or to pay the value of the interests if he could not return the property.

Mr. and Mrs. Hadsell owned property on the banks of Lake Elsinore which they subdivided into sixty-one lots. Lot No. 30 had a well and pumping plant upon it which supplied water for the other lots. Lot No. 61 was a beach lot on the lake front and was set apart for the use and benefit of all lot owners. Each deed and conditional sales contract conveyed, or agreed to convey, with each lot an undivided $\frac{1}{60}$ interest in lot 30, the well, pumping plant, tank, and water distributing system, together with a like interest in lot 61 for the purpose of permitting the purchasers to enjoy the "hunting, fishing, bathing and boating" incident to it.

Hadsell became indebted to E. R. Bailey in the sum of \$103. He and his wife executed a promissory note to Bailey in that amount which they secured by a deed to their interest in lots 30 and 61. The deed was dated June 22, 1932, and was duly recorded. The note was fully paid on April 9, 1933, and was surrendered to Mr. and Mrs. Hadsell. Bailey did not reconvey the security to them.

The complaint in this action was filed on March 29, 1935. Appellant, McGuire, was one of the attorneys for plaintiffs and acted as the notary before whom the complaint was verified. Among other things, plain-

tiffs sought cancellation of the deed from the Hadsells to Bailey on the grounds that it was executed without consideration and to defraud plaintiffs out of their interests in lots 30 and 61. After a motion for judgment on the pleadings was granted, judgment was rendered for defendants. No appeal has been taken from that judgment.

Mr. and Mrs. Hadsell filed a cross-complaint against their codefendant Bailey and also against McGuire seeking to compel them to reconvey the interests in lots 30 and 61 which they (the Hadsells) had conveyed as security to Bailey, or the value of these interests if they be not returned. McGuire was joined as cross-defendant because Bailey and his wife had on April 13, 1935, conveyed their interests in the two lots to McGuire. It should be here observed that the deed to McGuire was executed fifteen days after he had, as attorney for plaintiffs, filed a complaint in which it was alleged that the deed to his grantor was fraudulent and without consideration. Any title which he might assert must of necessity flow through this same deed.

The case went to trial on the allegations of the cross-complaint and the answers to it. The trial court found that the deed from Mr. and Mrs. Hadsell to Bailey was in fact a mortgage; that the debt which it secured had been fully paid; that the deed from Bailey and wife to McGuire was without consideration; that McGuire had notice of the defect in Bailey's title.

Section 2925 of the Civil Code provides as follows: "The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument."

It has been held that under this section the grantee of a grantee in a deed executed as a mortgage, in order to successfully sustain his title against the original mortgagors, must have taken his title for a valuable consideration and be without notice of the defect in the mortgagee's title. *Say v. Crocker First Nat. Bank*, 98 Cal.App. 408, 277 P. 146.

[1] The finding that appellant was not a purchaser for value finds ample support in the record. He introduced in evi-

dence the deposition of Bailey, in which the following appears: "Q. What consideration did you receive for executing the deed to Alva D. McGuire, or in other words, did you receive anything? A. I didn't receive anything, and made it to him because he was the attorney for the lot owners of the Hadsell tract."

[2] As appellant was not an innocent purchaser for value, he cannot complain of a judgment restoring to Mr. and Mrs. Hadsell property to which he holds legal title but which rightfully belongs to them.

It was alleged in the cross-complaint that the reasonable market value of Mr. and Mrs. Hadsell's $\frac{3}{4}$ interest in the two lots was \$100 each, or a total value of \$3,100. This was denied in McGuire's answer. It was found by the trial judge that this interest was of the reasonable value of \$3,100.

The judgment contains the following:

"It is ordered, adjudged and decreed, that the cross-complainants, R. J. Hadsell and Sadie J. Hadsell, do have and recover from the cross-defendants E. R. Bailey and Alva D. McGuire, all of the undivided interest in Lots 30 and 61 of the Hadsell Tract, as shown by map thereof on file in the office of the County Recorder of the County of Riverside, State of California, in Book 12 of Maps, at page 22 thereof, described in the deed from the cross-complainants herein to E. R. Bailey, dated June 22, 1932, and recorded in Book 80 of Official Records of Riverside County, California, at page 308 thereof, excepting an undivided $\frac{1}{59}$ th interest in and to each of said lots;

"It is further ordered, adjudged and decreed, that the cross-defendant, Alva D. McGuire, be and he is hereby required and directed to make, execute and deliver to the cross-complainants, R. J. Hadsell and Sadie J. Hadsell, a good and sufficient grant deed conveying to them the title to the property herein above described;

"It is further ordered, adjudged and decreed, that in case said conveyance cannot be, or is not made, within fifteen days from the date of the entry of this judgment, that the cross-complainants do have and recover judgment against the cross-defendant, Alva D. McGuire, in the sum of \$3,100.00. * * *

There was no evidence of the value of these interests introduced by any of the

parties. It follows that the finding as to value and the quoted part of the judgment based on such finding is not supported by any evidence.

[3] The cross-complaint alleged that Mr. and Mrs. Hadsell conveyed to Bailey as security, and there was conveyed by Bailey to McGuire a $\frac{31}{100}$ interest in the two lots. The answer denied that anything more than a $\frac{29}{100}$ interest was conveyed by Bailey to McGuire. It is virtually stipulated in the record that Bailey on May 2, 1934, on instructions from Hadsell conveyed a $\frac{1}{100}$ interest in the two lots to each of the following: James J. Gorman, Joseph H. Whiteman, and Georgia D. Richardson. McGuire should not be required to reconvey to cross-complainants a greater interest in the lots than he received from Bailey especially if Bailey conveyed interests in them to other persons under instructions from Mr. Hadsell.

The deed from Mr. and Mrs. Hadsell to Bailey described the property conveyed as "all of an undivided interest of the grantors * * *" in the property conveyed. The deed from Mr. and Mrs. Bailey to McGuire described the property conveyed as "all the undivided interest of the grantors in and to * * *" the described property except an undivided $\frac{1}{100}$ interest reserved to the grantors.

The exact interest conveyed by Mr. and Mrs. Hadsell to Bailey and by Mr. and Mrs. Bailey to McGuire is neither determined in the findings nor the judgment. As the judgment requires the positive act of reconveyance from McGuire, it should fix the exact interest he is required to reconvey.

If McGuire be so advised, he should be permitted to amend his answer to the cross-complaint so that he may correctly allege the exact interest he received under the conveyance from Mr. and Mrs. Bailey. From the record before us it would seem probable that he received a $\frac{27}{100}$ interest instead of a $\frac{29}{100}$ interest as now alleged in his answer.

The judgment against Alva D. McGuire is reversed with instructions to the trial court to retry the issues of (1) the interest in the property conveyed by E. R. Bailey

and Pauline Bailey, his wife, to Alva D. McGuire, and (2) the reasonable market value of such interest; that its findings be amended in accordance with the evidence taken; that an appropriate judgment be entered on such amended findings in favor of cross-complainants.

We concur: BARNARD, P. J.; JENNINGS, J.



23 Cal.App.2d 419

PEOPLE v. MOORE.

Cr. 3039.

District Court of Appeal, Second District,
Division 2, California.

Nov. 10, 1937.

Criminal law $\S$ 1130(4)

Where case was set for hearing and notice thereof duly given, but defendant did not file brief and did not appear, judgment was affirmed (Pen.Code, $\S\S$ 1252, 1253).

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Alex Moore was convicted of an offense, and, from an order denying a motion to modify a judgment adjudging defendant to be an habitual criminal, he appeals.

Affirmed.

J. F. Rosen and H. Wolpin, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

PER CURIAM.

This is an appeal from an order denying motion to modify judgment adjudging defendant to be an habitual criminal. The case was set for hearing as required by section 1252 of the Penal Code and notice thereof was duly given. The defendant has not filed any briefs and has failed to appear, and for that reason the judgment will be affirmed as provided in section 1253 of the Penal Code.

Judgment affirmed.

23 Cal.App 2d 318

HAGGLUND v. NELSON.

Civ. 5861.

District Court of Appeal, Third District,
California.

Nov. 6, 1937.

Hearing Denied by Supreme Court
Jan. 3, 1938.

1. Automobiles ⇨244(20)

In action against host for injuries to guest in defendant's automobile struck by train at railroad crossing, evidence *held* sufficient to show defendant's willful misconduct in recklessly attempting to beat rapidly approaching passenger train at crossing with full knowledge that such conduct was likely to result in collision and injury to guest (St.1935, p. 154, § 403).

2. Automobiles ⇨181(1)

An automobile driver's "willful misconduct," rendering him liable for resulting death of or injury to guest means the intentional doing of something, which should not be done, or intentional failure to do something which should be done, in operation of automobile under circumstances disclosing express or implied knowledge that injury to guest will probably result (St.1935, p. 154, § 403).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

3. Automobiles ⇨181(1)

To constitute "willful misconduct" rendering automobile driver liable for injuries to guest, he must have had actual knowledge, or legal equivalent of such knowledge, of peril to be apprehended from failure to act and consciously failed to act to avert injury (St.1935, p. 154, § 403).

4. Automobiles ⇨181(1)

"Willful misconduct," rendering automobile driver liable for injuries to guest, implies at least intentional doing of something with knowledge that serious injury is probable, as distinguished from possible result thereof, or intentional doing of act with wanton and reckless disregard of its possible result (St.1935, p. 154, § 403).

5. Automobiles ⇨181(1)

"Willful misconduct," rendering automobile driver liable for injuries to guest, depends on facts of particular case and involves deliberate intention, or wanton conduct in doing or omitting to perform act with knowledge or appreciation that fact that danger is likely to result therefrom (St. 1935, p. 154, § 403).

6. Automobiles ⇨181(1)

One may be guilty of willful misconduct in operation of automobile so as to render him liable for resulting injuries to guest in knowingly performing, or failing to perform, act with such wanton and reckless disregard of consequences that he knows or is charged with knowledge that injury or death will probably result therefrom, as well as by performing, or omitting to perform, act with deliberate intent to injure guest (St. 1935, p. 154, § 403).

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by Z. Hagglund against Charles Nelson. Judgment for plaintiff, and defendant appeals.

Affirmed.

Yale Kroloff, of Oakland, for appellant.

Gilbert Moody and W. Coburn Cook, both of Turlock, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of \$655.24 which was rendered against him in a suit for injuries received by the plaintiff in a railroad crossing casualty. The plaintiff was riding as a guest

in the defendant's automobile. The cause was based on alleged willful misconduct of the defendant in attempting to cross the railroad track ahead of an approaching passenger train. The case was tried by the court sitting without a jury. Findings were adopted against the defendant. From the judgment which was accordingly rendered this appeal was perfected. The sole ground for a reversal is the alleged insufficiency of the evidence to show willful misconduct.

[1] The defendant and his wife resided on the westerly side of the Southern Pacific railroad track in the suburb of Turlock. They owned the Plymouth sedan automobile which was involved in this accident. It was in good mechanical condition, having been driven only 9,000 miles. The brakes were in perfect order. The defendant was in his normal good state of health and mind. He understood perfectly how to drive an automobile, having operated automobiles for twenty years. He was familiar with the railroad crossing where the accident occurred, having frequently used it for several years past. He also knew that a passenger train from the north was due to arrive at Turlock daily at the noon hour.

On January 6, 1936, the plaintiff, who is a neighbor of the defendant, was invited to ride with him as a guest in his automobile to Modesto, which is about 10 miles northerly from Turlock on the easterly side of the Southern Pacific railroad track. They left home about 9 o'clock in the morning. It was a clear day. There was no rain. In going to and coming from Modesto the plaintiff sat on the front seat of the automobile at the right-hand side of the defendant, who operated the car. The defendant's wife and a young couple who were to be married the following day sat in the rear seat. The Southern Pacific railroad track runs from Stockton straight through Modesto to Turlock and thence southerly over an almost level open country. On the morning of the accident, the defendant drove his automobile along a graveled country road northerly from Turlock about one mile, which was his usual course, and then turned at a right angle across the railroad track, thence northerly to Modesto.

After completing their shopping that morning, the group left Modesto shortly before noon. They sat in the same positions occupied by them in the automobile on

their trip to Modesto. The plaintiff sat by the side of the defendant, who operated the car. They drove southerly from Modesto along the public highway, which parallels the railroad track about a hundred feet easterly thereof, to the point about a mile northerly from Turlock. Here the defendant turned his machine at a right angle to cross the track along the graveled country roadway. At the crossing, the railroad track is elevated several feet above the level surrounding land. The roadway approaches the track from either side at a slight grade. There were railroad crossing signs at that point. The railroad right of way is open and unobstructed in both directions from the highway crossing for a distance of several miles. The right of way is 42 feet in width on the easterly side of the railroad. Along the easterly margin of the right of way, where the highway crosses the railroad track, there is a line of telegraph poles, a fence, and some weeds. Mr. Nelson testified that he was perfectly familiar with that railroad crossing; he knew the train schedule and realized that a passenger train was due from the north at that time of day; he knew that it was then about noon. It was a distance of 75 feet from the public highway to the railroad track at that point. There was nothing to obscure a clear view of the track both north and south of the crossing, except the line of telegraph poles and the fence. The track was elevated above the surrounding surface of the land and the fence should not have obscured the view of an approaching train. The defendant reduced the speed of his car to about 10 or 15 miles an hour. There is evidence that he could have stopped the machine in a space of less than 20 feet. He made no effort to do so. When the automobile passed the line of poles, 42 feet easterly from the track, the plaintiff saw the passenger train at a distance of about 300 feet approaching from the north at a high rate of speed. The plaintiff testified: "As soon as I got past these posts, and little weeds, * * * I saw the train and then I hollered 'the train is coming' a little bit excited, * * * and then I looked back and looked at Nelson and he seemed to look at the train too; * * * and he didn't do anything, and kept on the same speed, maybe a little bit increased; but when we got pretty close so I was pretty sure he was not going to stop, I hollered again, 'step on it', and I don't know whether he did or not, but the car didn't pick up very good, and we were

just a foot and a half shy of getting across." The locomotive engine struck the rear end of the automobile. The three passengers who rode in the rear seat were killed, and the plaintiff was injured.

We are of the opinion the evidence in this case shows willful misconduct on the part of the defendant in recklessly attempting to beat a rapidly approaching passenger train to the crossing with full knowledge that his conduct was likely to result in a collision and injury to his guests. The facts which constitute willful misconduct are that the defendant, who was perfectly familiar with the railroad crossing, and knew that a train was then due from the north, after having been warned of an approaching train when his machine was 40 feet from the track, and having apparently seen the train, or by the exercise of his faculties and ordinary caution should have seen the train, deliberately attempted to beat the passenger train to the crossing, without attempting to stop his automobile, which he could have easily done. With a passenger train in full view 300 feet away approaching at a high rate of speed, it was wanton and reckless disregard of the consequences of his conduct for the defendant to persist in trying to drive his automobile some 40 feet across the track ahead of the train. He was familiar with the crossing. He knew it was train time. He disobeyed the crossing sign to "stop, look and listen" for the train. His attention was called to the near approach of the train, and he must have seen it in ample time to have stopped his machine. Such conduct may not be said to amount to mere lack of judgment. It was a willful and reckless disregard for human life. Under such circumstances it was the province of the trial court to determine whether such conduct was the result of a mere mistake of judgment, or whether on the contrary it constituted willful misconduct on the part of the driver of the machine. With that province we may not interfere under the facts of this case.

In the case of *Avery v. Thompson*, 11 Me. 120, 103 A. 4, 5, L.R.A.1918D, 205 Ann.Cas.1918E, 1122, upon facts remarkably similar to those of the present case it was held that the driver of an automobile was guilty of "reckless and willful misconduct."

[2] Proof of willful misconduct depends upon the facts of each particular case. *Candini v. Hiatt*, 9 Cal.App.(2d)

679, 683, 50 P.(2d) 843. The definition of willful misconduct of the driver of an automobile which results in the death or personal injury of a guest who is riding in the machine, as that term is used in section 403 of the California Vehicle Code (St. 1935, p. 154), is now well understood. It is clearly and concisely stated in *Meek v. Fowler*, 3 Cal.(2d) 420, 45 P.(2d) 194, 197. In that opinion the court quotes with approval from the case of *Turner v. Standard Oil Co.*, 134 Cal.App. 622, 626, 25 P.(2d) 988, as follows: "Willful misconduct" within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result."

[3] Quoting further with approval from the case of *Howard v. Howard*, 132 Cal. App. 124, 22 P.(2d) 279, the opinion in the *Meek Case* says: "To constitute 'willful misconduct,' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

[4] The court concludes, in the *Meek Case*, with the statement that: "Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result."

[5] In the case of *Norton v. Puter*, 138 Cal.App. 253, 258, 32 P.(2d) 172, 174, in which case a hearing was denied by the Supreme Court, the term is similarly defined as follows: "Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom."

[6] Accepting the foregoing quotations as adequate definitions of the term under consideration, it follows that one may be guilty of willful misconduct in the operation of an automobile, not only when he

performs an act, or omits to do so, with the deliberate intent to injure his guest, but he may also be guilty of such culpable conduct when he knowingly performs an act or fails to do so with such wanton and reckless disregard of consequences that he knows, or is charged with knowledge, that an injury or death will probably result from his conduct.

In the present case we are satisfied the defendant did not drive his automobile directly in front of the rapidly approaching passenger train with the deliberate intention of injuring his guest, but we are convinced that he did act with wanton and reckless disregard of the consequences of his conduct with knowledge, or the possession of facts which were equivalent to actual knowledge, that injury to his guest was likely to occur. Such conduct renders him guilty of willful misconduct.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



23 Cal.App.2d 239

CANNON v. KEMPER.

Civ. 5821.

District Court of Appeal, Third District,
California.

Oct. 21, 1937.

Hearing Denied by Supreme Court

Dec. 20, 1937.

1. Automobiles ⇐168(1)

On issue of motorist's liability for death of pedestrian struck on particular highway, the basic rule of law requiring that no person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for traffic, surface, and width of highway, and in no event at a speed endangering safety of persons or property, is not controlled or limited in its operation by fact that under certain conditions automobiles may be operated on that highway at 45 miles per hour (St.1935, p. 176, § 510).

2. Automobiles ⇐244(35)

Motorist's testimony, that he was driving on highway in early morning at 35 miles per hour, that a heavy rain was falling, that visibility was limited to about 25 feet,

and that it would require about 65 feet to stop his automobile, justified trial court in concluding that motorist was propelling his automobile in a grossly negligent manner at time of striking pedestrian approaching automobile from opposite direction (St.1935, p. 176, § 510).

3. Negligence ⇨72

Where one is confronted by a sudden emergency created by the unlawful act of another, the failure to act in such a manner as would conserve his own safety does not, in law, establish contributory negligence.

4. Automobiles ⇨244(57)

In action for death of pedestrian who was struck by a negligently operated approaching automobile in early morning while it was raining, evidence that pedestrian stepped to the right toward center of highway did not require trial court to hold pedestrian contributorily negligent, but court was justified in holding that pedestrian was confronted with a sudden emergency, and that he stepped to the right in hopes that automobile would pass by without injuring him.

5. Highways ⇨183

A pedestrian walking on left side of highway had right to assume that other persons using highway would obey the law and keep a proper lookout and avoid hitting him.

6. Automobiles ⇨242(8)

In action for death of pedestrian struck by a negligently operated approaching automobile, the presumption was that pedestrian was at all times exercising the requisite degree of care necessary for his own safety, and though that presumption was subject to be controverted, it was evidence for trial court until controverted.

7. Appeal and error ⇨996

In action for death of pedestrian struck by a negligently operated approaching automobile, any reasonable inferences drawn by trial court, to effect that pedestrian's stepping to the right toward center of highway instead of to the left was occasioned by sudden emergency, or that stepping to the right was an act of negligence contributing proximately to accident, were binding on reviewing court.

8. Automobiles ⇨225

Though a pedestrian must under ordinary conditions keep a lookout in front of him when walking on improved portion of highway, where conditions present sudden

emergencies by reason of rapid approach of a negligently driven automobile, such facts must be considered in determining question of motorist's liability for striking pedestrian.

9. Death ⇨32

A widow could recover for her husband's death caused by negligent operation of automobile, notwithstanding parties were not living together, and widow had returned to her mother's home in another state, where it appeared that for three or four years husband had had difficulty in obtaining employment, and it did not appear that parties were estranged, or that any marital differences had caused their separation.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Elizabeth Cannon against A. R. Kemper. From a judgment for plaintiff, defendant appeals.

Affirmed.

Gerald M. Desmond, of Sacramento, and Yale S. Kroloff, of Oakland, for appellant.

Bradford, Cross & Prior, of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action had judgment against the defendant in the sum of \$2,500 for and on account of the death of her husband, occasioned by the alleged negligent driving of an automobile. From this judgment, the defendant appeals.

It appears from the record that at about 3:30 a. m. on the morning of May 28, 1936, the appellant was driving a Dodge sedan automobile southerly along a certain highway in the county of Sacramento, known as and called the Rio Linda road. This highway extends in a northerly and southerly direction between the town of Rio Linda and the city of Sacramento. The paved portion of the highway was and is approximately 16 feet in width, having a white strip defining the center line thereof. The defendant, driving southerly, was on the westerly side of the white line, driving very closely thereto. Driving toward the city of Sacramento, the defendant was operating his automobile on the westerly side of the highway. The morning was dark and a heavy rain was falling, so that the appellant, according to his testimony, could not see more than about 25 feet ahead of him. The lights of his car were burning, the wind-

shield wiper was being operated, and the car was equipped with four-wheeled hydraulic brakes. The appellant testified that it would require about 65 feet within which he could stop his car traveling at the indicated speed. The testimony of the appellant is to the effect that he was driving at the rate of 35 miles per hour. The physical facts, however, would indicate that he was traveling somewhat in excess of that speed. The appellant was on his way to work at the headquarters of the Poultry Producers' Association in Sacramento. He was accustomed to travel this highway daily to and from his work.

While the appellant was operating his automobile on the Rio Linda road, under the circumstances which we have just stated, he came in contact with the husband of the plaintiff, William C. Cannon, who was walking northerly on the westerly edge of the highway, which would be the left-hand side of the highway where the law requires pedestrians to walk. Thus, with Kemper driving southerly and Cannon walking northerly, both parties would be on the same side of the highway.

The cause was tried before the court, and in rendering judgment for the plaintiff the court found that the death of Cannon was caused by the negligent manner in which Kemper was operating his automobile, and that the deceased was not guilty of contributory negligence, approximately causing his death.

Upon this appeal the appellant presents four propositions: First. That the evidence was insufficient to support a finding of negligence against the appellant. Second. That the deceased was guilty of contributory negligence. Third. That from the facts as developed by the evidence and surrounding circumstances, the court could reasonably draw but one inference, an inference pointing unerringly to the negligence of the deceased. Fourth. That there is no evidence to support the judgment in the sum of \$2,500.

The facts are simple, as testified to by the appellant. His testimony is to the effect that he was driving southerly at the rate of 35 miles per hour; that a heavy rain was falling; that visibility was limited to about 25 feet; that it would require approximately 65 feet within which to stop his car; that when he saw the deceased, he swerved his car to the left; that at the same instant the deceased stepped to the right; and that the collision followed.

The physical facts show that the appellant's car was driven diagonally across the highway, came in contact with a small tree, was guided back onto the highway, or rather, along the shoulder of the highway, encountered four mail-box posts, knocked them all down, and stopped at a point indicating that the car had traveled 75 feet from the place where he applied the brakes just preceding the collision.

[1] Upon these facts it is argued by the appellant that the court had nothing upon which to base the conclusion that the appellant was guilty of negligence. This contention, however, does not appear to us to be well taken. Section 510 of the Vehicle Code (St.1935, p. 176) requires that no person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property. This basic rule of law is not controlled or limited in its operation by reason of the fact that under certain conditions an automobile may be operated upon the Rio Linda highway at a speed of 45 miles per hour.

In the case of *Graybiel v. Auger*, 64 Cal. App. 679, 222 P. 635, the basic rule which we have just referred to was mentioned and held to be as much a portion of the law as that which allowed certain speeds under certain specified conditions.

In the case of *Dam v. Bond*, 80 Cal.App. 342, 251 P. 818, 822, the same question was presented to the court, and after referring to the *Auger Case*, it was there added: "In other words, it is not the absolute speed at which an automobile is being driven that determines whether it is or is not being propelled at a reckless rate, but the conditions and circumstances of the highway at the instant of time must be taken into consideration, and if these conditions are such that the safety of persons and property require a much lesser rate of speed, it is the duty of the driver of the motor vehicle to slow down the speed of his car."

The same rule was followed in the case of *Davis v. Brown*, 92 Cal.App. 20, 267 P. 754. Other cases might be cited, but all the cases having to do with the subject have affirmed the basic rule in determining the question of negligence.

[2] In view of the basic rule and the cases which we have cited, the trial court was justified in coming to the conclusion that the appellant was propelling his auto-

mobile in a grossly negligent manner at the time of the collision. When one's vision is limited to 25 feet, or thereabouts, a heavy rain falling, the highway necessarily wet and slippery, and the possibility of stopping a car requiring at least 65 feet, the propelling of a car at the rate of 35 miles per hour certainly presents a situation where the trial court was justified not only in holding that the appellant was guilty of gross negligence, but that he was driving his car without any regard to the safety of persons who might also be using the same side of the highway. Any other holding by the trial court would have been contrary to any reasonable conclusion based upon such facts. At a speed of 35 miles per hour the appellant was allowing himself only a half second within which to discover a person upon the highway, and act so as to avoid a collision; presenting almost an impossibility.

[3, 4] Was the deceased guilty of contributory negligence approximately causing a collision? In the first place, unless the testimony directly controverts the same, the presumption that the deceased was taking due care comes to the aid of the plaintiff in this action, and requires no further evidence to support the judgment. It is asserted, however, that the deceased, in stepping to the right toward the center of the paved portion of the highway instead of stepping to the left and off the paved portion, must be held guilty of contributory negligence.

Under the cases where visibility is clear, and the deceased has a plain, unobstructed view, and is not confronted by a sudden emergency, the holding would necessarily follow that contributory negligence was established. There is here, however, another principle involved, and that is, when one is confronted by a sudden emergency created by the unlawful act of another, the failure to act in such a manner as would conserve his own safety does not establish, in law, contributory negligence.

Under the circumstances which we have set forth, the trial court was justified in concluding that it was impossible for the deceased to correctly estimate the speed at which the defendant's car was approaching; that his own visibility was limited on account of the rain; and that the deceased also had a right to assume that no one, on such a morning, would be driving a car at a reckless rate of speed, or at a speed which was wholly disregarding of the safety of other persons upon the highway; and that the circumstances disclosed presented a sit-

uation of sudden emergency to the deceased; and that he stepped to the right instead of to the left in the hopes that the speeding automobile would pass by without injuring his person.

[5, 6] Just as indicated in the case of *White v. Davis*, 103 Cal.App. 531, 284 P. 1086, and *McVea v. Nickols*, 105 Cal.App. 28, 286 P. 761: The deceased was walking where he had a right to walk, and the right to assume that other persons using the highway would obey the law and keep a proper lookout and avoid hitting him. Also, as said in the case of *Hatzakorjian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027, the presumption is that the deceased, walking on the highway, was at all times exercising the requisite degree and amount of care necessary for his own safety and preservation. This presumption, however, is subject to be controverted, but, until controverted, it is evidence with which the jury or court, as the case may be, is bound to decide.

[7] The trial court in this case, we think, had before it the question whether, under the circumstances the deceased should be held presumed to be exercising reasonable care, and that his stepping to the right was occasioned by a sudden emergency, due to the rapid approach of the automobile, or whether stepping to the right was an act of negligence contributing proximately to the accident. Any reasonable inferences to that effect drawn by the trial court would be, and are, binding upon us upon this appeal.

In view of the facts which we have set forth, and the conclusions which we think the trial court had a right to deduce therefrom as to who was responsible for the collision in this case, we deem it unnecessary to analyze or distinguish the crossing cases cited by the appellant, nor even the cases where the circumstances present to a pedestrian an unobstructed view and no sudden emergency.

[8] A somewhat similar case was presented to this court in *Buchignoni et al. v. De Haven*, 72 P. (2d) 159. There, the driver was propelling his car at about 45 miles per hour, when the atmospheric conditions somewhat obscured vision, by reason of causing mist or moisture to collect upon the windshield of the automobile involved in the accident. The right of the deceased in that case to walk where the law required him to walk was set forth, and it is further held that the deceased was not required to walk

entirely off the roadway, or off the improved portion thereof. Where, under ordinary conditions, the law is well settled that it is the duty of a pedestrian to keep a lookout in front of him when walking upon the improved portion of a highway, yet, when the conditions present sudden emergencies by reason of the rapid approach of a negligently driven automobile, such facts must be considered in determining the question of liability.

[9] As to the fourth assignment of error we may add that the record shows that the plaintiff and the deceased were not living together; that for three or four years the deceased had had difficulty in obtaining employment. The wife had returned to her mother's home in one of the southern states. It does not appear that the wife and the husband were estranged, or that any marital differences had caused their separation. Under these circumstances, the cases cited by the respondent, to wit, *Gilmore v. Los Angeles Railway Corp.*, 211 Cal. 192, 295 P. 41; *Powers v. Sutherland Auto Stage Co.*, 190 Cal. 487, 213 P. 494, and *People v. Stokes*, 71 Cal. 263, 12 P. 71, sufficiently show that the plaintiff in this action was and is entitled to the damages awarded.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



**TITLE GUARANTEE & TRUST CO. v.
MONSON et al.***

Civ. 10565.

District Court of Appeal, First District,
Division 2, California.

Nov. 10, 1937.

Hearing Granted by Supreme Court
Jan. 6, 1938.

1. Judgment ⇨587

An action by beneficiary of trust deed, denominated an action for specific enforcement of terms of trust deed, wherein beneficiary obtained judgment that it was entitled to possession of property, requiring subsequent owners of trust property to deliver possession, was an action for specific performance, and hence judgment for beneficiary therein barred beneficiary from sub-

sequently recovering balance due on note secured by trust deed.

2. Judgment ⇨524

A judgment will be construed with reference to the law regulating the rights of the parties.

3. Specific performance ⇨64

The beneficiary of a trust deed had right to sue for specific performance of provision in trust deed that beneficiary was entitled to possession after default, making persons who had purchased property subject to trust deed parties defendant.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Title Guarantee & Trust Company against Charles E. Monson and Nellie Monson. From a judgment for plaintiff, defendants appeal.

Reversed.

Sven H. Svenson, of San Francisco, for appellants.

Hansen & Sweeney, of Los Angeles, and Lillick, Olson, Levy & Geary, of San Francisco, for respondent.

STURTEVANT, Justice.

[1] The defendants have appealed from a judgment awarding the plaintiff \$6,768.36. They contend, in effect, the findings do not support the judgment, and that under the facts no liability existed against them. We think the contention is well founded.

Plaintiff framed its complaint in four separate counts. In the first it pleaded the facts, in the second it pleaded an action for money had and received, in the third it pleaded the existence of an account and asked for an accounting, in the fourth it pleaded a wrongful withholding of the possession of real property and prayed for damages.

In pleading its first count the plaintiff alleged that it was a corporation; that on the 6th day of September, 1928, Joseph P. Stein and wife executed 140 promissory notes aggregating \$145,000 in favor of American Mortgage Company, and to secure the payment thereof they executed to plaintiff a trust deed on certain lots and the improvements thereon in the city of Los Angeles; that after the recordation

*For subsequent opinion see 81 P.2d 944.

of said deed, the owners by mesne conveyances transferred the property to these defendants, Charles E. Monson and Nellie Monson, his wife, "* * * subject to the terms and conditions of said deed of trust"; that the building on said property is a six-story apartment house containing seventy separate apartments which for a consideration are rented to the public; that on the 6th day of June, 1932, the interest due on the above-mentioned notes was not paid; that by the terms of said deed of trust on the happening of said default plaintiff in its discretion was authorized to enter upon and take possession of the trust estate, exclude the trustor therefrom, and to operate and control the business of the trust estate and to collect the rents, issues, and profits thereof; that it elected to take and hold possession of said trust estate, and on the 29th day of July, 1932, in writing, it demanded of the defendants that they deliver possession of said estate to the plaintiff; that on the 10th day of August, 1932, it commenced an action against the defendants to specifically enforce the terms of said deed of trust; that on the 17th day of November, 1932, it obtained a judgment that since the 29th day of July, 1932, it was entitled to the possession of the above-mentioned property, that these defendants forthwith deliver such possession to the plaintiff, and that plaintiff recover its costs; that notwithstanding the terms of said deed of trust and the terms of said judgment, the defendants continued in possession of said property until February 28, 1933; that between July 29, 1932, and the 28th day of February, 1933, defendants collected rents, issues, and profits in the sum of \$22,228.50 and still withhold the same; and that plaintiff has been damaged in said sum. The contents of each of the other counts are mentioned above. The action was tried before the court sitting without a jury. The trial court made findings that the plaintiff had been damaged in the sum of \$5,533.27, and from a judgment based on those findings the defendants have appealed.

[2, 3] The defendants complain as to the amount of the judgment against them. This contention they present in several different attacks. They quote from the complaint allegations showing or tending to show that the first action was one in speci-

fic performance; that is, an action in equity. They then argue that when the court of equity took jurisdiction of the controversy it did so for all purposes and it must be assumed if any damages were claimed that such issue was determined against the plaintiff and it may not now be made the basis of another action. If, as contended by the defendants, the action commenced in Los Angeles county was an action in specific performance, the contention of the defendants must be sustained. 23 Cal. Jur. 516. At this time the plaintiff claims said action was a tort action brought to recover possession. But in its complaint in the instant case, it alleged that said action was in specific performance; that the plaintiff obtained a judgment; and it pleaded the judgment in *haec verba*. These defendants, by failure to deny, admitted all of those allegations. The trial court made findings that all of said allegations were true and, in its judgment in the instant case, adopted and incorporated said allegations and findings. On the trial the plaintiff introduced in evidence a certified copy of the judgment in the Los Angeles action. No other portions of the judgment roll in that action are set forth in the record in the instant case. The judgment will be construed with reference to the law regulating the rights of the parties. *Watson v. Lawson*, 166 Cal. 235, 241, 135 P. 961. On its face the said judgment in the Los Angeles action shows that it was a judgment in specific performance as these defendants contend. That the plaintiff was, under the facts, entitled in the Los Angeles action to file a complaint asking specific performance is settled law. *American Securities Co. v. Van Loben Sels*, 218 Cal. 662, 24 P. (2d) 499. And it is clear that under the facts it had the right to name, among others, as defendants, Mr. and Mrs. Monson, who purchased the property subject to the deed of trust after the deed had been executed and recorded. 58 C.J. 921.

In view of the conclusion we have reached on the point just discussed, it is not necessary to discuss any other points made in the briefs.

The judgment is reversed.

We concur: SPENCE, Acting P. J.;
GOODELL, Justice pro tem.

23 Cal.App.2d 402

THOMPSON v. MUNICIPAL BOND CO.

Civ. 2048.

District Court of Appeal, Fourth District,
California.

Nov. 8, 1937.

Hearing Denied by Supreme Court
Jan. 6, 1938.**1. Compromise and settlement ⇨16(1)**

An agreement between buyer of bonds and seller, reciting that buyer had asserted certain claims with respect to purchase of bonds and "certain alleged representations pertinent thereto," and providing that seller would buy interest coupons and bonds themselves at cost as they became due, and that discharge of agreement would release all of buyer's claims arising out of purchase, operated as a compromise and settlement of buyer's claim for fraud inducing purchase, with implied covenant not to sue for fraud, and barred action for fraud based on original purchase of bonds.

2. Compromise and settlement ⇨18(1)

Where buyer of bonds instituted action against seller for fraud inducing sale of bonds, notwithstanding previous compromise agreement, and seller informed buyer that seller considered institution of action as abandonment of agreement wherein seller acquiesced, seller thereby cut itself off from right to rely on compromise agreement and was relegated to meeting charge of fraud.

3. Compromise and settlement ⇨18(1)

Where buyer of bonds instituted action against seller for alleged fraud inducing sale, notwithstanding previous compromise agreement with seller, and seller served notice on buyer that seller considered buyer as having repudiated compromise agreement and that seller acquiesced in repudiation, buyer was precluded from suing on promissory notes given pursuant to compromise agreement, notwithstanding that buyer voluntarily dismissed action for fraud.

4. Contracts ⇨256

Abandonment of a contract by consent may be implied from acts of parties, as by refusal to comply with contract wherein other parties have acquiesced.

5. Appeal and error ⇨1010(1)

The question of whether an agreement has been abandoned is a mixed question of law and fact, upon which trial court's findings will not be disturbed when supported by evidence.

6. Evidence ⇨208(2)

In action on notes given pursuant to compromise agreement, defended on ground that payee of notes had abandoned agreement by bringing action on compromised claim, original and amended complaint in payee's action were admissible to show that payee's action was based on compromised claim.

7. Evidence ⇨591

In action on notes given pursuant to compromise agreement, wherein maker of notes introduced in evidence payee's pleadings in action brought after execution of compromise agreement, merely to show that payee abandoned compromise agreement by bringing such action, maker did not thereby admit truth of allegations in pleadings.

8. Compromise and settlement ⇨18(1)

Institution of an action for deceit inducing plaintiff to execute compromise agreement would not constitute abandonment of agreement.

9. Compromise and settlement ⇨18(1)

A compromise agreement was abandoned by bringing action on compromised claim, irrespective of estoppel against claimant arising out of detriment to defendant in being compelled to defend the action.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by D. E. Thompson against the Municipal Bond Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Roger Marchetti and Calvin E. Woodside, both of Los Angeles, for appellant.

Donald J. Dunne and Bailie, Turner & Lake (by Richard A. Turner), all of Los Angeles, for respondent.

JENNINGS, Justice.

The plaintiff instituted this action on March 12, 1936, for the purpose of recovering the principal and interest of four promissory notes executed by the defendant on September 16, 1932, and made payable to plaintiff or order. The principal sum mentioned in each note was \$3,045, and the due date specified in each instrument was October 1, 1934. The complaint alleged that the consideration for the execution of each note was the postponement by the plaintiff of the payment of certain,

amounts which the defendant was obligated to pay to plaintiff by the terms of a written agreement entered into between plaintiff and defendant on March 14, 1932. A copy of this agreement was attached to the complaint as an exhibit thereto and by reference made a part thereof.

The defendant's answer to plaintiff's complaint admitted the execution of the four notes and alleged that the instruments were executed and delivered by defendant solely in connection with and as a modification of the written agreement between the parties which was made on March 14, 1932. It was, however, alleged that on or about March 5, 1934, the plaintiff had abandoned the written contract of March 14, 1932, and that the defendant acquiesced in and accepted plaintiff's abandonment of said contract and rescinded the same, tendering to plaintiff everything of value which had been received by defendant pursuant to the agreement and that as a result of such abandonment and rescission and the failure of plaintiff to perform his part of the agreement nothing was due plaintiff on the notes. As a separate and affirmative defense to plaintiff's complaint, the answer alleged in detail certain transactions between the parties which culminated in the making of the contract of March 14, 1932, its subsequent modification which resulted in the execution of the four notes mentioned in the complaint, and the facts which were claimed to have amounted to an abandonment of the agreement by plaintiff, together with defendant's acquiescence in and acceptance of such abandonment and its rescission of the agreement.

Trial of the issues thus framed before the court without a jury resulted in the rendition of a judgment in defendant's favor from which the plaintiff has prosecuted this appeal.

The chief contention here advanced relates to a certain finding made by the trial court which is declared to be lacking in proper evidentiary support. This finding is in the following language: "That by the commencement of said action numbered 364437 and the service of summons therein on said Municipal Bond Company said D. E. Thompson abandoned and repudiated said agreement of March 14, 1932." Intelligent consideration of appellant's contention with respect to this finding requires some reference to the facts which were developed during the trial.

During the years 1927, 1928, and 1929 respondent sold to appellant a considerable

number of bonds issued by the county of San Diego. These bonds were known as road district improvement bonds and the aggregate par value thereof was \$87,000. In addition to the bonds which appellant thus purchased for himself, he also bought for his sister similar bonds from respondent whose face value amounted to \$4,000. Subsequent to the purchase of the bonds as hereinabove stated and during the year 1931 appellant, on behalf of his sister and himself, asserted claims and demands against respondent which were based on alleged misrepresentations of facts claimed to have been made by respondent to appellant for the purpose of inducing appellant to purchase the bonds. On March 14, 1932, an agreement in writing was executed between appellant as first party and respondent as second party. The opening paragraph of this contract contained the following recitation: "Underlying this agreement are the differences existing between first party on the one hand, and second party on the other hand, arising out of the purchase by first party from second party of an aggregate of seventy thousand (\$70,000.00) Dollars par value of bonds of San Diego County Road District Improvement number Fifty two (52) together with also an aggregate of Twenty One Thousand Dollars (\$21,000.00) par value of bonds of San Diego County Road District Improvement Number Twenty five (25)." The next two paragraphs of the instrument were devoted to a particular description of the bonds. The following language then appeared: "First party has asserted certain claims and demands against second party in connection with the purchase by first party of said R. D. I. bonds and with respect to certain alleged representations pertinent thereto. Said claims and demands have been denied and disregarded by second party. With a view to finally settling, compromising and adjusting all claims, demands, and differences whatsoever that have arisen in connection with said transactions, and as full accord and satisfaction thereof, It is mutually agreed by and between the parties hereto * * *." The substance of the agreement which was then recited was that respondent would purchase from appellant for cash, and appellant would sell to respondent, all interest coupons attached to said bonds which should thereafter mature for the par value of such coupons at or after the time of maturity, and respondent would also purchase from appellant for cash all of the bonds as said bonds should

mature and become due; the price to be paid therefor being the par value of said bonds. The agreement further provided that "the faithful discharge of the rights and obligations herein created shall act and operate as the full and complete release and relinquishment of any and all claims and demands which first party might or could have against second party arising out of or in connection with the purchase by first party from second party of said R. D. I. bonds and/or any other bonds heretofore purchased from second party by first party either for himself or for the account of others, and/or arising out of or in connection with any and all past transactions or relationships whatsoever between the parties hereto." On September 16, 1932, the aforementioned agreement was modified by respondent's execution and appellant's acceptance of the four promissory notes whose collection was sought by the present action. These notes were given in lieu of cash payments which were then due or would presently become due from respondent under the terms of the contract of March 14, 1932, on account of interest accrued on the bonds therein mentioned on July 2, 1932, January 2, 1933, July 2, 1933, and January 2, 1934. As a condition precedent to his acceptance of the four notes, appellant insisted that respondent pay him the amount of principal and accrued interest on the four bonds which appellant had purchased for his sister. This was accordingly done and on September 16, 1932, respondent drew its check for \$4,038.88 in favor of appellant's sister, said sum representing the face value of said bonds in the amount of \$4,000, plus \$38.88 interest due on the bonds. Subsequently an additional payment of \$140 by way of interest due on said bonds was made to appellant's sister. On October 21, 1933, appellant instituted an action, No. 364437 in the superior court of Los Angeles county against respondent and a number of other defendants, including various officers and directors of respondent. Service of process therein was made on respondent on March 5, 1934. To the complaint filed in said action respondent demurred. The demurrer was sustained as to part of the pleading and overruled as to part. Thereafter and on August 9, 1935, appellant filed a first amended complaint in said action to which respondent interposed demurrers which were sustained in part and overruled in part. Subsequently on October 3, 1935, a second

amended complaint was filed by appellant and demurrers thereto were again filed by respondent which were again partly sustained and partly overruled. Neither the original complaint nor the amended complaints filed in said action were verified. No additional complaint was filed by appellant after the second amended complaint was filed. No answer was filed by respondent in the action. At some time prior to the institution of the present action, action No. 364437 was voluntarily dismissed by appellant. Since respondent's answer raised the issue that the institution of action No. 364437 constituted an abandonment of the agreement of March 14, 1932, and the trial court expressly so found, a finding which is attacked by appellant, it becomes important to discover the nature of this prior suit.

The original complaint in the action contained four causes of action. The first three were based on fraud which it was alleged had permeated the original transactions between appellant and respondent during the years 1928 and 1930, whereby bonds having a total face value of \$88,173.-60 were sold to appellant by respondent. The fourth cause of action was based on fraud alleged to have been practiced and misrepresentations alleged to have been made by respondent to induce appellant to enter into the contract of March 14, 1932, whereby appellant was deprived of pursuing the statutory remedy of a suit against respondent's directors and stockholders to recover damages for the fraud practiced upon him until the time within which such remedy was available had expired. The total amount of damages claimed by appellant in this complaint was \$85.-160. Each of the two amended complaints filed in said action contained three causes of action based on fraud alleged to have been practiced on appellant by respondent in connection with the sale to appellant of the bonds. In neither of these amended complaints was any cause of action attempted to be stated for fraud and deceit inducing appellant to enter into the compromise agreement of March 14, 1932.

In connection with respondent's claim that the institution of the above-mentioned action constituted an abandonment by appellant of the compromise agreement of March 14, 1932, it was shown that after service of process in the action had been made on respondent and on June 29, 1934, respondent addressed a letter to appellant stating that respondent "has accepted and

does hereby accept your abandonment of said contract as evidenced by your act in commencing that certain action in the Superior Court * * * numbered therein No. 364437 * * *." This communication further contained a statement to the effect that respondent "has rescinded and does hereby rescind said contract" referring to the agreement of March 14, 1932, "and does hereby tender to you and offer to return to you everything of value received by it under said contract, when you return to Municipal Bond Company everything of value received by you under said contract," specifying the four bonds which respondent had taken back and for which it had paid appellant's sister a total of \$4,178.85 and a considerable number of interest coupons detached from other bonds, which coupons matured on July 2, 1932, and demanding that appellant return the sum of \$4,178.85 and the four promissory notes executed on September 16, 1932.

[1] It is apparent, not only from the provisions of the written agreement of March 14, 1932, but also from other evidence produced during the trial, that it was intended by the parties to said agreement that it should effect a compromise and settlement of appellant's claim that fraud had been practiced upon him by respondent in connection with the sale to him by respondent of the bonds in question. The record, for example, contains a statement of facts which were expressly stipulated to be true. Among the facts therein set forth the following statement is included: "That during the latter part of the year 1931, D. E. Thompson, the plaintiff in this action, asserted certain claims and demands against the Municipal Bond Company, based upon alleged misrepresentation of facts claimed to have been made by said Municipal Bond Company to induce the plaintiff in this action to buy and purchase said bonds and each of them from the Municipal Bond Company. That on or about the 14th day of March, 1932, in order to fully settle, compromise and adjust the claims and demands so asserted by Mr. Thompson, the plaintiff in this action, the plaintiff and the Municipal Bond Company made, executed and entered into an agreement in writing dated the 14th day of March, 1932, which is in evidence as Plaintiff's Exhibit 3 by reference." The testimony of respondent's witness Harold B. Reed, who was the president of respondent, also

shows that in the month of January, 1932, appellant asserted claims against respondent which were based on alleged misrepresentations of fact made to him by an agent of respondent. It is clear, therefore, that the written agreement of March 14, 1932, was entered into for the definite purpose of settling and compromising such claims. It is also clear from the evidence and as to this fact there is, as we understand it, no dispute that the written agreement of March 14, 1932, was modified in September of the same year by respondent's executing the notes for whose collection the instant action was brought and by appellant's acceptance of said notes. It also appears that before appellant would consent to the modification of the contract of March 14, 1932, in the manner stated he insisted that respondent should repurchase and pay cash for four bonds each having a par value of \$1,000, which had been sold to appellant's sister and that this condition was fully performed by respondent.

Since it is evident that appellant had completely settled and compromised his asserted claim that he had been defrauded in the sale of the bonds by his execution of the agreement of March 14, 1932, as modified in September, 1932, it is proper to inquire what consideration respondent received for its agreement to repurchase the bonds. Obviously, the sole consideration for respondent's agreement was the extinguishment of appellant's claim that he had been defrauded. It may further be observed that although the written agreement of compromise contains no express covenant by appellant not to sue for fraud, it is apparent that such a covenant is proper to be implied from the terms of the contract.

[2,3] On October 21, 1933, the date on which appellant instituted action No. 364437 whereby he sought to recover damages for the alleged fraud practiced upon him, the evidence showed that respondent was not in default as to its part of the compromise agreement of March 14, 1932. The same situation existed when service of process in said action was made on respondent on March 5, 1934. Respondent had then rendered partial performance of the compromise agreement as modified by its repurchase of the four bonds sold to appellant's sister. None of the notes which had been executed in conformity with the modified

agreement of compromise was due. At this time, that is, the date on which service of process was made, respondent had a perfect defense to the first three causes of action alleged in the complaint in said action. Each of these causes of action was founded on fraud alleged to have been practiced by respondent in its sale of the bonds to appellant. However, all such claims had been settled by the execution of the compromise agreement and this agreement if not rescinded would therefore have been a bar to the action so far as it was based on fraud which entered into the original sale of the bonds. *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 58 P. 92, 61 P. 667. Respondent did not, however, elect to stand on the compromise agreement and plead it as a defense to the action. It chose instead to signify to appellant that it considered the institution of the action as an abandonment by appellant of the compromise agreement in which it acquiesced and that it therefore rescinded the contract of compromise offering at the same time to return to appellant everything of value which it had received under said contract and demanding that appellant likewise surrender the benefits he had received thereunder, specifying the money it had paid for the four bonds which it had repurchased and the four promissory notes which it had executed in appellant's favor on September 16, 1932. In so doing respondent effectually cut itself off from its right to rely on the compromise agreement as a bar to the first three causes of action in the original complaint in said suit and was thenceforth relegated to meeting the charge of fraud pleaded in said causes of action. When appellant was apprised of respondent's attitude he chose to continue the prosecution of said action No. 364437. The record shows that he thereafter filed two amended complaints in the action in each of which he sought damages for the fraud which he alleged had been practiced upon him in connection with the original sale of the bonds. He did not, however, in these amended complaints seek to recover damages for fraud and misrepresentation inducing him to make the compromise agreement. Evidently he abandoned his claimed cause of action in this regard which he had pleaded in his original complaint. Subsequently after he had filed a second amended complaint to which demurrers filed by respondent were in part sustained he voluntarily dismissed action

No. 364437 and thereafter instituted the present action seeking to recover on the four promissory notes.

[4, 5] It is our conclusion that the trial court's finding that appellant by his institution of the prior suit and his service of process therein on respondent had abandoned the agreement of compromise is justified by the record. It is settled that an abandonment of a contract by consent may be implied from the acts of the parties. *Newell v. E. B. & A. L. Stone Co.*, 181 Cal. 385, 184 P. 659, 9 A.L.R. 993; *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25; *Tompkins v. Davidow*, 27 Cal.App. 327, 149 P. 788; *Tattersson v. Kehrlein*, 88 Cal.App. 34, 47, 263 P. 285; *Jones v. Noble*, 3 Cal.App.(2d) 316, 322, 39 P.(2d) 486. A rescission by consent is implied by a refusal to comply with a contract in which the other party thereto has acquiesced. *Mettler v. Vance*, 30 Cal. App. 499, 158 P. 1044; *Carter v. Fox*, 11 Cal.App. 67, 103 P. 910. The question of whether or not an agreement has been abandoned is a mixed question of law and fact (*Ross v. Tabor*, 53 Cal.App. 605, 200 P. 971; *Jones v. Noble*, supra), and the trial court's finding that appellant had abandoned the compromise agreement being supported by the evidence may not be disturbed.

[6, 7] Appellant presents certain complaints with reference to the reception in evidence by the trial court of the original and amended complaints in action No. 364437. It is contended, in the first place, that these pleadings were improperly admitted. This contention is without merit. Respondent had expressly pleaded the institution of the prior action as an abandonment by appellant of the compromise agreement by way of affirmative defense to appellant's cause of action on the notes. The fact of the bringing of the prior action was therefore an important matter in issue in the present suit and the nature of the prior action was important since its effect was claimed to amount to an abandonment of the contract which was the foundation of the cause of action alleged by appellant in the present action. *Kamm v. Bank of California*, 74 Cal. 191, 197, 15 P. 765; *Coward v. Clanton*, 79 Cal. 23, 28, 21 P. 359.

It is next contended with reference to the pleadings in the prior suit that since they were introduced by respondent and received in evidence all facts alleged in

said pleadings must be deemed to be admitted by respondent. In this connection it is apparently urged that the voluminous allegations contained in said pleadings show that appellant had a cause of action for damages for deceit which induced him to enter into the compromise agreement of March 14, 1932. It is, we think, a sufficient answer to the contention thus advanced to point out that the pleadings in the prior action were introduced for the purpose of showing the nature of such prior action. Respondent had expressly raised the issue that the institution of the prior action constituted an abandonment of the compromise agreement. This issue could only be determined by an inspection of the pleadings in such action wherein appellant had attempted to state the causes of action upon which he then relied. *Williams v. Hartford Insurance Co.*, 54 Cal. 442, 449, 35 Am.Rep. 77; *Froeming v. Stockton Electric Railway Company*, 171 Cal. 401, 153 P. 712, Ann.Cas.1918B, 408; *Avery v. Wiltsee*, 177 Cal. 484, 171 P. 95. Under these circumstances it is obvious that respondent is not bound by the facts alleged in such pleadings on the theory that since it introduced the pleadings in evidence for the limited purpose stated it thereby admitted that such facts were true.

[8] Appellant makes certain other contentions which deserve mention. It is pointed out, for example, that appellant was entitled to bring an action for deceit inducing him to make the compromise agreement without abandoning the agreement since thereby he would have been affirming the contract and claiming damages for the fraud which induced him to make it. It is then urged that the allegations contained in the pleadings in the former suit when properly analyzed state a cause of action for damages based on deceit inducing appellant to execute the compromise agreement. In this regard it is maintained that the fraud alleged to have been practiced on appellant in connection with the original sale of the bonds is precisely the same fraud which later induced him to execute the compromise agreement. This last contention is not warranted by the allegations contained in the three complaints which were filed by appellant in action No. 364437. Examination of these pleadings discloses that the original complaint filed therein attempted to state four causes of action. In the first three causes of action he alleged that

he purchased the bonds as a result of certain specific representations concerning the assessed and actual value of the property against which the bonds were issued which representations he later discovered were false and that his discovery of the falsity of such representations was not made until a designated time because of specified reasons, one of which was that he conferred with certain officers of respondent after a default in payment of interest due on the bonds had occurred and said officers assured him that the default was purely temporary, that the underlying securities were adequate, that the bond issue was sound, and that these officers then proposed that respondent should guarantee the payment of principal and interest of the bonds and to effect such guarantee the agreement of compromise was executed. In these causes of action no effort was made to claim damages for misrepresentations inducing appellant to execute the compromise agreement. Reference was therein made to the execution of this agreement solely for the purpose of explaining why appellant had not earlier discovered the misrepresentations which he claimed had originally induced him to buy the bonds and which formed the basis for his demand for damages. The fourth cause of action was, however, entirely different from the first three. Therein he alleged that he was induced to execute the compromise agreement by misrepresentations made to him by respondent, that he was thereby lulled into a sense of security and his right to maintain an action against the stockholders of respondent to enforce the liability imposed by law upon such stockholders was delayed until he was deprived of such remedy by lapse of time to his damage. This fourth cause of action was one that sounded in deceit inducing appellant to execute the compromise agreement and it may be conceded that the institution of an action so grounded would furnish no basis for a claim by respondent that thereby appellant had abandoned and renounced the contract of compromise. It must, however be observed that a demurrer interposed to the fourth cause of action by respondent was sustained without leave to amend, and it is significant that in the two amended complaints thereafter filed by appellant no mention was made of the compromise agreement. Its execution was not even pleaded as a reason for appellant's failure to have made earlier discovery of the mis-

representations which he claimed had induced him to purchase the bonds for which he continued to maintain his right to damages.

[9] Appellant also contends that the institution by him of the prior action did not estop him from maintaining the present action for breach of the compromise agreement since it is a settled principle of the law of estoppel that it must appear that a detriment was suffered by the person who relies on application of the principle of estoppel in order that the doctrine may be applicable. Here it is declared that there was no showing that respondent had altered its position to its prejudice or suffered any detriment whatever by reason of the institution of the former suit which was voluntarily dismissed without being brought to trial. Hence it is urged that the doctrine of estoppel could not apply. Appellant's contention in this regard is evidently based on the assumption that the foundation for the finding that appellant had abandoned the compromise agreement was a conclusion by the trial court that appellant by the institution of the prior suit was estopped to maintain the present action.

The obvious answer to the contention thus advanced is that appellant is entirely mistaken as to the reason for the trial court's finding that the present action was barred by the institution and prosecution of the former suit. This finding was not based on the doctrine of estoppel. The doctrine did not enter into the court's conclusion or form any part of it. As heretofore noted the trial court expressly found that by bringing the former action appellant had effectually abandoned and renounced the compromise agreement under which the present action was sought to be maintained. It may be conceded that the abandonment, if it is to be an effective defense to an action of the character here presented, must be complete and go to the entire consideration for the compromise agreement. It is our opinion that the trial court correctly concluded that appellant's abandonment of the compromise agreement was complete and that thereby the consideration for respondent's agreement entirely failed.

Furthermore, it may not, we believe, be successfully maintained that respondent suffered no detriment by the bringing of the former action. Not only did respondent entirely lose that for which it had

bargained in the compromise contract, but it further sustained a positive proven detriment in that it was compelled to defend the suit and to meet the expense required in so doing. Appellant's contention with respect to the doctrine of estoppel which we think is not here applicable is nevertheless not sustainable under the facts disclosed by the record.

For the reasons stated herein the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



SCHWARTZLER v. LEMAS et ux.
(VIERRA, Intervener).*

Civ. 5807.

District Court of Appeal, Third District,
California.

Nov. 4, 1937.

Hearing Granted by Supreme Court
Jan. 3, 1938.

1. Appeal and error ⇨1099(3)

A former decision, determining that intervenor purchased interest in mortgaged property and that chattel mortgagee had knowledge thereof prior to mortgagors' execution of renewal mortgage which mortgagee was seeking to foreclose, was controlling as the "law of the case."

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

2. Appeal and error ⇨1099(3)

A former decision, affirming as to mortgagors a judgment foreclosing renewal chattel mortgage, became the "law of the case," and was controlling on subsequent appeal by intervenor purchasing interest in mortgaged property after execution of original chattel mortgage and prior to execution of renewal chattel mortgage.

3. Chattel mortgages ⇨225(1)

A purchaser of undivided one-half interest in property subject to chattel mortgage took title subject to lien of mortgage.

4. Chattel mortgages ⇨241

A second chattel mortgage executed to renew note secured by first mortgage did

*For subsequent opinion see 82 P.2d 419.

not create new obligation, but merely perpetuated existing lien, and so did not impair rights of purchaser who took title to one-half interest in property subject to lien of first mortgage, notwithstanding that mortgagee had knowledge of purchase when second mortgage was executed.

5. Partnership ⇨142(2)

Ordinarily, mortgage executed against partnership property by one partner only to secure his individual debt, and without consent of associate partners, conveys no title and creates no lien upon property of partnership or against nonconsenting partners.

6. Partnership ⇨234

Where chattel mortgagor mortgaged property when he and his wife were exclusive owners thereof, and a partnership was subsequently created with a partner who had full knowledge that property was subject to mortgage, a second chattel mortgage executed by mortgagor in renewal of original mortgage did not impair subsequent partner's interest in partnership property, since subsequent partner's interest was subject to original mortgage.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Suit by P. J. Schwartzler against M. Lemas and his wife, wherein M. C. Vierra intervened. From a judgment against the intervener, he appeals.

Affirmed.

Hjelm & Hjelm, of Turlock, for appellant.

George L. Klug, of Merced, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The intervener has appealed from a judgment which was rendered against him in a suit to foreclose a chattel mortgage on dairy cattle and equipment. The court found that the intervener became a partner of the mortgagor of the personal property with full knowledge of the previous indebtedness of the owners thereof, for which the second mortgage was given to renew the original obligation, and that he therefore took his title and interest subject to the existing debt. The court therefore rendered judgment against the appellant for the sum of \$4,175.99, together with

attorneys' fees in the sum of \$500 and costs of suit. From that judgment the intervener has appealed. It is urged that the law of this case is determined by the opinion of this court in a former appeal herein. *Schwartzler v. Lemas et al.*, 11 Cal.App.(2d) 442, 53 P.(2d) 1039, 1043. It is further asserted the findings and judgment to the effect that the partnership property is liable for the indebtedness are not supported by the evidence.

[1,2] Prior to September, 1924, M. Lemas and wife owned the dairy cattle and equipment which are involved in this action. September 11, 1924, M. Lemas executed a chattel mortgage on their forty head of cattle and dairy equipment to secure the payment of two promissory notes due in six months, one for \$1,500 and the other for \$3,317. The intervener, M. C. Vierra, lived in the Lemas home and was employed by them in the dairy business. Vierra had knowledge of the first chattel mortgage. January 1, 1925, the owners of the cattle and dairy equipment executed a written contract agreeing to sell to Vierra "one-half interest in the said dairy business and personal property," which, it is conceded, are the same business and property involved in this action. The contract provided for payment of the purchase price of \$3,500 in installments "on or before the 1st day of January, 1929." The entire purchase price of the property was fully paid prior to 1928. The original chattel mortgage was never foreclosed. January 20, 1928, Mr. and Mrs. Lemas executed to the plaintiff, Schwartzler, a chattel mortgage on the same dairy cattle and equipment which were involved in the first transaction to renew the promissory note for \$3,317, which was included in the first mortgage. This note became due in two years from the date of the second mortgage. At the time of the execution of the second chattel mortgage Mr. and Mrs. Lemas and Vierra were in joint possession of the property, and were engaged in operating the dairy. The plaintiff then knew of the interest of Vierra in the dairy business and property which was mortgaged. The \$3,317 note for which the second chattel mortgage was given, was the same note which was included in the original mortgage. The second mortgage was, therefore, given to renew and secure the payment of one of the notes for which the first mortgage was executed. Only about \$700 was thereafter paid on this last secured note. December

6, 1933, this suit was commenced against Mr. and Mrs. Lemas to foreclose the last-mentioned chattel mortgage. By permission of court, M. C. Vierra intervened in that action. The cause was tried, and the court adopted findings in favor of the plaintiff and thereupon rendered judgment against the defendants for the foreclosure and sale of the mortgaged property to pay the obligation due to plaintiff. From that judgment, the defendants appealed. On that previous appeal this court affirmed the judgment as to all the defendants except Vierra. For the reason that it could not be determined from the record whether the second mortgage dated January 20, 1928, covered the same property which was mortgaged September 11, 1924, the judgment was reversed with respect to the intervenor, Vierra. This court then determined the following facts which became the law of this case: "As to the intervenor, Vierra, as we have shown, the uncontradicted testimony shows the execution of the agreement; shows that the intervenor, together with Lemas, remained in possession of the property from the date of the execution of the agreement; also, shows knowledge of the interest of the intervenor on the part of the plaintiff, and that this knowledge was possessed by the plaintiff prior to the execution of the second mortgage."

This court determined on the former appeal that the mere making of the executory contract by the mortgagors agreeing to sell to this appellant an interest in the mortgaged property, contrary to the provisions of section 538 of the Penal Code, "would not affect the title of the intervenor Vierra."

The first judgment was reversed as to Vierra only because the record failed to disclose the fact that the second mortgage created a lien on the same property which was covered by the first mortgage. The opinion reads in that regard: "The record shows, as we have stated, that the interest of the intervenor Vierra *includes only a portion of the property described in the second mortgage*, which may properly be determined upon a retrial of this cause."

The judgment of foreclosure was affirmed as to the mortgagors. To that extent the former decision of this court became the law of this case and is controlling on this appeal. The former judgment was reversed as to this appellant for the reason above stated. Upon retrial of the cause it was stipulated that the second

mortgage covered all of the equipment and dairy property covered in the first mortgage, including the natural increase of cattle. There is now no question that the second mortgage covers all of the property which was included in the first mortgage.

It thus appears as the law of this case that the intervenor, Vierra, became the owner of an undivided one-half interest in the dairy business, stock, and equipment of the mortgagors after the execution of the original chattel mortgage. It was also determined that the mortgagee had knowledge of Vierra's joint interest in the property before the execution of the renewal mortgage. It was not specifically determined on the previous appeal that Vierra's interest in the business and property was subject to the lien which was created by the first chattel mortgage. It necessarily follows as a matter of law that, since the lien to secure the payment of the mortgagors' debt vested before the undivided one-half interest in the property was acquired by Vierra, he took title subject to that lien. 11 C.J. 623, §§ 338 and 341; Jones on Chattel Mortgages (4th Ed.) 517, § 454; Ilfeld v. Ziegler, 40 Colo. 401, 91 P. 825. In 11 Corpus Juris, supra, it is said: "In the absence of a stipulation to the contrary a mortgagor rightfully in possession may, before a default has occurred in the condition of the mortgage, sell the mortgaged property, *but the purchaser takes subject to the mortgage lien.*"

[3,4] To the same effect as the last-quoted authority is the text in Jones on Chattel Mortgages, supra. We therefore assume that Vierra took title to his undivided one-half interest in the dairy business, stock, and equipment subject to the lien created by the original chattel mortgage to secure the two promissory notes. The evidence supports the finding of the trial court to the effect that the original lien was not extinguished. One of the notes, to wit, the \$3,317 note, for the security of which the original chattel mortgage was executed, was not paid, and the second mortgage was given to renew the mortgage to secure that note. In spite of the fact that the mortgage was renewed with knowledge on the part of the mortgagee of the intervening sale to Vierra of the undivided interest in the business and property, the renewal of the mortgage created no new obligation. On the contrary, it merely perpetuated the existing lien on the cattle and equipment as

continuing security for the payment of the \$3,317 note, together with accrued interest and counsel fees as provided by the terms of the original note. Under the circumstances of this case the lien created by the first mortgage was never extinguished. The second mortgage therefore did not abridge the rights acquired by Vierra in his purchase of the property for the reason that he took title subject to that very lien to secure the payment of the identical note which was secured by the renewal mortgage. There is substantial proof that the mortgage of January 20, 1928, was executed to renew the original \$3,317 note which was secured by the first mortgage, and that the original lien was therefore not extinguished. The plaintiff, P. J. Schwartzler, admitted, in response to interrogations on the witness stand, that the second mortgage was given to secure the same \$3,317 note for which the first chattel mortgage was executed. The amount of that note is identical with the rather unusual figure of one of the original notes. The second transaction, therefore, constituted a mere renewal of the mortgage and a continuation of the existing lien and not an extinguishment of the obligation. 2 Jones on Mortgages (8th Ed.) p. 663, §§ 1186, 1187. In the authority last cited it is said at page 664, section 1187: "A mortgage does not lose its priority by taking a renewal mortgage when the debt is the same and the property is not released from the lien."

[5] The appellant contends that since he became a partner with the mortgagors in their dairy business and a joint owner of the cattle and equipment incident thereto, Mr. and Mrs. Lemas had no legal authority to mortgage partnership property or abridge his interest therein, to secure the payment of their individual debt. It is ordinarily true that a mortgage executed against partnership property by one partner only to secure his individual debt, and without the consent of his associate partners, conveys no title and creates no lien upon the property of the partnership or against nonconsenting partners. 47 C.J. p. 858, § 330; 20 R.C.L. p. 910, §§ 123, 124; 50 A.L.R. 441, note; 54 A.L.R. 554, note; 1 Rowley's Modern Law of Partnership, p. 538, § 441. In 47 Corpus Juris, *supra*, it is said: "Since a partner

cannot, without consent, apply partnership property to the payment of his individual debts, *he cannot abridge the rights of firm creditors or of his partners by giving an unauthorized mortgage of partnership chattels as security for such debts; * * ** the mortgagee of such share takes subject to all the equities of the non-assenting partners."

[6] But in this case the mortgagor did not mortgage the *partnership property* to secure his individual debt. He mortgaged the property when he and his wife were the exclusive owners thereof and before Vierra became a partner in the business. When the property was mortgaged no partnership existed. Vierra bought his interest in that property subject to the lien which was previously created, and of which chattel mortgage the purchaser had knowledge. All that the mortgagors accomplished by renewing the mortgage was to extend the lien which then existed. It did not impair or abridge the interest of Vierra. In fact, the record indicates that the purchase price of Vierra's share in the business and property was paid through a series of years from the profits of that very dairy business. If his share of the proceeds of the business had not been credited on his obligation for the purchase price of his one-half interest therein, it seems quite likely the \$3,317 note for which the chattel mortgage was previously executed would have been fully paid without the necessity of renewing the mortgage or extending the lien to secure the payment of the debt.

It seems equitable and in accordance with law that the property which was mortgaged to secure a specific obligation prior to the disposal of one-half interest therein should be charged with the satisfaction of that debt in accordance with the terms of the chattel mortgage, so long as the lien thereon exists, independently of any subsequent interests which may have been acquired either as a purchaser thereof or a partner in the business. There is nothing in the former decision of this court to the contrary.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

23 Cal.App.2d 346

Ex parte ELLIOTT.**Cr. 1996.**

**District Court of Appeal, First District,
Division 1, California.**

Nov. 5, 1937.**1. Divorce ☞269(11)**

A finding of court, set forth in provisional order, determining that husband was regularly employed at salary of \$120 a month and directing payment of \$40 a month alimony pending a showing of greater ability to pay, and divorced wife's affidavit that husband, although still in receipt of monthly earnings, had refused to comply with order, established prima facie case of contempt.

2. Divorce ☞286

Where provisional order directing stipulated alimony payments pending showing of greater ability to pay and wife's affidavit that husband was receiving same monthly earnings, but had refused to comply with order, established prima facie case of contempt, husband's affidavit that he was unable to comply with order raised a mere conflict, upon which trial court's adjudication of contempt for refusal to pay alimony was controlling.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge.

Proceeding in the matter of the application of Clarence E. Elliott for a writ of habeas corpus.

Application denied.

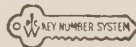
J. Thaddeus Cline, of San Francisco, for petitioner.

PER CURIAM.

[1,2] This is an application for a writ of habeas corpus, following an adjudication of contempt for refusal to pay alimony. The main grounds urged for the issuance of the writ are that the affidavit initiating the contempt proceeding contained no averment that petitioner was able to comply with the terms of the decree, and that no evidence was introduced to that effect at the hearing. We are of the opinion that the findings of the trial court as set forth in the provisional order of June 3, 1937, which formed the basis for the adjudication of contempt, wherein the trial court deter-

mined that petitioner was regularly employed at a salary of \$120 a month and directed that, pending a showing of "greater ability to pay," he should pay \$40 a month, in and of themselves constituted a finding as to petitioner's ability to pay said monthly sum, and, such being the case, said provisional order and the affidavit of petitioner's divorced wife that petitioner was still in receipt of said monthly earnings and had refused to comply with the terms of said order were evidently legally sufficient to establish a prima facie case of contempt. In re McCarty, 154 Cal. 534, 98 P. 540; In re Rasmussen, 56 Cal.App. 368, 205 P. 72; In re Leet, 99 Cal.App. 788-790, 279 P. 466. In that state of the record the affidavit presented by petitioner at the time of the hearing in support of his claim that he was unable to comply with the terms of said provisional order could do no more than raise a conflict upon which the determination of the trial court is controlling. *Bailey v. Superior Court*, 215 Cal. 548, 11 P.(2d) 865.

The application is denied.



23 Cal.App.2d 379

SWEET v. WATSON'S NURSERY et al.**Civ. 2024.**

**District Court of Appeal, Fourth District,
California.**

Nov. 6, 1937.

Rehearing Denied Dec. 6, 1937.

Hearing Denied by Supreme Court
Jan. 3, 1938.

1. Limitation of actions ☞46(9)

The statute of limitations against an action for breach of warranty in sale of fruit trees does not commence to run until trees first bear fruit, since in such case the warranty is not limited to present fact that trees are as represented, but there is a further warranty that trees will bear corresponding kind of fruit, and warranty is not broken until happening of future events by which its truth must be ascertained (Code Civ.Proc. § 339, subd. 1).

2. Contracts ☞171(1)

The divisibility of a contract does not alone depend upon multiplicity or separability of items therein, but upon parties' intention and object of contract.

3. Contracts ⇨171(1)

Where several things are to be done under a contract, and money consideration is apportioned to each item to be performed, the covenants are ordinarily regarded as severable and independent.

4. Sales ⇨62

A contract is generally severable where the price is expressly apportioned by the contract.

5. Limitation of actions ⇨51(1)

The sale of a large number of orange trees warranted to be a certain kind at a stated price per tree was a severable contract, and successive annual failures of trees to bear as warranted were separate breaches of warranty affecting trees about which fact became apparent in a particular year, and hence first breach did not start running of limitations except with respect to trees involved therein, and action begun within two years after discovery that about 800 other trees did not comply with warranty was not barred as to those trees (Code Civ.Proc. § 339, subd. 1).

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Bryan A. Sweet against Watson's Nursery and others. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Fred Kunzel and Renwick Thompson, both of San Diego, for appellant.

Sloane & Steiner, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for breach of warranty in the sale of orange trees. The trial court ordered a nonsuit on the ground that the action was barred by subdivision 1 of section 339 of the Code of Civil Procedure, and from the judgment which followed this appeal was taken.

In March, 1931, the respondents sold to the appellant 1,122 orange trees, warranted to be Valencias, at 90 cents per tree; the contract being oral. The appellant testified and the respondents agreed that it is impossible to tell a Navel orange tree from a Valencia orange tree until fruit thereon reaches a certain development, which occurs in the month of October of the year when the tree first bears fruit. These trees were set out in the spring of 1931 and 40

of them bore some fruit in 1932, which in October of that year turned out to be Navel oranges; no other trees having then borne any fruit. On October 26, 1932, the appellant wrote to the respondents informing them that a great number of the trees had borne Navel oranges, that he believed that a large number of them would prove to be Navel orange trees, and that he intended to ask for a settlement in the matter. In October, 1933, an additional 660 trees bore Navel oranges, at which time only 125 of the trees were bearing Valencia oranges. In October, 1934, another 131 trees were bearing Navel oranges and only 127 of the trees were bearing Valencia oranges. A few of the trees were dead and the rest had borne no fruit. This action was begun on January 31, 1935, more than two years after the discovery that forty of the trees were not as warranted but within two years after the discovery that some 800 others did not comply with the warranty.

The appellant contends that the contract for the sale of the trees was severable and that the statute of limitations would not start running as to each tree or group of trees until the breach of warranty was discovered and they first produced fruit. The respondents argue that a breach of the contract occurred in October, 1932, when it was discovered that some of the trees were not as represented, that the appellant then knew that the warranty had been breached, and that the statute then began to run as to the entire contract.

[1] It is well settled that the statute of limitations against an action for breach of warranty in the sale of fruit trees does not commence to run until the true facts appear, when the trees first bear fruit. *Firth v. Richter*, 49 Cal.App. 545, 196 P. 277; *Shearer v. Park Nursery Co.*, 103 Cal. 415, 37 P. 412, 42 Am.St.Rep. 125. This is based upon the ground that in such a case the warranty is not limited to the present fact that the trees are as represented but that there is a further warranty that the trees will bear the corresponding kind of fruit and that since the warranty relates to a future event by which its truth must be ascertained the warranty is not broken until the happening of such future event. In *Ackerman v. A. Levy & J. Zentner Co.*, 7 Cal.App.(2d) 23, 45 P.(2d) 386, 387, it is said: "Warranties as to nursery stock and planting seed are either present, and broken as soon as made, if at all, or pros-

pective relating to the happening of a future event and not broken until the happening of that event. The courts of this state hold such warranties to be prospective."

Since the breach of warranty in such a case occurs when the trees first bear fruit, thus disclosing the facts, there are, as a matter of fact, successive breaches where part of the trees bear fruit in one year and others do not bear fruit until succeeding years. It is respondents' contention, however, that the first breach which occurs not only puts the buyer on his guard but constitutes a breach of the entire contract, which starts the running of the statute as to all parts thereof. Undoubtedly this result obtains in many cases where the contract must be treated as an entirety and where notice of the first breach must be taken as notice that the entire contract has been breached. In other cases where the contract covers different things which may be separately treated, a different rule often prevails.

[2-4] The solution of the question before us depends upon whether there here appears a breach of an entire contract, with the duty to act on the first discovery of the breach, or separate breaches of a severable contract. "Whether a contract is severable or entire is a question of interpretation, depending upon the intent of the parties." *Lewis v. Shell Oil Co.*, 220 Cal. 80, 29 P.(2d) 413, 415. "The divisibility of the contract does not alone depend upon the multiplicity or the separability of the items therein, but upon the intention of the parties and the object of the contract." *Stern v. Sunset Road Oil Co.*, 47 Cal.App. 334, 190 P. 651, 654. "Where several things are to be done under a contract, if the money consideration is apportioned to each of the items to be performed, the covenants are ordinarily regarded as severable and independent." *Waybright v. Meek*, 90 Cal.App. 13, 265 P. 370, 372. A contract will generally be held to be severable when the price is expressly apportioned by the contract. *More v. Bonnet*, 40 Cal. 251, 6 Am.Rep. 621; *Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 P. 55.

[5] In the instant case the price was apportioned to the items of the contract, the trees being purchased at 90 cents each. Looking to the intention of the parties and the object of the contract, it fully appears that each tree was warranted to be of a

certain kind. From common experience it must be taken that they did not intend or expect that all of the trees would first produce fruit in the same year. It was, however, warranted that each tree would produce that kind of fruit, if and when it came into bearing. There would be no breach of the warranty until fruit was produced. The first breach that occurred gave, and could give, no indication as to the situation with respect to the other trees. There were separate breaches in successive years but the later ones related not to those trees concerning which the truth had earlier appeared but to other trees which had also been warranted, or to another and distinct part of the contract. In our opinion, this contract was severable and the various breaches were separate, each affecting the trees about which the fact became apparent in a particular year. It follows that the first breach did not start the running of the statute, except with respect to the 40 trees involved therein, and that a nonsuit should not have been granted.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.



23 Cal.App.2d 416

**TOSI et al. v. NORTHERN CALIFORNIA
BLDG. & LOAN ASS'N et al.**

Civ. 10569.

District Court of Appeal, First District,
Division 2, California.

Nov. 10, 1937.

Hearing Denied by Supreme Court
Jan. 6, 1938.

1. Principal and agent ☞ 169(3)

That debtors, who had paid to payee's agent full amount of notes secured by trust deed, commenced two actions against agent and his bondsmen to recover money paid to him, and that one of them swore to a criminal complaint charging agent with embezzlement after agent's misdeeds were known to them and after commencement of their action to cancel notes and trust deed, did not show ratification by debtors requiring finding that agent was their agent.

2. Cancellation of Instruments ☞ 56

In suit for cancellation of notes and trust deed given to secure notes, trial court,

which found that notes had been fully paid, properly entered judgment for cancellation of notes in addition to cancellation of trust deed, as against contention that plaintiffs did not sign notes and were therefore only concerned with trust deed.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Amadio Tosi and another against the Northern California Building & Loan Association and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Cross & Brandt, of San Francisco, for appellants.

Milton Newmark and Thomas C. Nelson, both of San Francisco, for respondents.

SPENCE, Acting Presiding Justice.

Plaintiffs sought to obtain the cancellation of two promissory notes and a deed of trust given to secure said notes, which instruments had been executed by plaintiffs' predecessors in interest in favor of defendant Northern California Building & Loan Association. The cause was tried by the court sitting without a jury and, from a judgment in favor of plaintiffs, defendants appeal. For the purpose of this discussion the above-named defendant may be treated as the sole defendant and appellant.

Upon the first trial of the cause defendant had judgment and said judgment was reversed on appeal, *Tosi v. Northern California Building & Loan Association*, 3 Cal. (2d) 274, 44 P.(2d) 333. The main facts are set forth in the opinion on the first appeal and need not be repeated here. The main issue there was that of payment, which issue was in turn dependent upon the issue of agency. The findings upon the first trial to the effect that MacArthur was the agent of plaintiffs and was not the agent of defendant were held to be without support in the evidence, and the judgment was therefore reversed. The second trial was had upon the same pleadings and upon substantially the same evidence. The trial court found in effect upon the second trial that MacArthur was the agent of the defendant and that he was not the agent of plaintiffs. It therefore found that the notes held by defendant had been fully paid by the payments made by plaintiffs to MacArthur as the agent of defendant and it

entered judgment for the cancellation of the notes and the deed of trust given to secure the same.

Appellant contends that the evidence was insufficient to sustain the finding to the effect that MacArthur was the agent of appellant during the entire time that respondents were making their payments to MacArthur. We find no merit in this contention. Much is said in the briefs regarding the law of the case under the decision on the first appeal, but we find it unnecessary to discuss this question. All of the evidence produced upon the issue of agency on the first trial was produced upon the second trial, together with additional evidence. Whatever may be said with respect to the applicability of the doctrine of the law of the case, the decision upon the first appeal is at least authority supporting the conclusion that the evidence was sufficient to support the above-mentioned finding. We therefore refrain from further discussion of said evidence.

[1] Appellant further contends that, even if the above-mentioned finding was supported by the evidence, the further finding to the effect that MacArthur was at no time the agent of the respondents was without support in the evidence. Here again we believe that the decision on the former appeal is authority to the contrary. In this connection, appellant lays great stress upon the fact that after MacArthur's misdeeds were known to the parties, and after the commencement of this action, respondents commenced two actions against MacArthur and his bondsmen to recover the money paid MacArthur and that one of respondents swore to a criminal complaint charging MacArthur with embezzlement. Appellant seems to take the position that the mere showing that respondents filed such actions showed a "ratification" by respondents and was conclusive evidence requiring a finding that MacArthur was the agent of respondents. No authority in this jurisdiction is cited to support appellant's position, and we do not believe it should be sustained. Respondents were faced with the problem of protecting their rights after paying to MacArthur the full amount of the notes under the circumstances set forth in the opinion on the former appeal. Respondents should not be prejudiced in this action by the mere filing of the other actions against MacArthur and his bondsmen, which filing was probably done in an attempt to avoid the running of the statute

of limitations with respect to any claim that respondents might assert against them. It may be further stated that evidence showing that one of said actions had been filed was introduced on the first trial and the effect thereof was argued upon the first appeal. The Supreme Court did not apparently consider said evidence of sufficient significance to mention it in the opinion on the first appeal.

Appellant further contends that the trial court erred in certain rulings on the admission of evidence. Our review of the record herein leads us to the conclusion that the error, if any, in admitting the portions of the evidence to which reference is made was not prejudicial to appellant.

[2] The final contention of appellant is that the trial court erred in ordering the cancellation of the notes in addition to the cancellation of the deed of trust. The claim is that respondents did not sign the notes and were therefore only concerned with the deed of trust which encumbered their property. We find no error in the action of the trial court. The entire controversy was over the question of whether said notes had been fully paid. The trial court found that they had been fully paid, and we are of the opinion that it was entirely proper to enter a judgment for cancellation of the notes based upon said finding of payment.

The judgment is affirmed.

We concur: STURTEVANT, J.;
GOODELL, J., pro tem.



23 Cal.App.2d 208

VALLEY MOTOR LINES, Inc., v. RILEY,
State Comptroller, et al.

Civ. 1890.

District Court of Appeal, Fourth District,
California.

Oct. 19, 1937.

Rehearing Denied Nov. 2, 1937.

Hearing Denied by Supreme Court
Dec. 16, 1937.

1. Automobiles ⌘97

The tax of 5 per cent. of gross receipts imposed against motor carriers prior to January 1, 1935, in lieu of all other taxes and assessments, was a "property tax" (Pol.

Code, §§ 3664aa, 3669; Const. art. 13, § 15, adopted Nov. 2, 1926; and art. 13, §§ 15, 15½, adopted June 27, 1933).

[Ed. Note.—For other definitions of "Property Tax," see Words & Phrases.]

2. Automobiles ⌘97

The vehicle license tax imposed against motor carriers is a charge for the use of the highway and a compensation therefor (St.1933, p. 928, as amended by St.1935, p. 2176).

3. Automobiles ⌘73

That tax of 5 per cent. of gross receipts imposed against motor carriers in lieu of all other taxes and assessments and the vehicle license tax imposed against carriers overlapped during first six months of the calendar year 1935 did not make either unconstitutional (Pol.Code, §§ 3664aa, 3669; Const. art. 13, § 15, adopted Nov. 2, 1926; and art. 13, §§ 15, 15½, adopted June 27, 1933; St. 1933, p. 928, as amended by St.1935, p. 2176).

4. Automobiles ⌘102

Taxation ⌘535

Under Constitution and under the Vehicle License Tax Act, providing for refunding of difference between amount of license taxes and property taxes and 5 per cent. of gross receipts of motor carriers, carrier was not entitled to refund for amount in excess of 5 per cent. of gross receipts for 1935 representing installment payment made in 1935 on tax of 5 per cent. of gross receipts in lieu of all other taxes and assessments, assessed in 1934 (St.1933, p. 928, as amended by St. 1935, p. 2176; St.1933, p. 934, § 9; Pol.Code, §§ 3664aa, 3669; Const. art. 13, § 15, adopted Nov. 2, 1926; and art. 13, §§ 14½, 15, 15½, adopted June 27, 1933).

Application for a writ of mandate by Valley Motor Lines, Incorporated, against Harry B. Riley, as State Comptroller, and others.

Peremptory writ denied, and alternative writ discharged.

See, also, (Cal.App.) 70 P.(2d) 672.

James J. Broz, of Fresno, for petitioner.

U. S. Webb, Atty. Gen., and James J. Arditto, Deputy Atty. Gen., for respondents.

MARKS, Justice.

This is an original proceeding in this court to compel respondents to credit peti-

tioner with, or refund to it, an alleged overpayment of taxes paid during the calendar year 1935. Respondents have appeared by demurrer and answer.

Petitioner is a corporation engaged in the business of transporting freight between fixed termini by motortrucks over the public highways of the state under certificates of public convenience and necessity issued by the railroad commission of the State of California.

Prior to January 1, 1935, petitioner was required to pay five per cent. of all its gross income as a tax in lieu of all other taxes and assessments. Section 15, art. 13, Const., adopted Nov. 2, 1926; sections 15 and 15½, art. 13, Const., adopted June 27, 1933; section 3664aa, Pol.Code. See, also, section 3669, Pol.Code. That tax for a fiscal year was based on the gross income of the preceding calendar year, and might, on permission granted, be paid in two installments. After January 1, 1935, petitioner's taxes were levied and collected under the California Vehicle Transportation License Tax Act (St.1933, p. 928, as amended; St.1935, p. 2176). We will refer to this act as the Vehicle License Tax Act. Petitioner secured permission to pay its tax for the fiscal year 1934-1935 in two installments. It paid its first installment on August 13, 1934, and its second, amounting to \$5,264.61, on February 2, 1935. No question is raised as to the correctness of the amounts of these payments.

After January 1, 1935, petitioner made its monthly returns and payments under the Vehicle License Tax Act. During the calendar year 1935 petitioner paid to the state 3 per cent. of its monthly gross receipts from its operations in the total sum of \$9,192.82. In addition it paid, during the same year, motor vehicle license tax, \$10,385.44; city and county personal property tax, \$1,618.97; real property tax, \$893.19; municipal licenses or penalty tax, \$104.22; or a total of \$22,194.64, subject to a deduction of \$160.30, leaving the net payments during the calendar year 1935 at the sum of \$22,034.34. The sum of \$5,264.61, paid on February 2, 1935, is included in the item of "Motor Vehicle License Fees Paid, \$10,385.44."

Petitioner's gross income from its operations during the calendar year 1935 was \$306,427.47. Five per cent. of this income amounted to \$15,321.37. Petitioner filed a claim with the state board of equalization for \$6,873.09 which it maintained was an

overpayment by it under the following provisions of section 9 of the Vehicle License Tax Act: "If during any calendar year, any operator pays hereunder license taxes which together with all other taxes and licenses, State, county and municipal, upon the property of such operator used exclusively by him in his business of transporting persons or property for hire or compensation over the public highways of this State, exceed five per cent. of the gross receipts from operations of such operator in this State for such calendar year, the difference between five per cent. of such gross receipts and the total amount of such taxes and licenses paid during the calendar year shall be credited on any license taxes thereafter due from such operator under this act, and the balance shall be refunded to such operator."

The board made the adjustment of \$160.30, which we have mentioned, allowed petitioner a credit of \$1,448.18, which it has received, and disallowed \$5,264.61 of the claim which is the exact amount of the payment made on February 2, 1935, the second installment of taxes for the fiscal year 1934-1935.

It is evident that the principal ground of controversy between the parties here is due to the following: That prior to January 1, 1935, the taxes of petitioner were computed on the basis of the gross income for a calendar year and were the taxes of the fiscal year ending on June 30, 1935; that after that date, while they were still computed on the basis of the gross income for a calendar year, they were paid monthly during such year; and the further fact that petitioner secured permission to pay its taxes for the fiscal year 1934-1935 in two installments, and paid the second installment on February 2, 1935, which was during the last half of the fiscal year 1934-1935 and also during the first half of the calendar year 1935.

[1-3] It is now settled in California that the old in lieu tax imposed before January 1, 1935, was a property tax. *Alward v. Johnson*, 208 Cal. 359, 281 P. 389. The present tax is a charge for the use of the highway and a compensation therefor. *In re Bush*, 6 Cal.(2d) 43, 56 P. (2d) 511. That the two overlap during the first six months of the calendar year 1935 is no valid objection to the constitutionality of either. *Pacific Electric Railway Company v. Department of Motor Vehicles*, 4 Cal.(2d) 181, 48 P.(2d) 657.

[4] Section 15½ of article 13 of the Constitution, as adopted on June 27, 1933, contains the answer to the problem here presented. It suspends the operation of certain provisions of section 15 of the same section until January 1, 1935. It concludes as follows: "From and after January 1, 1935, the provisions of section 15 of this article as they read on May 1, 1933, shall no longer be of any force and effect; provided, however, that nothing herein contained shall be construed to affect the collection or distribution of taxes assessed under said section prior to January 1, 1935."

It is clear that the drafters of this section must have had in mind the very situation here presented when they added the proviso that nothing in this section should *affect* the collection of taxes *assessed* under the old constitutional provision.

In the instant case the \$5,264.61 claimed by petitioner was assessed in 1934 under the old section. The provisions of the statutes and amendments of 1933 do not affect the right of the state to collect in 1935 the taxes so assessed in 1934. The Constitution so provides. In construing the similar provisions of section 14½ of article 13 of the Constitution a similar conclusion was reached by the Supreme Court in *Pacific Electric Railway Company v. Department of Motor Vehicles*, *supra*.

As we have considered the case on its merits the demurrer is overruled.

The peremptory writ of mandate is denied, and the alternative writ is discharged.

We concur: BARNARD, P. J.; JENNINGS, J.



23 Cal.App.2d 281

**HUGHSON CONDENSED MILK CO. v.
STATE BOARD OF EQUALIZA-
TION et al.**
Civ. 5918.

District Court of Appeal, Third District,
California.

Oct. 25, 1937.

1. Automobiles ⇨107(2)

A milk manufacturing concern's action to restrain state officers, attempting to im-

press upon it the status of one transporting property for hire or compensation subject to license tax, from canceling truck registration certificates and thereby barring concern's trucks from highway, was a "collateral proceeding," and was not barred under statute providing that no injunction shall issue against state or any officer thereof to prevent or enjoin collection of any license tax (St.1933, p. 928, as amended St. 1935, p. 2176; St.1933, pp. 933, 934, §§ 8, 9).

[Ed. Note.—For other definitions of "Collateral Proceeding," see Words & Phrases.]

2. Automobiles ⇨76

In statute purporting to levy license tax upon any one transporting persons or property for hire or compensation, either directly or indirectly, the words "either directly or indirectly" refer as well to the word "hire" as to the word "compensation," and the words "hire" and "compensation" should be given the meaning ordinarily conveyed by such words (St.1933, p. 928, § 1(a)).

3. Sales ⇨199

Where only the price to be paid for goods remains to be determined, the question when title passes depends upon parties' intention (Civ.Code, § 1738).

4. Automobiles ⇨76, 107(2)

A milk manufacturing concern which maintained trucks to pick up milk at producers' ranches and transport it to its plant was not subject to license tax as "transporting property for hire or compensation either directly or indirectly" where title to milk passed immediately upon concern's taking possession, cost of operation of trucks was all carried into overhead operations, and there was no indication that concern had gained any monetary advantage by manner of conducting its business, and hence concern was entitled to injunction restraining state officers from canceling its truck registration certificates in attempt to subject concern to tax (St.1933, p. 928, as amended St.1935, p. 2176; St.1933, pp. 933, 934, §§ 8, 9; Code Civ.Proc. § 526).

5. Automobiles ⇨76

The statute purporting to levy license tax on any one transporting persons or property for hire or compensation either directly or indirectly does not apply to persons transporting their own property (St.1933, p. 928, as amended St.1935, p. 2176).

6. Licenses 8(1)

Statutes 245

Statutes levying taxes or licenses should not be construed beyond the plain import of language used by Legislature.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by the Hughson Condensed Milk Company against the State Board of Equalization and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

U. S. Webb, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for appellants.

McClymonds, Wells & Wilson and Elwood Murphey, all of Oakland, and Thomas B. Scott, of Modesto, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action had judgment against the defendants enjoining and restraining them from canceling the registration certificates for plaintiff's trucks. From this judgment the defendants appeal.

The Hughson Condensed Milk Company is a manufacturing milk concern operating a plant in Stanislaus county for the production of milk products, etc. As an incident to the conduct of its plant it maintains a number of trucks which pick up milk at the ranches of producing dairymen, and transport the same to its plant where the milk is processed.

The defendants and appellants, as members of the State Board of Equalization, Motor Vehicle Department, and agents, have attempted to impress upon plaintiff the status of one who is transporting property for hire or compensation, within the meaning of the California Motor Vehicle Transportation License Tax (St.1933, p. 928, as amended in 1935 [St.1935, p. 2176]). Plaintiff resisted such classification, and the defendants thereupon gave notice that the registration certificates for plaintiff's trucks would be suspended and plaintiff's trucks barred from the highway. This action was filed to restrain such proceeding, and the plaintiff had judgment as prayed for.

Upon this appeal two issues are presented:

First. Does section 9 of the act bar an equitable proceeding such as the instant case?

Second. Is the act applicable to one who, in good faith, and not for the purpose of evading a tax, but as an incident to, and a vital part of its business, purchases milk from dairymen at the place of production, and thereafter transports the milk so purchased from the place of production to its plant at Hughson, where, as stated, it is thereafter processed?

The plaintiff in the action, as shown by the record, does not transport any milk in its trucks belonging to any other than to itself. The court found upon substantial testimony that the purchase of the milk was made at the place of production, and that the title thereto passed to the plaintiff immediately upon receiving the same from the dairymen producing the milk at the place of production.

[1] The appellants contend first: That the provisions of section 9 of the act referred to is a complete bar to this action; that section 9 provides in substance that no injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action, or proceeding in any court, against this state or against any officer thereof, to prevent or enjoin the collection under this act of any license tax sought to be collected, etc. The section further provides that one paying the tax may pay the same under protest, and thereafter bring an action against the state treasury in the county of Sacramento for the recovery of the tax so paid under protest. A number of authorities are cited in support of the proposition that such a provision of law is valid, and that no injunction to restrain the collection of the tax should issue, but that the person paying the tax is afforded a speedy and adequate remedy at law by paying the tax under protest and thereafter instituting proceedings for the recovery of the same. That this position of the appellants is untenable readily appears from the fact that this action is not one to restrain the collection of a tax. It is simply a proceeding intending and having for its purpose the restraining of certain officers from canceling truck registration certificates, and thereby barring the plaintiff's trucks from the highway.

The License Tax Act, *supra*, does provide for the manner of collecting the tax, and authorizes suits for that purpose, as set forth in section 8 thereof. Our attention is also called to section 526 of the Code of Civil Procedure, setting forth that an injunction cannot be granted to prevent the

exercise of a public or private office in a lawful manner, by the person in possession, etc. That of course presents the question of whether the proceeding in this action is a lawful one, and whether the action taken is taken in a lawful manner. This question will be answered later on. Any other proceeding on the part of the plaintiff would involve a multiplicity of suits and would be almost prohibitive, as the different sections of the act set forth so many different factors that compliance therewith requires the expenditure of considerable sums of money to different departments of the state government.

The operator is required to pay an original license fee to the State Board of Equalization; required to pay a certain fee to the Department of Motor Vehicles for special plates; and required to pay to the State Board of Equalization each month a tax imposed upon gross receipts. It does not require citation of authorities to show that a multiplicity of suits would necessarily follow.

The Supreme Court, in the case of *Las Animas, etc., Land Co. v. Preciado*, 167 Cal. 580, 140 P. 239, sets forth the doctrine which is applicable here if the holding of the trial court that the action of the defendants was without authority of law is upheld. Thus, if the defendants are attempting to bring about the cancellation of the registration certificates for the plaintiff's trucks, without authority of law, such a proceeding will be restrained.

Again, if the defendants are seeking to deprive the plaintiff of a property right or privilege without due process of law, equity will interpose. *Pierce v. City of Los Angeles*, 159 Cal. 516, 114 P. 818. Other cases might be cited, but by reason of the fact that this is not an action to restrain the collection of the tax, and does not in any way interfere with the rights of the parties interested to bring a suit under section 8 of the act, but is only a collateral proceeding, further consideration of the appellants' first objection need not be had.

[2-4] The merits of the controversy present a question upon which the courts of this state have not expressed any opinions or rendered any decisions. The act under consideration purports to levy a license tax upon any one who transports persons or property for hire or compensation, either directly or indirectly. Subdivision (a) of section 1 of the act reads: "The word 'operator' shall include all persons,

firms, associations and corporations who operate motor vehicles upon any public highway in this State, and thereby engaged in the transportation of persons or property for hire or compensation, either directly or indirectly."

The appellants attempt to draw a line of demarcation between the word "hire" and the word "compensation," and argue that, if money is saved by reason of the manner of the appellants' conduct of its business, it is receiving compensation. It will be noted that the subdivision which we have quoted uses the words "hire or compensation, either directly or indirectly," from which it would appear that a correct deduction from the language used is to the effect that the words "either directly or indirectly" refer as well to the word "hire" as to the word "compensation." There appears to be nothing in the act which would lead to the conclusion that either the word "hire" or the word "compensation" was inserted in the act with the intent to give either word a meaning other than that ordinarily conveyed by such words. The word "compensation" is defined in 12 C.J., beginning on page 229, as follows: "An act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person damaged may receive equal value for his loss, or be made whole in respect of his injury; a consideration; the consideration or price of a privilege purchased; an equivalent in money for a loss sustained; an equivalent given for property taken or for an injury done to another; the giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred; the rendering an equivalent in value or amount; indemnification; making amends; payment of damages; a recompense in value; a recompense or reward for some loss, injury or service, especially when it is given by statute; remuneration for the injury directly and proximately caused by a breach of contract or duty; remuneration or satisfaction for injury or damage of every description; that return which is given for something else; that which is necessary to restore an injured party to his former position. The term etymologically suggests the image of balancing one thing against another, its primary signification being equivalence, and the secondary and more common meaning something given or obtained as an equivalent."

In *Kroger Baking Co. v. Cynthiana*, 240 Ky. 701, 42 S.W.(2d) 904, 906, cited in 80 A.L.R. 574, the meaning of the word "compensation" is set forth, and where, as here, the same contention was made and overruled by the court, to wit, that compensation would consist in the difference in the amount between what it costs to operate the trucks in the performance of the service rendered, and what it would cost to hire others to do the same. This contention was overruled by the court in the following language: "Its" (compensation) "close connection with the word 'hire' would seem to indicate that it was the intention and purpose, in appropriating the word 'compensation' to refer to the reward received by the one who was hired from the one who hired him, and that it was not the intention to broaden the true definition of compensation so as to include all benefits, advantages, or profits that might accrue to one who operated his own trucks instead of hiring and compensating others to perform the same services." The court also said: "'Compensation' in law primarily applies to a transaction between two or more persons and does not enter into or arise from a unilateral transaction, purpose, or policy of one person alone in the prosecution of his individual enterprise or undertaking."

The actual money paid to the dairymen is based upon the butterfat content thereof, and is governed by the price of butterfat in San Francisco and Los Angeles. The purchase price or the amount to be paid is determined by a process which ascertains the quantity of butterfat contained in the milk purchased. However, this does not affect the passing of the title.

In the case of *Boessow v. Johnson*, 10 Cal.App.(2d) 578, 52 P.(2d) 505, 507, the court said: "Where only the price to be paid is to be determined, it becomes a matter of intention of the parties as to when title passes." (And the testimony in the record in that case all being to the effect that title passed upon taking possession of the milk, it must be held that the finding of the court in this particular is not sustained by the testimony.) Here, the testimony likewise is all to the effect that the title passed immediately upon the plaintiff taking possession of the milk, and thereafter it was transporting its own property. The record shows that the trucks belonging to the plaintiff were sent around to the different dairymen, as we have stated, and the milk picked up at the point of produc-

tion. The record also shows that some milk was delivered by the producers, and they were allowed the sum of 2½ cents per pound for butterfat for hauling the same.

The appellants contend that the plaintiff is operating its trucks for compensation indirectly. The appellants concede that no one pays anything directly to the plaintiff as compensation for operating its trucks, but argues that its compensation comes indirectly, due to the fact that it saves the cost of hauling when it goes into the country and picks up and hauls to its own plant the milk it there processes, and that this is compensation indirectly. The cost of the operation of the trucks is all carried into the overhead operations of the company, and there is not a word in the record indicating that it has gained any monetary advantage by its manner of conducting its business.

The reply of the plaintiff to the contention of the appellants is that its manner of conducting its business and collecting the milk was adopted long prior to the passage of the License Tax Act, *supra*, as a matter of convenience and for the purpose of securing the milk produced by the dairymen at the earliest possible moment after its production and while the milk would be in the best condition for processing. Whether its costs are greater or less than the mere hiring of others to perform this service is not shown by the record, nor is there anything in the record to show that it has saved a dollar in money by the operation of its own fleet of trucks. We may add here that the record shows that the plaintiff paid the same price for the milk collected, irrespective of the distance traveled by the trucks in collecting the same.

The first case relied upon by the appellants to sustain their contention is that of *Smith v. New Way Lumber Co.* (Tex.Civ. App.) 84 S.W.(2d) 1104. An examination of that case discloses its inapplicability to the question here presented. The lumber company maintained its own trucks, and made delivery to the purchasers of lumber, using its own trucks to do so, but in selling its lumber and delivering the same it charged a different price for lumber delivered at its lumberyards and lumber delivered to the purchaser by its own fleet of trucks. Thus, on the face of the record it shows that the lumber company was receiving a compensation for the delivery of the lumber to purchasers away from its lumberyards. Fur-

ther comment on this case is unnecessary.

The second case submitted for our consideration is that of *West et al. v. Western Maryland Dairy*, 150 Md. 641, 135 A. 136. In that case the question of title was involved, as well as the price differential. The court in that case, while holding that the title had passed, said it was immaterial, in that the company was a common carrier, and therefore liable for the tax under the act there being considered.

In the case of *Forsyth v. San Joaquin Light & Power Corporation*, 208 Cal. 397, 281 P. 620, 626, the court, in considering this case, used the following language: "There was no showing whatever that the dairy company had ever carried or solicited transportation of any milk except that which it had purchased from the producers, nor was there any proof that it had held itself out to the general public as a carrier of milk or any other commodity. It is difficult, therefore, to understand, in view of the great unanimity of authority upon this subject, how the court could have held that the dairy company under such circumstances, was a common carrier." Comment by us on the *Western Maryland Dairy Case* seems to us unnecessary; nor do we need to consider the cases cited relying thereon.

Appellants refer to the recent case of *In re Bush*, 6 Cal.(2d) 43, 56 P.(2d) 511. A reference to the opinion in that case shows that the Supreme Court expressly refused to express any opinion as to the liability of one who transported his own property under the License Tax Act of 1933.

Where only the price to be paid remains to be determined, it becomes a matter of intention of the parties as to when title passes. 55 C.J. p. 537, § 337 et seq.; *Boesow v. Johnson*, supra; *Welch v. Spies*, 103 Iowa 389, 392, 72 N.W. 548, 549; section 1738, Civ.Code. That section reads as follows: "Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

In addition to what we have said relating to the provisions of the License Tax Act of 1933, we may add that the tax provided for by the act is to be levied upon the gross receipts from the operation of the

motor vehicles engaged in the transportation. As we have stated, the record shows no gross receipts in its transportation of the milk purchased by the plaintiff. The plaintiff has in fact received nothing by way of a monetary compensation or property compensation either directly or indirectly, in maintaining its fleet of trucks and picking up milk from purchasers. The record shows only an expense carried in overhead, and that its purpose in conducting the manner of its operation has been the same for many years, and is founded upon convenience and securing of better quality of the product purchased.

With no showing that any saving is accomplished by maintaining its own fleet of trucks, we cannot very well find any foundation for the appellants' contention "that a dollar saved is an indirect dollar received by way of compensation."

The following authorities, some of which we will further consider, lead us to the conclusion that one hauling his own goods is not transferring goods for hire or compensation, and especially is this true where there is no differential in the price paid to the producer for the goods purchased. *People v. Montgomery*, 92 Colo. 201, 19 P.(2d) 205, 207; *City of Sioux Falls v. Collins*, 43 S.D. 311, 178 N.W. 950; *Murphy v. Standard Oil Co.*, 49 S.D. 197, 207 N.W. 92; *Griffin v. Murphy*, 51 S.D. 50, 211 N.W. 804; *Kroger Baking Co. v. Cynthiana*, 240 Ky. 701, 42 S.W.(2d) 904; *State v. Manhattan Oil Co.*, 199 Iowa 1213, 203 N.W. 301; *Rountree v. State Corporation Commission*, 40 N.M. 152, 56 P.(2d) 1121; *Elkins v. Schaaf*, 189 Wash. 42, 63 P.(2d) 421.

In *People v. Montgomery*, supra, the court had under consideration a license tax act purporting to levy a tax upon persons transporting property of others for compensation or hire. It will be noted that the only difference in the act under consideration reads: "hire or compensation." The transposition of the words, however, we think, does not indicate any intention to give either word a different meaning than that which ordinarily attaches. We find the following language in the opinion touching upon the principle involved herein, to wit: "The finding that defendant is a carrier for hire is a conclusion of law wholly unsupported by any proper finding of fact or any evidence in the record. In order to support the conclusion that defendant is a carrier for hire, there

must be evidence showing that defendant is equipped for carrying persons or property, and that it is engaged in carrying, or offers to carry persons or property, other than itself or its own property, for a compensation in some form. The phrase 'carry for hire,' necessarily implies a contractual relation between the two parties, and the Legislature cannot, by mere legislative fiat, make a party a carrier for hire who never carries or offers to carry anything but himself or his own property, any more than it can make black white or white black. A person cannot hire himself or pay himself."

In the Kroger Case, *supra*, the plaintiff owned a chain of stores and operated its own trucks which it used exclusively in delivering goods from its central warehouse to its different stores. The same contention was made there that is made here, that the company was at least operating for compensation, that is, it saved the difference between what it cost the grocery company to operate its trucks, and what it would have cost them to have hired others to perform the same services in the same way. The court declined to adopt such contention, and used the language which we have heretofore quoted to the effect that the term "compensation," in law, primarily refers to a transaction between two or more persons, and does not enter into or arise from a unilateral transaction.

In *Rountree et al. v. State Corporation Commission*, 40 N.M. 152, 56 P.(2d) 1121 (a very recent case), it was held, quoting from the syllabus, as follows: "Person engaged in buying merchandise and transporting it for sale to customers at distant places, without fixing quantity and price in advance of transportation held not engaged in transportation of property for compensation, so as to be subject to regulation as a 'contract motor carrier' under statute where cost of transportation was charged to overhead expenses, and no specific charges were made for transportation." It was there further said that compensation for hire must necessarily be paid by one who hires, so in transporting his own goods a carrier does not come within the statutory definition of "contract motor carrier for hire," as no one hires him. It was there further said that the act, when considered, which is similar to ours, indicates that the legislature in-

tended to give to the word "hire" the sense and meaning of "compensation".

In *Elkins et al. v. Schaa et al.*, 189 Wash. 42, 63 P.(2d) 421, the Supreme Court of Washington defines the term "compensation." We quote from the syllabus: "'Compensation' within statute defining special carrier as person engaged exclusively in transportation * * * in vehicle specially equipped for handling such commodities and operating for compensation, means compensation pursuant to contract or agreement for trucking." In that case the respondents were doing their own trucking. The use of the road was an ordinary use incidental to carrying on their business.

[5, 6] In *Collins-Dietz-Morris Company v. State Corporation Commission*, 154 Okl. 121, 7 P.(2d) 123, 80 A.L.R. 561, the Supreme Court of Oklahoma had before it the same question we are now considering. Two classes of service were performed by the company, one was the transportation without charge to the customer; the second was the direct charge to customer for cost of transportation. The first transaction to which we have referred was called "Class X"; the second "Class Y." No charges were made against the customers under "Class X," but the expense of operating trucks was carried into overhead. The court held that under such circumstances the transactions coming under "Class X" were not transactions for compensation, and no license could be collected on account thereof. Under "Class Y," where there was compensation, the company was liable under the License Taxing Act. This case and the annotations thereto found in A.L.R., we think conclusive authority for supporting the conclusion that the License Taxing Act of 1933 does not apply to persons transporting their own property. The other cases which we have cited but not analyzed support the same doctrine. We do not deem it necessary to cite cases to the point that statutes levying taxes or licenses are not to be construed beyond the plain import of the language used by the Legislature.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

23 Cal.App.2d 371

BECKLEY et al. v. VEZU et al.

Civ. 1681.

District Court of Appeal, Fourth District,
California.

Nov. 6, 1937.

As Modified Nov. 23, 1937.

Hearing Denied by Supreme Court

Jan. 3, 1938.

1. Automobiles Ⓒ279

Where a bridge was narrower than highway leading into it, county owed a duty to motorists and their guests to take reasonable steps for protection of those lawfully using the highway and to take such action as might be reasonably necessary to warn the public against such dangers as remained (St.1923, p. 675).

2. Automobiles Ⓒ304(1)

In guests' action against county for injuries sustained when automobile in which they were riding struck a bridge which was narrower than highway leading into it, burden was on guests to prove that driver of automobile was using highway in a proper manner, and that county had notice of the existing condition and of its dangerous character (St.1923, p. 675).

3. Counties Ⓒ143**Highways** Ⓒ188

A county is not an insurer against accidents on its streets or property.

4. Counties Ⓒ143

A county must guard against dangerous or defective conditions of which its responsible representatives have actual constructive notice.

5. Counties Ⓒ143

To recover from county for injuries resulting from defective condition of its property, municipality must have had notice of dangerous character of such condition.

6. Counties Ⓒ143

Whether defective condition of county property is of a dangerous character depends largely on intended lawful use of property, as respects county's liability therefor.

7. Evidence Ⓒ5(2)

It is well known that lights on automobiles are not ordinarily as blinding on a three-lane highway as when the automobiles are approaching on a narrower road, and that they are not as blinding when coming under large arc lights.

8. Automobiles Ⓒ306(7)

In guests' action against county for injuries sustained when automobile in which they were riding collided with bridge in nighttime, where bridge was narrower than highway leading into it, evidence established that driver's conduct in continuing at a high speed after his vision was obstructed and he knew bridge, with which he was familiar, was near, was the cause of the accident, precluding recovery from county on theory that bridge, contrary to statute, was maintained in a dangerous condition without any warning being given of such condition (St.1923, p. 675).

9. Automobiles Ⓒ306(5)

Guests of motorist who collided with bridge in nighttime, where bridge was narrower than highway leading into it, could not recover from county for failure to make bridge approach sufficiently safe, in absence of evidence tending to show constructive notice to county that warnings given of narrow bridge were not sufficient to advise reasonably careful drivers of any possible danger or that county should have anticipated that a driver would conduct himself as motorist said he did.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by E. S. Beckley and another against Victor Vezu, the County of San Bernardino, a body politic and corporate of the State of California, and another. From an order denying its motion for judgment notwithstanding the verdict, the County of San Bernardino appeals.

Reversed, with directions.

Stanley Mussell, Dist. Atty., and Albert E. Weller, Deputy Dist. Atty., both of San Bernardino, for appellant.

Wilson & Coughlin, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries sustained by the plaintiffs when an automobile in which they were riding struck a bridge on Colton avenue, which runs in a northerly and southerly direction, and is the main highway connecting the City of San Bernardino with Colton and Riverside.

Colton avenue is 60 feet wide and for several hundred feet on each side of this bridge the city limits of San Bernardino

run along the center line of the right of way, leaving the westerly half inside, and the easterly half outside, the city limits. However, this bridge and all parts of the paved portion of the highway which are material here were on the westerly half of the right of way and within the city limits. The bridge was about 180 feet long and about 19 feet wide, the sides being steel arches which rose about 10 feet above the surface of the pavement. The road was straight and level for several miles southerly from the bridge. Originally, the pavement southerly from the bridge was 16 feet wide. In July, 1934, the county, at the request of the city, widened this pavement near the bridge by adding 10 feet to the east side thereof, corresponding to what had been done on the road farther south. Two white lines were painted on the pavement dividing it into three lanes, which lines stopped 186 feet southerly from the bridge. The easterly of these white lines, if extended, would have run into the easterly side of the bridge. The easterly edge of the pavement was gradually slanted over to the easterly side of the bridge, reducing the road to two lanes as it crossed the bridge.

A patented bumper railing 34 feet long was erected, extending from the southeasterly corner of the bridge at an angle of about 45 degrees so that its southerly end was some 8 or 10 feet easterly from the edge of the pavement. This bumper railing was about 3 or 3½ feet high and consisted of a metal strip about a foot wide attached to four 8x8-inch posts. Two red reflector glasses of the type now in common use, each being 4x6 inches, were attached to the bridge end of this bumper rail, and a post between the end of the rail and the bridge was painted white. Another red reflector glass was attached to the south end of the east side of the bridge some 5 or 6 feet above the pavement. Above that glass was placed a large sign reading "Load limit 8 tons, Speed limit 20 miles." The sides of the bridge and the bumper rail were all painted with a color known as aluminum. A 250 candle power arc light was suspended 22 feet above the center of the pavement, 19 feet southerly from the bridge.

The accident happened shortly after midnight on November 2, 1935. The plaintiffs were riding in an automobile driven by the defendant Vezu, the latter's wife being a member of the party. They had visited a

night club and later a Mexican café in Colton known as "Little Tiajuana," and were traveling north toward San Bernardino when the accident occurred. The automobile struck the easterly side of the bridge and stopped on the bridge about 20 feet north of the southerly end. Mrs. Vezu was killed and the plaintiffs were both injured. While there is a conflict as to how much liquor the driver of the car had consumed, he admits having taken one drink of whisky and several glasses of beer.

From the testimony of the plaintiffs it appears that the driver of the car had had two glasses of beer and a drink of whisky before they arrived at Colton, which was around 11:30 o'clock p. m.; that while at Colton he drank four "beers" and one drink of whisky, the latter just before they started on the return trip; that while traveling the 3 miles between Colton and the bridge he drove rapidly and on three separate occasions narrowly averted an accident, twice with other cars and once while crossing a "dip"; that each time some of his passengers protested and asked him to go slower; that he disregarded these protests and did not diminish his speed; that he was going from 46 to 48 miles an hour when he struck the bridge; that when the car was about 100 feet from the bridge Beckley said to him, "For God's sake turn out"; that he then turned to his left but not far enough to avoid the side of the bridge; and that just before Beckley warned him he had his head turned toward the right, his wife having just asked him to slow down because Mrs. Beckley, who was riding with her in the rear seat, was "awfully nervous." Mrs. Beckley also testified that she saw the bridge before her husband called out and in her deposition, which was introduced, she testified that she saw the bridge when they were 200 or 300 feet away.

The defendant Vezu testified that he had been traveling along this road from 35 to 45 miles per hour; that as he drove along he had it in mind that there was a bridge some place along there; that he was driving in the right-hand lane and looking ahead; that he did not see the red reflectors; that "I was and I wasn't looking for them"; that he "never noticed" the bumper guard; that he was somewhat blinded by the lights of two cars which crossed the bridge coming toward him before he got there; that he first saw the bridge when he was 75 or 100 feet away; that about the same time he saw it Beckley told him to

turn over; that he turned to his left; and that he was going about 40 miles an hour when he collided with the bridge. On cross-examination he testified that he had traveled this road many times; that the bridge had been where it then was for more than fifteen years; that for quite a number of years the pavement had been wider than the bridge; that he knew these facts and knew the relation of the bridge to a point he had just passed; that he was familiar with the highway and the conditions there; that he knew that the white lines marking the traffic lanes terminated about 200 feet south of the bridge; that it was a clear night with no wind or noise; that he was traveling in the right-hand lane just clearing the line; that when that line ended he kept going straight; that two cars "kind of blinded me from seeing the bridge"; that these cars were passing him when he was at a point about 200 feet south from the bridge; that when these cars passed him the bridge showed up; that these cars were fairly close together, one following the other, and that they affected the visibility; that he did not know whether or not he had gotten to the end of the white lines when the second car passed; that when the second car passed there was nothing between him and the bridge; that he saw the bridge when he was from 75 to 100 feet away; that when the lights of the approaching cars began to bother him he did not reduce his speed or put on his brakes; that he knew when the lights of the second approaching car began to bother him that he was getting in "some close proximity to the bridge"; that when he emerged from the lights of the second car he saw the bridge and Beckley cried out a warning; that the second car passed him "in the vicinity of" the termination of the white lines; and that he was talking to Beckley just before Beckley told him to turn over.

In this action Vezu, the City of San Bernardino, and the County of San Bernardino were joined as defendants. The complaint alleges that the defendant city and the defendant county maintained this bridge in a dangerous and defective condition, without providing for or giving any warning of that condition. It is then alleged that the defendant Vezu drove the car without regard for the safety of the plaintiffs and in such a wanton manner as to constitute willful misconduct, and that the collision was proximately caused by this negligence on the part of the city and county, together

with the willful misconduct of the driver. A jury returned a verdict in favor of the plaintiffs and against the city and county without mentioning the defendant Vezu. A motion for an instructed verdict in favor of the defendant county had been denied. Following the verdict the defendant county filed a motion for judgment notwithstanding the verdict, reserving the right to apply for a new trial if the motion should be denied. That motion was denied but motions for a new trial filed by the county and by the city were granted on the ground of the insufficiency of the evidence. However, the defendant county has taken this appeal from the order denying its motion for judgment notwithstanding the verdict under the authority of section 629 of the Code of Civil Procedure (as amended by St.1935, p. 1956), as that section then read. See *Barthelmess v. Cavalier*, 2 Cal.App. (2d) 477, 38 P.(2d) 484.

It is sought to impose liability upon the appellant county through the Public Liability Act of 1923 (Stats.1923, p. 675), which imposes liability upon counties for damages resulting from the dangerous or defective condition of streets, highways, and other structures where the governing board of such county, or other officers having authority to remedy the condition, had knowledge or notice of such defects and failed for a reasonable time thereafter to either remedy the condition or to take such action as was reasonably necessary to protect the public therefrom. In the ordinary case of this nature it is claimed that the accident was caused by the dangerous condition and not by any lack of care on the part of the driver of the vehicle. An unusual situation is here presented where the respondents alleged and tried to prove that the accident resulted not only from the defective condition but from acts on the part of the driver which amounted to willful misconduct. The appellant contends that it is not liable since this bridge and those portions of the traveled or paved part of the highway which are material here were all within the limits of the City of San Bernardino, and that, aside from that question, the evidence does not bring this case within the liability imposed by the statute and is not sufficient to sustain a verdict and judgment as against the county. The respondents contend that the county and city are jointly liable since half of the right of way was outside the city limits, and that the evidence is sufficient to sustain the implied finding of the

jury that a dangerous condition existed which proximately contributed to their injuries without negligence on their part. Because of our views on the second of these problems it will be unnecessary to consider the general question of responsibility for the condition of this bridge and its approaches as between the county and city.

[1,2] The respondents rely particularly on the case of *Adams v. Southern Pac. Co.*, 109 Cal.App. 728, 293 P. 681, where a widening of the pavement led up to a railroad track and stopped and where no warning signs or barriers were erected. It is also argued that whether the conditions with which we are here concerned were defective and dangerous, and whether adequate warnings were given, are questions of fact which have been passed upon by the jury. The decision in the *Adams* Case is not very helpful under the essentially different facts of this case, where the widened pavement did not abruptly end and where much was done to give warning of the condition and to direct traffic into the narrower entrance to the bridge. Obviously such a situation cannot be as safe as where the bridge is also three lanes wide. The duty owed in such a case is to take reasonable steps for the protection of those lawfully using the highway and to take such action as may be reasonably necessary to warn the public against such dangers as remain. Conceding that there was a question of fact as to whether a dangerous condition still existed it was incumbent upon the respondents to prove that the driver of this car was using the highway in a proper manner, and that the appellant had notice not only of the existing condition but also of its dangerous character.

[3-6] We may say here as we said in *Howard v. City of Fresno*, 70 P.(2d) 502: "Three recent decisions of the Supreme Court seem to be controlling here. *Nicholson v. City of Los Angeles*, 5 Cal.(2d) 361, 54 P.(2d) 725; *Rodkey v. City of Escondido*, 67 P.(2d) 1053; *Whiting v. City of National City*, 69 P.(2d) 990. See, also, *Beeson v. City of Los Angeles*, 115 Cal. App. 122, 300 P. 993. These cases establish the following: That a municipality is not an insurer against accidents on its streets or property; that it is required to guard against dangerous or defective conditions of which its responsible representatives have actual or constructive notice; that it is not sufficient that the municipal repre-

sentatives have notice of the condition, but that they also must have notice 'of the dangerous character of such condition' (*Whiting v. City of National City*, supra); that the question of the dangerous character of a defective condition depends largely on the intended lawful use of the property. (*Rodkey v. City of Escondido*, supra; *Beeson v. City of Los Angeles*, supra.)"

[7,8] The respondents alleged that the manner in which the car was driven on this occasion amounted to willful misconduct. They testified to conduct on the part of the driver which, whether or not it constituted willful misconduct, was certainly not consistent with the exercise of reasonable care and caution. If, however, we are to assume that the respondents did not tell the truth and are to take the driver's testimony of what he did as being more favorable to them, this is hardly sufficient to show that he was driving with due care under the circumstances. Although he knew the condition which existed at the bridge, knew its location with respect to a point he had just passed, and knew that it was in close proximity, he continued with unabated speed even when he says his vision was obstructed. While he states that he was following the white line which separated the easterly lane from the middle lane, he did not notice when that line stopped. After he actually saw the bridge and the bumper rail he had from 75 to 100 feet in which to move over about the width of his car, with no other traffic approaching and nothing in his way. He says that he was "somewhat blinded" by the lights of two approaching cars although the second of these cars passed him near the end of the white lines, 186 feet southerly from the bridge. It is well known that the lights of an automobile are not ordinarily as blinding on a three-lane highway as when the cars are approaching on a narrower road and that they are not as blinding when coming under large arc lights. It is hard to believe that these approaching lights would prevent his seeing a large bridge and a long guard rail directly in his path, both painted a light color and illumined by a large arc light, and with three red reflector glasses. But if we accept his statement, although the only possible inference from the evidence is that these things must have been visible to other drivers who must have met lighted cars near this bridge during many months' use of this much-traveled road, the facts remain that the

driver of this car continued at a high speed when he knew he was somewhere near the bridge, that he made no attempt to slow down when he did see it, and that he was then going so fast that he was unable to turn to his left about the width of his car, in a distance from 75 to 100 feet. In our opinion the evidence, taken most favorable to the respondents, discloses that the cause of this accident was the conduct of the driver of this car and the manner in which he drove the same, and the evidence was insufficient to show any such defective condition as would impose liability on the appellant under the statute. *Rodkey v. City of Escondido* (Cal.Sup.) 67 P.(2d) 1053.

[9] There was a further failure of proof in that there is no evidence which would support a finding that the appellant had notice that the condition here existing was dangerous for persons properly using the highway. It is not claimed that it had actual notice and respondents must rely upon constructive notice. The real charge is that the conditions of the bridge were not made sufficiently safe for one whose driving amounted to willful misconduct. If, however, the respondents must be permitted to divide their case, and claim as against the county that the driver was proceeding with due care, there is no evidence in the record to support a finding that the appellant had constructive notice that the existing condition was dangerous for such a driver. Rather unusual precautions had been taken to give warning of the condition, to guide traffic onto the bridge, and to protect the public. Whether or not it was possible to do more in this direction the precautions taken had proved sufficient for nearly a year and a half with heavy travel. There is no evidence that any other driver of an automobile ever had an accident because of this condition or that any claim had ever been made. There is no evidence that would tend to bring home to the appellant notice that the warnings given were not sufficient to advise reasonably careful drivers of any possible danger and none to indicate that it should have been known and anticipated that a driver would conduct himself as this one says he did. It follows that the court erred in denying appellant's motion for a judgment notwithstanding the verdict.

The order appealed from is reversed, with directions to enter a judgment in favor of the appellant.

We concur; MARKS, J.; JENNINGS, J.

10 Cal.2d 1

Ex parte MOONEY.

Cr. 3898.

Supreme Court of California.

Oct. 29, 1937.

1. Habeas corpus §56

The demurrer to application for writ of habeas corpus on which show-cause order had been issued admitted, for the purposes of proceeding on the return, truth of allegations of application.

2. Habeas corpus §85(1)

To entitle prisoner to release in habeas corpus proceeding on ground that requirements of due process had not been satisfied upon trial resulting in prisoner's conviction because of connivance by state to procure conviction by perjured testimony, it was necessary for prisoner to establish by preponderance of substantial credible evidence, not only that perjured testimony had been adduced upon his trial, but, also, that it was knowingly produced by the prosecuting officials.

3. Habeas corpus §90

A reference may be ordered in habeas corpus proceedings when disputed questions of fact exist.

4. Habeas corpus §85(1)

Where petitioner sought release under habeas corpus writ on theory that conviction of murder was procured by prosecuting officials on perjured evidence, no material variation appeared in testimony of witness given on trial of defendant and testimony given on trial of others that would warrant claim of corruption against witness or prosecuting authorities, where witness did not attempt definitely to fix exact time but merely approximated time as to occurrences described by him and where before grand jury witness testified fixing time identical

with time specified by witness on defendant's trial.

5. Habeas corpus ⇨85(1)

Where prisoner sought release under habeas corpus writ on theory that conviction for murder was result of corruption on part of prosecuting authorities, evidence was insufficient to establish that state's witness gave false testimony upon trial of prisoner, but established that witness' attempted repudiation of trial testimony was false.

6. Habeas corpus ⇨85(1)

Where prisoner sought release under habeas corpus writ on theory that conviction for murder caused by bomb explosion was procured by corruption of prosecuting authorities, evidence was insufficient to establish charge that prosecuting officials were guilty of subornation of perjury in connection with testimony of witness for state.

7. Habeas corpus ⇨29

Fact that existence of written report made by police officers of statements made to them by state's witness was not known to defendant or his counsel until long after trial did not entitle defendant to release under habeas corpus writ on theory that conviction had been procured by corruption of prosecuting authorities by deliberately suppressing or negligently concealing evidence, notwithstanding report did not contain accurate description of defendant, where witness positively identified defendant.

8. Evidence ⇨19

It is a matter of common experience that power to reproduce a mental picture of an unknown, or even a known, person, sufficiently accurate in every particular to enable ready identification of such person by others, is, in a great majority of cases, quite impossible.

9. Habeas corpus ⇨85(1)

In prosecution for murder caused by bomb explosion, testimony of two principal witnesses for state regarding occurrences just prior to explosion was not in irreconcilable conflict so as to show that conviction was procured by corruption on part of prosecuting authorities and to entitle defendant to release under habeas corpus writ.

10. Habeas corpus ⇨29

Where during cross-examination of state's witness in prosecution for murder witness disclosed that he had first told his story to one representing the district attor-

ney, such testimony furnished defendant with sufficient information to charge him with knowledge of witness' prior affidavit and precluded him from obtaining release under habeas corpus writ on theory that prosecution deliberately or improperly concealed witness' affidavit.

11. Habeas corpus ⇨85(1)

Where prisoner sought release under habeas corpus writ on theory that conviction for murder caused by bomb explosion was procured by corruption on part of prosecuting authorities, and it appeared that district attorney had requested additional information from party purporting to know a witness to crime and reply to district attorney's request had been lost, evidence was insufficient to show that reply was improperly destroyed by prosecuting authorities for purpose of suppressing evidence because reply contained damaging information.

12. Habeas corpus ⇨85(1)

Where petitioner sought release under habeas corpus writ on theory that conviction for murder was procured by corruption on part of prosecuting authorities, evidence was insufficient to show any impropriety on part of prosecuting officials in producing witness against defendant.

13. Habeas corpus ⇨29

Evidence that state's witness in prosecution for murder had written letters to another allegedly seeking to induce him to become witness and testify that he saw writer in city in which crime was committed did not entitle defendant to release under habeas corpus writ on theory that conviction was procured by corruption of prosecuting authorities, where prosecuting authorities were without knowledge of contents of letters until time subsequent to trial.

14. Habeas corpus ⇨29

Where after jury returned verdict convicting defendant of murder third party with whom witness for state had had correspondence sent prosecuting authorities telegram stating that he had information which would entitle defendant to new trial, failure of prosecuting authorities to disclose such telegram did not entitle defendant to release under habeas corpus writ on theory that prosecuting authorities had suppressed material evidence, where prosecuting authorities had unsuccessfully attempted to induce the informant to state nature of supposed evidence and where the informant had previously admitted his own duplicity and

falsehood in a prior effort to mislead the prosecution.

15. Habeas corpus ⇨85(1)

Where defendant convicted of murder caused by bomb explosion sought release under habeas corpus writ on theory that conviction was procured by corruption of prosecuting authorities, testimony of two witnesses that state's witness who testified to occurrences immediately prior to explosion was with the two witnesses in their home in another town at time of explosion was unworthy of belief in view of their prior inconsistent and contradictory statements and in view of their admitted falsehoods.

16. Habeas corpus ⇨85(1)

Where defendant sought release under habeas corpus writ on theory that conviction for murder was procured by corruption on part of prosecuting authorities, evidence that witness for state in murder prosecution had upon another occasion assertedly perjured himself and attempted to procure as a corroborating witness the same party who he allegedly attempted to procure as corroborating witness in murder prosecution was inadmissible, but, even if properly admitted, did not show that witness for state committed perjury or improperly sought the other as corroborating witness.

17. Habeas corpus ⇨85(1)

Where defendant sought release under habeas corpus writ on theory that conviction for murder was procured by corruption on part of prosecuting authorities, evidence did not establish that witness for state in murder prosecution perjured himself, nor that prosecuting authorities were guilty of any irregularities or improprieties in the production of such witness.

18. Habeas corpus ⇨3

Affidavit offered for purpose of showing that testimony of witness for state in murder prosecution was perjured was not available on habeas corpus where the affidavit was made on motion for new trial in murder case and was, therefore, available upon such motion.

19. Habeas corpus ⇨85(1)

Where defendant sought to obtain release under habeas corpus writ on theory that conviction for murder was procured by corruption on part of prosecuting authorities, testimony of police officers offered for purpose of showing that witness for state in murder case gave perjured testimony could not be accepted as credible in view

of the equivocation, indefiniteness, lack of memory of important details, and admitted silence when life of defendant was in the balance.

20. Habeas corpus ⇨85(1)

Where defendant sought release under habeas corpus writ on theory that conviction for murder was result of corruption on part of prosecuting authorities, defendant failed to establish that two witnesses for state in murder prosecution committed perjury or improper conduct on part of prosecuting officials in connection with the production of such witnesses.

21. Habeas corpus ⇨85(1)

Where defendant sought release under habeas corpus writ on theory that conviction for murder was result of corruption on part of prosecuting authorities, testimony of ex-police officer as to perjury and frame-up in connection with witnesses for state in murder trial was not credible in view of ex-police officer's inconsistent statements and in view of his conviction of grand theft (Code Civ.Proc. § 2051).

22. Habeas corpus ⇨85(1)

Where defendant sought release under habeas corpus writ on theory that conviction for murder was result of corruption on part of prosecuting authorities, evidence that throughout trial jury foreman was clandestinely meeting with prosecuting attorney and reporting reactions of jury to evidence, and that on return of verdict foreman signaled verdict to prosecuting attorney, was inadmissible, but, even if admissible, evidence was insufficient to show improper conduct.

23. Habeas corpus ⇨25

Where defendant sought release under habeas corpus writ on theory that conviction for murder caused by bomb explosion was result of corruption on part of prosecuting authorities, claim that prosecuting authorities furnished defendant with blurred copies of photographs, showing defendant and wife on building a mile away from scene of crime so as to preclude ascertainment of time on clock, as part of alleged frame-up, was not sustained where defendant on murder trial had benefit of enlargement showing time on clock and prosecuting authorities did not question accuracy or genuineness of enlargement.

24. Habeas corpus ⇨85(1)

Where defendant sought release under habeas corpus writ on theory that conviction

tion for murder caused by bomb explosion was result of corruption on part of prosecuting authorities, witness testifying that he had informed prosecuting authorities that defendant was not involved in explosion because witness had seen defendant on roof of building approximately a mile from scene of crime and was told to remain silent because defendant should have "been hung long ago" was not worthy of belief where he admitted that he had read in newspapers that defendant was to be hanged and did not disclose information to trial court or defendant's counsel.

25. Habeas corpus ⇌85(1)

Where defendant sought release under habeas corpus writ on theory that conviction for murder was result of corruption on part of prosecuting authorities, evidence did not support contention that defendant's arrest and prosecution were the result of antipathy on the part of certain large corporations because of defendant's prior activities in attempting to unionize their employees.

26. Habeas corpus ⇌85(1)

Where defendant sought release under habeas corpus writ on theory that conviction for murder caused by bomb explosion was result of corruption on part of prosecuting authorities, evidence that incriminating articles had been found in defendant's residence and in basement of another's home wherein defendant kept his motorcycle tended to overcome charges of frame-up and conspiracy and pointed to defendant's guilt.

27. Habeas corpus ⇌85(1)

Where defendant sought release under habeas corpus writ on theory that conviction for murder caused by bomb explosion was result of corruption on part of prosecuting authorities, testimony of accomplice who had been convicted for participating in same offense was unworthy of belief where he had been convicted of another crime.

28. Habeas corpus ⇌85(1)

Evidence that defendant was engaged in revolutionary activities which clearly established his aim and purpose to weaken and undermine, with view of ultimate destruction, both by violent and insidious means, the entire social and political structure of the nation, tended to overcome charge made by defendant, in habeas corpus proceeding, that murder conviction was result of frame-up (Code Civ.Proc. § 1960, subd. 2).

29. Habeas corpus ⇌85(1)

Evidence in habeas corpus proceeding did not entitle defendant to release on ground that his conviction of murder caused by bomb explosion was result of perjury on part of state's witnesses and that prosecuting officers caused or suffered to be introduced at defendant's trial any testimony which they knew or had reason to believe was false, or that they were guilty of suppressing or preventing the introduction of evidence which would have been favorable to the defendant.

LANGDON, J., dissenting.

In Bank.

Habeas corpus proceeding by Thomas J. Mooney seeking his release from the custody of the warden of the state prison at San Quentin.

Writ discharged, and petitioner remanded.

Frank P. Walsh, of San Francisco, John F. Finerty, of Washington, D. C., and George T. Davis, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary and Emery F. Mitchell, Deputy Attys. Gen., for respondent.

Charles Kaufman, of San Francisco, *amicus curiæ*.

PER CURIAM.

By this proceeding in habeas corpus, the petitioner, Thomas J. Mooney, seeks his release from the custody of the warden of the state prison at San Quentin, where he is confined pursuant to a judgment on a verdict finding him guilty of murder of the first degree.

At 2:06 p. m., on July 22, 1916, a devastating crime was committed in the city of San Francisco. At that moment a dynamite bomb, concealed in a suitcase and detonated by means of a clockwork device, was exploded at Steuart and Market streets, in the midst of numerous persons who either were watching or about to participate in a planned and publicized preparedness day parade. As a result of the explosion, 10 persons were killed and 40 or 50 other persons received serious bodily injuries.

Several days later, Thomas J. Mooney, the petitioner herein, Rena Mooney, his wife, Warren K. Billings, Edward Nolan, and Israel Weinberg were arrested and, on August 2, 1916, jointly indicted for the murder of Hetta Knapp, one of the victims of

the explosion. Seven other joint indictments, one for the death of each of the other victims who had then died, were also returned against the group. Billings was tried first, on the Knapp indictment, was convicted and sentenced to life imprisonment. His conviction was affirmed on appeal. *People v. Billings*, 34 Cal.App. 549, 168 P. 396. According to the testimony herein of the deputy district attorney who prosecuted Billings, the death penalty was not asked by the prosecution in his case, for it was determined by the prosecuting officials that Billings was a mere tool who did the bidding of Mooney, the petitioner in this proceeding.

Mooney was the second of the group to be tried. He likewise went to trial on the Knapp indictment. At the conclusion of 13 trial days, during which 154 witnesses were examined, the jury returned a verdict finding petitioner guilty of murder of the first degree, without recommendation. A motion for new trial was thereafter denied. Petitioner was accordingly sentenced to be hanged. Subsequently, and on November 29, 1918, and following intervention by President Wilson, his sentence was commuted to life imprisonment. From that sentence he seeks his discharge in this proceeding.

Merely to complete the record as to the disposition of the other charges filed against the group, it should be pointed out that the later and separate trials of Rena Mooney and Weinberg resulted in their acquittal. The charge against Nolan was ultimately dismissed. The additional charges against petitioner growing out of the other deaths caused by the bomb explosion were all dismissed, except one. Said remaining indictment was permitted to remain dormant on the files until the year 1933, at which time petitioner demanded to be tried thereon. The then district attorney refused and failed to produce any evidence in support of said indictment and the trial court directed a verdict of not guilty thereon.

As will presently appear from the chronological court history of the Mooney Case, certain of the foundational matters upon which the present application is grounded are not of recent discovery or proclamation. The charge of "frame-up," now so vigorously urged by petitioner, even antedated petitioner's trial and the production in court of any evidence against him. Subsequent to his arrest and prior to his trial, this charge was voiced through the publication and circulation of a pamphlet entitled

"The Frameup System." One needs only to examine the voluminous record in this proceeding to conclude that, underlying the Mooney defense, from its inception, has been a determined and vigorous campaign of propaganda and vilification directed with all its force against the state and its witnesses in an effort to accomplish the release of petitioner. The purpose of such a prolonged and determined campaign finds eloquent expression in many letters and documents written and received by petitioner and his associates over the years, and which have been placed in the record in this proceeding. The purpose is concededly "public agitation to change the psychology of the people," regardless of the guilt or innocence of the petitioner.

We now briefly narrate the court history of the Mooney Case. Following Mooney's conviction and pending the determination of his appeal from the judgment imposing the extreme penalty, which sentence had not then been commuted to life imprisonment, the Attorney General, on July 30, 1917, filed in this court, a stipulation consenting to a reversal of the judgment of conviction. He was motivated to pursue this course by reason of the publication of certain letters written by one Frank C. Oxman, who, subsequent to the writing of the letters, had appeared as a prosecution witness upon the petitioner's trial. At a later point in this opinion we shall have more to say about the witness Oxman. In disposing of the point raised by the Attorney General's consent to a reversal, we pointed out (*People v. Mooney*, 175 Cal. 666, 166 P. 999) that the action of that officer was not based upon any claim or assumption that the record on appeal disclosed cause for a reversal, but was "prompted by matters outside the record, disclosed after the proceedings were terminated in the trial court, which led him to believe that justice would be subserved by a retrial of the cause." This court thereupon declared that "in view of the novelty of the suggestion of the Attorney General, and the serious question as to the right of this court under the provisions of our Constitution to grant a new trial except for error in the proceedings in the trial court, we will not consider the question of the advisability of the action suggested by the Attorney General's consent, except on formal application or motion by one of the parties addressed to the court, on notice to the other parties interested, including the district attorney of the city and county of San Francisco."

Thereafter, the petitioner, while his appeal from the judgment was still pending, addressed a motion to this court requesting that the judgment and order be reversed "solely on the ground that the attorney general of the state has filed * * * a stipulation and consent that, for reasons stated therein, such action should be had by this court, and that defendant joins in said stipulation." The motion was opposed by the district attorney and denied by this court. In the opinion filed September 11, 1917 (*People v. Mooney*, 176 Cal. 105, 167 P. 696), it was declared, in substance, that the only jurisdiction then possessed by the court under the Constitution was to determine whether there had been any error of law in the proceedings in the trial court, the determination of which, it was pointed out, had to be based solely upon a consideration of the transcript of the record in that court.

Subsequently, and on March 1, 1918, and after a consideration of said transcript, a decision was rendered on the merits which affirmed the judgment of conviction and the order denying petitioner a new trial. *People v. Mooney*, 177 Cal. 642, 171 P. 690.

Orderly consideration of the issues in this proceeding suggests that we presently defer any discussion of the evidence upon which the jury found its verdict of guilty and which upon appeal was held to be sufficient to support the same.

In the month following this court's affirmation of the judgment of conviction, i. e., in April, 1918, petitioner moved the trial court to set aside the judgment and sentence on the ground that the verdict of the jury, the judgment, the order denying a new trial, and the sentence were "procured through the willful nonfeasance, malfeasance and willful fraud of the district attorney and his assistants who conducted the prosecution * * * whereby defendant was deprived of a fair and impartial trial and which prevented a fair submission of the cause." The motion was denied and an appeal was taken. Pending said appeal, the petitioner sought from this court a certificate of probable cause to stay the execution of his sentence which at the time had not been commuted. In the opinion denying such certificate (*People v. Mooney*, 178 Cal. 525, 174 P. 325, 326), this court had occasion to refer to the "vague and unsatisfactory" affidavits filed by petitioner in connection with his motion to vacate wherein he had charged that the district attorney and his deputies prior to petitioner's trial pos-

sessed certain information, assertedly unknown to petitioner at the time of trial, which it was charged seriously undermined the credibility of 2 of the prosecution witnesses (Oxman and Mellie Edeau, to each of whom more detailed reference shall hereinafter be made) and which information it was averred seriously challenged the truthfulness of their testimony. The opinion went on to declare that the "showing of fraud or misconduct on the part of the district attorney and his assistants in conducting the trial is of the weakest character, even if he were under any duty or obligation to disclose to the defendant all the evidence within his knowledge relating to the case." However, this was not the only ground of the decision upon that occasion. In addition to the foregoing, this court also adopted the opinion of the trial judge where, in denying the motion to vacate the judgment, he declared that the motion under the circumstances then presented was the equivalent of an application for the common-law writ of coram nobis, the office of which writ is abridged, it was held, when statutory remedies exist of a character which had been available to petitioner, viz., motion for new trial and appeal.

In *Mooney v. People of California*, 248 U.S. 579, 39 S.Ct. 21, 63 L.Ed. 430, decided November 18, 1918, the United States Supreme Court denied certiorari to review the last-cited decision of this court.

In 1921, the petitioner applied to the United States District Court for a writ of *audita querela* on the ground that his conviction was the result of a conspiracy on the part of the prosecuting officials. In support thereof he set out the Oxman letters above mentioned and an affidavit of John MacDonald, dated February 7, 1921, as asserted evidence of the alleged perjury of those persons upon his trial, both of which matters shall hereinafter receive more detailed attention. The United States District Court denied the application on the ground that the writ was not available under California law.

Thereafter an application for a writ of habeas corpus was filed by petitioner with the United States District Court based on the production of assertedly perjured evidence upon his trial and the alleged suppression by the district attorney of evidence averred to have been material to the defense. The writ was denied. An appeal to the United States Circuit Court of Appeals was denied and the latter tribunal [In re

Mooney, 72 F.(2d) 503, decided July 25, 1934], in denying a petition for probable cause and for an appeal, quoted extensively from the last-cited decision of this court. Reference was also made to the denial of certiorari therein by the United States Supreme Court.

[1] Three months later (October, 1934) the petitioner sought leave to file an application for a writ of habeas corpus with the United States Supreme Court, which proceeding was the forerunner of and ultimately proved to be the direct cause for the institution of the present proceeding in this court for a similar writ. In his application to the United States Supreme Court the petitioner alleged that his conviction was brought about solely by perjured testimony, knowingly used by the prosecuting authorities in order to obtain that conviction, coupled with the alleged deliberate suppression of evidence which assertedly would have impeached and refuted the testimony thus given against him. The Attorney General of this state, representing the respondent warden in that proceeding, and by way of return, demurred to the application on which the order had been issued therein directing the warden to show cause why leave to file the application for a writ of habeas corpus should not be granted. Upon well-established rules of pleading the demurrer admitted, for the purposes of the proceeding on said return, the truth of the allegations of the application. It therefore appears to have been the theory of the Attorney General that, even if those allegations were true, still the petitioner was without remedy in the Supreme Court of the United States under prior decisions of the state and federal courts. In other words, it was his theory, based on said prior decisions, that the requirements of due process had been satisfied upon petitioner's trial in that he had received notice thereof and had a hearing thereon, with full opportunity to defend on all the issues, and that the alleged acts of the prosecuting authorities, even if established, would not have served to destroy the requirements of due process.

The admission by demurrer, of the charges so made by petitioner, without doubt had a controlling influence on the action of the Supreme Court of the United States in that proceeding wherein, on January 21, 1935, that court, in rejecting the Attorney General's "narrow view of the requirement of due process," declared (*Mooney v. Holohan*, 294 U.S. 103, 55

S.Ct. 340, 342, 79 L.Ed. 791, 98 A.L.R. 406) that "It [meaning due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." The court, in its opinion, then states that it is not satisfied that California "has failed to provide such corrective judicial process," that "we do not find that petitioner has applied to the state court for a writ of habeas corpus upon the grounds stated in his petition here" and that "we are not at liberty to assume that the state has denied to its court jurisdiction to redress the prohibited wrong *upon a proper showing* and in an appropriate proceeding for that purpose." (Italics added.) Leave to file the application for habeas corpus was thereupon denied, without prejudice, in order to permit recourse by petitioner "to whatever judicial remedy afforded by the State may still remain open."

Shortly thereafter, and following the indicated course, petitioner again directed his attention to the state courts and filed an application for writ of habeas corpus with the District Court of Appeal of the First Appellate District. In an opinion filed on May 14, 1935, in *Re Mooney*, 6 Cal.App.(2d) 730, 45 P.(2d) 388, a majority of the members of division 1 of that court denied said application. On May 31, 1935, petitioner filed the present application for a writ of habeas corpus with this court.

[2] According to the recent decision of the United States Supreme Court in this matter, *supra*, it is incumbent upon petitioner in this proceeding, if he is to accomplish his release, that he establish by a preponderance of substantial, credible evidence not only that perjured testimony was adduced upon his trial, but also, if such be the fact, that it was knowingly produced by the prosecuting officials. Proof of both elements, perjury and knowledge, by a preponderance of credible evidence, is indispensable under that decision. It was recently so construed by the

Supreme Court of Florida in *Skipper v. Schumacher*, 124 Fla. 384, 169 So. 58, 62-64, and certiorari was denied by the United States Supreme Court (299 U.S. 507, 57 S.Ct. 39, 81 L.Ed. 376).

Therefore, proof of perjury alone, without satisfactory substantial proof of knowledge thereof or connivance therein by the prosecuting officials, can avail the petitioner nothing in this proceeding but would relegate him to the executive department. In passing, it may here be mentioned that he has made an application for executive clemency to each of four Governors of this state, all of whom, upon independent consideration of petitioner's charges, denied a pardon to him.

We shall consider the charge of suppression of material evidence in so far as it ties in with or constitutes a part of the alleged frame-up in furtherance of which it is claimed that perjured testimony was knowingly produced by the prosecution.

As stated above, the present proceeding was commenced on May 31, 1935, by the filing with this court of an application for a writ of habeas corpus. Shortly thereafter, a writ was issued and made returnable before this court at a designated time. Certain preliminary points were disposed of and on August 5, 1935, A. E. Shaw, Esq., a member of the San Francisco bar, was duly appointed to act as referee in the matter for the purpose of taking evidence.

[3] It is not uncommon to order a reference in habeas corpus proceedings when disputed questions of fact exist. In *re McCoy*, 10 Cal.App. 116, 101 P. 419; In *re Matusow*, 129 Cal.App. 76, 18 P.(2d) 72; *Ex parte Eagan*, 18 Fla. 194; *U.S. ex rel. Chin Cheung Nai v. Corsi* (D.C.) 55 F.(2d) 360; *Cooke v. Cooke*, 67 Utah, 371, 248 P. 83, 84; In *re Meyer*, 146 App.Div. 626, 131 N.Y.S. 380.

The order appointing the referee defined the issues to which the evidence was to be directed, as follows:

"1. Did any witness who testified against Thomas J. Mooney in the trial which led to his conviction on the charge for which he is now deprived of his liberty, commit perjury as defined in section 118 of the Penal Code of the State of California, that is, did such witness testify to any material matter which he knew to be false?

"2. In the event that such witness or witnesses did commit perjury, as so defined, did the representatives of the State of California, the District Attorney or any of his deputies or assistants cause or suffer such testimony to be introduced knowing that such testimony as given was perjured?

"3. Did the District Attorney or any of his staff charged with the prosecution of Thomas J. Mooney deliberately, wilfully, knowingly or at all suppress or prevent the introduction of any evidence which, had it been given, would have been favorable to the defense of said Thomas J. Mooney?"

It was provided by court order that the body of petitioner, in custody of the sheriff, be produced at hearings before the referee. In the interest of orderly procedure, and to insure to petitioner a full hearing and a complete record for the consideration of this court, the practice was adopted, pursuant to court order, of permitting the parties to put into the record, by way of an offer of proof, all testimony or other evidence to which objection might be sustained by the referee. This was in addition, of course, to all other properly admitted evidence. The hearings before the referee were for the most part held in the city and county of San Francisco. Hearings were also held in various cities throughout the United States, the place being determined solely by the residence or convenience of witnesses. Said hearings commenced on August 12, 1935, and extended to August 31, 1936, a period of approximately 1 year, during which time a record consisting of 20 volumes, containing 13,416 pages of evidence or proffered evidence and hundreds of exhibits, was made up. On August 5, 1936, the referee was directed to prepare and file his findings of fact, based upon the evidence adduced before him. His report and findings were filed herein on January 28, 1937. All material issues were resolved against the petitioner by the referee. On March 12, 1937, the petitioner filed his exceptions to the report and findings of the referee.

Before undertaking to narrate the evidence adduced by the prosecution upon petitioner's trial and prior to a consideration of his present attack thereon, we deem it pertinent here to state that in our examination and consideration of this cause we have disregarded the "Report and Findings of Fact of the Referee" on the issues involved. We have done so, not because

of any dissatisfaction with the conclusions of the referee, but for the reason that both petitioner's and the Attorney General's proposed findings differ materially from those of the referee, and we have reached our determination of the cause upon our own examination of the record. Our findings and conclusions will be developed and disclosed as this opinion progresses. With the way so cleared by this chronological history of the case, we now address ourselves to the evidence upon which petitioner's guilt was determined and his present effort to avoid its consequences.

We direct our attention first to the testimony of John MacDonald, given upon the trial of petitioner. MacDonald, then an itinerant waiter and seller of newspapers, testified, in substance, that he arrived on the southeast corner of Steuart and Market streets at "about 1:40" on the afternoon of July 22, 1916, the day of the explosion; that while standing on Steuart street about 12 or 15 feet from Market street, he saw a man, identified by him before the trial as Billings, walking from the direction of Mission street toward Market street on the west side of Steuart street; that Billings was carrying a suitcase which he set down near the building line on the sidewalk near the southwest corner of Steuart and Market streets; that Billings appeared "excited" and his head "was working on a pivot"; that after depositing the suitcase Billings walked to the corner and to the door of a saloon; that almost immediately another man, whom the witness subsequently and also prior to the trial identified as Mooney, the petitioner herein, came out and joined Billings; that they talked, looked at the petitioner's watch and toward the Ferry building, and departed, separately, through the crowd and were lost to the sight of the witness; that the witness shortly thereafter left the vicinity and walked slowly down Market street toward the Embarcadero; and that when he had walked approximately 150 feet he heard the report of an explosion. Other evidence established the time of the explosion as 2:06 p. m. The witness MacDonald also testified on the trial that he "estimated" it was about 5 minutes after he (the witness) arrived at Steuart and Market streets that he first saw Billings (computation reveals this to be at approximately 1:45 p. m.) and that he did not know the exact time Billings set the suitcase down. He was "positive" that

Mooney was the man who came out of the saloon and joined Billings.

[4] On cross-examination, defense counsel attempted to make much of an asserted change of time in the testimony of the witness given upon the prior Billings trial and upon petitioner's trial. Inasmuch as a similar contention is here advanced and the alleged discrepancy in time is charged to and asserted to be the product of improper suggestion by deputy district attorney Cunha, who prosecuted Mooney, we shall pause at this point to consider the contention.

Upon the Billings trial, MacDonald testified, as to the matter of time, that he saw Billings "as near as can remember 8 or 10 minutes to 2" and that it "must have been about two o'clock" when he set the suitcase on the sidewalk. We perceive no great variation in the story of the witness as regards the fixing of the time of the events narrated by him. In each instance, and upon each trial, it is apparent that the witness was not attempting definitely to fix the exact time of the occurrence of the events. MacDonald was merely estimating and approximating the time of the occurrences described by him. His testimony upon the Billings and Mooney trials is susceptible of no other construction. This is likewise true of his testimony upon the subsequent trials of Rena Mooney and Weinberg (also introduced into this record) where, in effect, he testified he (the witness) arrived at Steuart and Market streets between "1:30 and 1:40" and that he saw Billings "about" 5 minutes later. We are of the opinion that no material variation appears in the testimony of the witness upon the several trials that would warrant any claim of corruption against the witness or the prosecuting authorities. Moreover, in asserting that a discrepancy exists in the time element between the testimony of MacDonald upon the Billings and upon the Mooney trials, and in charging the same to the prosecuting officials as part of an avowed attempt on their part to reconcile the time fixed by the witness in the latter trial with the defense of the petitioner which, if accepted, placed him several blocks distant from the scene of the explosion at or about the time the testimony of the witness MacDonald placed him at Steuart and Market streets, petitioner has overlooked the fact that as regards the time element the testimony of the witness upon petitioner's trial is con-

sistent with and the same as that given by him before the grand jury that indicted petitioner and his codefendants, which testimony before the grand jury was given prior to the trials of any of the indicted persons and at a time when it was not necessary for the prosecution to "meet" what was then an undisclosed defense. Before the grand jury, the witness testified that he arrived at Steuart and Market streets "about twenty minutes of two" and shortly thereafter saw Billings and Mooney conducting themselves substantially as already set forth. The time so fixed by the witness on that occasion is identical with the time specified by the witness upon the Mooney trial and definitely destroys petitioner's charge of collusion and corruption in the matter between the Billings trial and the trial of petitioner. Nor, for the same reason, may it successfully be urged that an asserted change of time in MacDonald's story was fabricated in the interim between the two trials in an effort to make it consistent with the testimony of the witness Oxman, to which testimony reference will later be made. This follows from the fact that, upon the occasion of MacDonald testifying before the grand jury and fixing the time of the events observed by him at Steuart and Market streets substantially identical with the time designated therefor in his testimony upon petitioner's trial, the testimony of the witness Oxman constituted no part of the prosecution's case for the reason that he had not then been located. In fact, Oxman had not been located at the time of the Billings trial and he did not appear as a witness at that trial. In addition to what has been said upon the time element, we have the positive testimony of the prosecuting officials denying that they requested the witness to or had him change the time of the events described by him. They likewise denied any and all other claimed improper conduct with reference to this witness.

We turn now to other matters which the petitioner asserts challenge the credibility of the testimony of the witness MacDonald, as given upon the trial. On February 7, 1921, approximately 4 years after petitioner's trial and conviction, MacDonald executed what may be termed an affidavit of repudiation. In the petition herein it is alleged that at that time MacDonald voluntarily called at the New York office of one of petitioner's present counsel

and after stating that he had perjured himself upon petitioner's trial pursuant to asserted coaching given to him by the district attorney's office, then and there executed the affidavit which since its execution in 1921 has constituted one of the principal props supporting petitioner's case. Subsequent developments tend to indicate that MacDonald's "voluntary" decision to purge himself was induced or at least influenced by circumstances that cast suspicion thereon. By this statement no reflection is intended upon counsel. We shall presently and specifically clarify the point. Later developments, as will be shown, likewise challenge the truthfulness of such attempted repudiation.

Sight should not be lost of the fact that in his affidavit, and up to the present moment, MacDonald has never retracted his testimony that he was in the vicinity of Steuart and Market streets on the day of the explosion and observed two men, one with a suitcase, acting in the manner described by him at the trial. His belated repudiation relates solely to the exact time then fixed by him for such occurrences, and to his identification of Mooney and Billings as the individuals then observed by him. He avers that he was induced to falsify his testimony and perjure himself in these particulars under the guidance and instruction of the district attorney, his assistants, and certain police officials. MacDonald repeated this repudiation of his testimony in the respects just mentioned in a later affidavit, bearing date July 12, 1930, wherein, among other things, he reaffirmed the 1921 affidavit. In his 1930 testimony before the members of this court, sitting as a commission, In the Matter of the Application of Warren K. Billings for a Pardon (210 Cal. 669, 298 P. 1071), he also assumed to retract certain portions of his testimony given at petitioner's trial, particularly having to do with the time element and the identification of Mooney and Billings. Again, upon the present proceeding, when called as a witness by the petitioner, he reiterated his repudiation of the indicated portions of his trial testimony and testified that the falsity therein was induced by the prosecution. Being confronted with the fact that he had testified under oath in substantially the same manner upon five occasions (before the grand jury and at four trials) and had substantially reaffirmed his testimony in a letter, to be

mentioned shortly, MacDonald at the 1930 hearing before the members of this court could assign no reason why his affidavit of repudiation or his testimony at that hearing should be accepted and believed in preference to his testimony given at the trials. He also conceded while on the stand in the present hearing that he could not expect any court, under all of the circumstances, to attach any credibility to his attempted repudiation. It is significant to note that less than a month prior to the execution by MacDonald of his first affidavit of repudiation, he addressed an unsolicited letter on January 11, 1921, to Duncan Matheson, wherein, among other things, he wrote: "What is all the fuss about Mooney again? * * * I will say if I was on my death bed and the last words from me, would be that he is guilty, and that what I swore to was nothing but the truth, and I am willing to take the stand tomorrow and swear to the same things." Duncan Matheson, the addressee of MacDonald's letter, is now treasurer of the city and county of San Francisco. He was formerly a captain of police and immediately after the bomb explosion was placed in charge of the so-called Bomb Bureau created to investigate the crime and track down the perpetrators thereof.

It is inconceivable that MacDonald could writ an unsolicited letter to Matheson unqualifiedly affirming the truthfulness of his trial testimony and then, less than a month later, make an uninduced confession of perjury. An explanation for such a complete and radical change of attitude is to be found in certain events that preceded the execution of the first affidavit of repudiation. The explanation, in our opinion, is to be found in the testimony of Edward N. Nockels, given before the members of this court in 1930. His testimony was read into this record pursuant to agreement, and in order to serve the convenience of Nockels and thus not require him to be present at the hearings held herein before the referee in Grayville, Ill. The testimony of Nockels, so read into the record, discloses that he was then the secretary of the Chicago Federation of Labor and had been for 27 years; that after the Mooney trial his organization sent out over the country pictures of the witness MacDonald in an effort to locate him; that MacDonald was located in Trenton, N. J., whereupon the Chicago Federation of Labor in January, 1921, sent

one Jack Johnston there to observe MacDonald (the latter has always referred to Johnston as Thompson, the only name he claims to have ever known him by); that Johnston remained in Trenton for several weeks and roomed in the same place as MacDonald; that Johnston ultimately communicated with the witness (Nockels) and informed him MacDonald had confessed that he committed perjury upon petitioner's trial; that MacDonald was brought to New York and, as already indicated, executed the 1921 affidavit of repudiation. The witness admitted that his organization thereupon paid Johnston and MacDonald each \$500 and financed a trip for both to California and return, including transportation, compartment, and expenses en route. After arriving here, MacDonald failed to testify before the grand jury, undoubtedly the purpose for which the trip was undertaken. Nockels also testified he did not know who paid the expenses of MacDonald's 1930 trip to California when he testified at the Billings hearing and Nockels volunteered the statement that in the absence of other arrangements his organization again would have furnished them.

Since the execution of the 1921 affidavit of repudiation, MacDonald's statements have been a sequence of inconsistencies, contradictions, and obvious falsehoods. The members of this court so stated in a report to the Governor, *supra*, filed in 1930 in connection with the Billings application for a pardon. Since his first repudiation he has been a vacillating and inconsistent witness who has repeatedly contradicted himself in the expression of a series of patent falsehoods uttered in a vain and abortive effort to retract and repudiate his trial testimony, given at a time when he was free of the influences and forces which over the years have fastened themselves upon him.

His testimony in this proceeding is as unsatisfactory and as patently perjured as his 1930 testimony upon the Billings pardon application. While on the stand in this proceeding as a witness for the petitioner, MacDonald testified on direct examination that he did not see Mooney or Billings at Steuart and Market streets or any other place on the day of the explosion; that he testified falsely before the grand jury and upon each of four trials when he said he had seen them at that place; that he could not have identified them had Captain of Police Goff, then as-

signed to the Bomb Bureau, not pointed out their pictures in a book and said they were the " * * * they wanted"; that the first time he ever saw Mooney or Billings was several days later and while they were in jail; that upon that occasion he, in company with Goff, went to see Mooney in jail and the three of them spoke (this was contradicted by the petitioner himself while on the stand herein when he testified that nothing was said at the time by anyone); that Goff thereupon took him to the Bomb Bureau and in the presence of District Attorney Fickert and others said, "he identified him" (singularly enough, the witness does not recall what he then replied, though he purports to detail other portions of the conversation); that the following day he was taken by Goff and the district attorney to see Billings at the Park Police Station; that he was told by Goff that the man he saw was Billings though he could not recognize or identify him; that Goff then told the district attorney, who had remained outside the building in an automobile, that the witness had identified Billings; that prior to the grand jury session and the trials the district attorney and his deputy Cunha told him that Mooney and Billings were the persons they wanted and to swear they were the two he had seen at Steuart and Market streets; that in the interim between the Billings and Mooney trials Cunha told him to change the time (a matter already discussed) though, almost in the next breath, he testified that "I do not really think that anybody suggested to me that I change the time as to when I saw the suitcase put down, from about 2 o'clock to about 1:45"; that he refused to testify upon the later Weinberg trial, as assertedly requested by Cunha, that he had seen an automobile at the scene of the explosion (this, apparently to cause his testimony to conform in this particular with that of the witness Oxman who testified upon petitioner's trial); that he refused to so testify because "I just made up my mind then that I wasn't going to swear that I did see an automobile there because there wasn't any automobile there." We pause here to state that this is a fair indication that the witness testified truthfully upon the several trials for if he refused to "cooperate" to the extent of testifying falsely as to the presence of an automobile at the scene of the explosion because he had not seen such a vehicle there,

it is inconceivable that, merely because requested, he would testify falsely as to the identity of the persons he had seen there when in all probability such identification might lead to their execution.

Cross-examination of MacDonald herein resulted in the witness entangling himself in a series of contradictions which cast serious doubt upon his present testimony and leads to the conclusion that he is now corruptly attempting to undermine and destroy his trial testimony. During the course of such cross-examination, MacDonald again narrated the events he had witnessed at Steuart and Market Streets. Again, he fixed the time of his arrival there as approximately 1:40 p. m., which is consistent with his testimony given before the grand jury and at the Mooney trial. He testified herein that at the time of his arrival at Steuart and Market streets, one short block west of the starting point of the parade, the parade had not started, an incident that would impress itself upon a witness and tend definitely to determine the time element. Other evidence fixed the commencement of the parade at 1:30 p. m. which tends to indicate that MacDonald must have been at Steuart and Market streets at about that time.

In his effort to establish in this proceeding that he falsified his testimony upon petitioner's trial as to the time element, the witness in apparent confusion contradicted himself several times. This matter is again referred to merely as furnishing a reason for rejecting his present testimony as unreliable. Finally, he testified that while Cunha requested him to change the time he failed to do his bidding. Obviously, this contradicts the averment in his 1921 affidavit wherein he stated that he had changed the time at the insistence of Cunha. As a matter of fact, the witness here testified that the averment of his affidavit was false in this respect. Yet, immediately following, and in almost consecutive sentences, he contradicted himself and testified herein, first, that he did change his testimony as to time at Cunha's request and, then, that he did not.

Another contradiction in the testimony of the witness herein appears when on one occasion he testified that Goff did not show him the book containing the pictures of Billings and Mooney on the day that he made a statement to the police (to be re-

ferred to later) and on another occasion he testified that both events transpired on the same day.

In the course of his direct examination, the witness testified that he received \$5 or \$10 at a time from the prosecution and that while waiting to testify at the several trials he was sent to a ranch for several weeks where he was paid \$3 a day. On cross-examination he stated that he was not offered or paid any money by the prosecution. As some explanation for his presence on a ranch, he admitted on cross-examination that prior to his going there red pepper had been thrown in his eyes as he walked in front of the Sutter Hotel in San Francisco and also that he had received letters threatening his life. This would appear to furnish ample reason for the prosecution to remove its witness to a ranch or any other place of safety.

The story told by MacDonald herein as to his association and connection with the mysterious Johnston (alias Thompson) and Nockels is too absurd and fantastic to commend it to serious consideration. He admitted having lived in the same hotel with Johnston and talking with him about baseball and sundry other subjects, to the exclusion of the Mooney Case. In view of the explanation given by Nockels as to Johnston's mission at the time, MacDonald's statements are not entitled to any credence. In fact, as already shown, Nockels testified that Johnston had communicated with him and said that MacDonald had confessed perjury upon the trial. This is in utter conflict with MacDonald's testimony herein. MacDonald also testified herein that he went to New York with Johnston, paying his own expenses, and was there introduced in a saloon by Johnston to Nockels, at which time they talked for several hours without any mention being made of the Mooney Case. On cross-examination he admitted this testimony was in conflict with that given by him at the Billings hearing in 1930 wherein he testified: "We talked it over in there and he (Nockels) said, 'Let's go up and see Mr. Cochran' and I said 'Yes'. So then we found out Mr. Cochran was sick and he says 'We will go up and see Frank Walsh tomorrow morning.'" This prolonged silence as to the Mooney Case continued, according to MacDonald's story herein, up to the moment he appeared in the office of Mr.

Walsh, one of petitioner's present counsel, where he had gone at Johnston's suggestion, for some apparently undisclosed purpose. While in said office he executed the 1921 affidavit upon which petitioner relies. In explanation thereof, he testified "I guess Johnston told Walsh that I was willing to repudiate my testimony." In the light of MacDonald's earlier testimony in this proceeding that he and Johnston had not discussed the Mooney Case, one necessarily pauses to inquire from whence did Johnston receive the information that MacDonald was ready to repudiate his trial testimony. Realizing the absurdity of his story, and in an apparent endeavor to bolster obvious weaknesses therein, MacDonald then went on to testify in this proceeding that he did "not know how Johnston knew that, but guess that Johnston must have read it or seen it in the paper" and this, apparently prior to any public repudiation of this testimony by MacDonald.

Another illustration of the present unreliability of MacDonald is found in the fact that he here testified that when he went to New York in 1921 he had no intention or idea of making a confession or an affidavit of depudiation, while at the same time he admitted testifying at the Billings hearing in 1930 that he "went to New York to make a confession to Mr. Cochran."

There are other circumstances which illustrate material variations in MacDonald's attempted repudiation of his testimony and which prove beyond question that his testimony given in repudiation of his trial testimony is corruptly false and untrue. Among them are the many contradictions found in his testimony given before Lieutenant Governor Carnahan a few days following his testimony in 1930. His testimony on that occasion, made a part of this record by petitioner, is not only self-contradictory in many particulars but likewise runs counter to his earlier testimony at the Billings hearing. A similar circumstance is presented by the testimony of David Murphy, a retired police sergeant, who testified that he met MacDonald in 1920 in Baltimore at which time MacDonald requested the witness to inform Capt. Matheson that, while there was some talk about his changing or repudiating his testimony, he would not do so but would again testify, if necessary, in the same manner as upon the trials,

The unsatisfactory and highly contradictory testimony of MacDonald upon this proceeding causes us to affirm our appraisal of him as expressed in the report filed in connection with the recent Billings application for a pardon, *supra*. We there declared, in part: "However much MacDonald may have sought to discredit himself and his former testimony by the making of such an affidavit, we are satisfied that placing his two conflicting statements together and considering each in the light of the circumstances under which it was made, the original testimony of John MacDonald as given with so much of circumstance and detail upon the trials of each of these men, within a short time after the occurrence of the tragedy for the causation of which they were being tried, bears the stamp of truth, while, on the other hand, this belated affidavit, wherein he undertakes with so much of intermingled untruth to cast discredit upon his former testimony bears the stamp of falsity, and that the substance and effect of this affiant's former positive and damning identification of both of these men as the perpetrators of this foul crime has not been thereby overthrown."

Having in mind all of the circumstances and particularly the many contradictions in MacDonald's testimony given in this proceeding, we may well sum up the matter, as did Mr. Justice Richards upon the Billings second hearing, by declaring "as our deliberate conclusion that the effect upon our minds of the production of John MacDonald as a witness before us has been but to reinforce our former conclusion that his attempted repudiation of the testimony which he gave before the court and jury in the Billings and succeeding cases was so abundantly shown to be false, if not, as we believe, corruptly inspired, as to be utterly valueless for that purpose, and hence that the testimony of John MacDonald as given upon the Billings trial in 1916 [and the following trials, including petitioner's] and the truth thereof have not been successfully assailed or overthrown. * * *

In addition to the matters already referred to as lending credence to MacDonald's testimony as given upon the several trials, the following circumstances, fully developed in the record herein, serve also to establish the truthfulness thereof and the falsity of the attempted repudiation. It appears that on the afternoon of July 22, 1916, a short time after the explosion, Mac-

Donald told several persons with whom he casually came in contact that he had seen a man deposit a suitcase at the place of the explosion and prior thereto. In these conversations he described and repeated in detail the appearance and actions of the man and his confederate, substantially as he did upon the later trials. Several of these persons were called as witnesses in this proceeding by the respondent and related their recollection of MacDonald's statements. At the time, MacDonald was advised to convey his information to the police. Accordingly, on the following Monday morning, 2 days after the explosion, MacDonald went voluntarily to the police department. This accounts for MacDonald's presence in the case and, quite naturally, precludes any charge being made that he was produced by the prosecution in support of an asserted "frame-up." He thereafter told his story to police officials. He identified Mooney and Billings, according to the testimony herein of certain of those officials, from their pictures and their persons. Before the grand jury and upon the four subsequent trials he reiterated his story and positively identified Mooney and Billings as the persons he had observed at the scene of the explosion and acting in the manner described by him. Rigid and searching cross-examination by eminent counsel upon the trials left his story and particularly his identifications unshaken.

Moreover, at this hearing the district attorney and his deputies, who prosecuted petitioner and Billings, and Captains of Police Goff and Matheson, took the stand and denied the accusations made by MacDonald in his affidavits and in his subsequent testimony at the Billings hearing and in this proceeding. Capt. Goff while on the stand herein testified that he met MacDonald at police headquarters 3 days after the explosion whereupon MacDonald narrated to him what he had seen and in a manner substantially the same as his testimony upon the trials; that MacDonald also designated the several persons to whom he had related his experiences on the afternoon of the explosion; that MacDonald, without assistance or suggestion, had identified Billings and Mooney from pictures in a book, pointing out in the course of such identification that the picture of Mooney showed him with a mustache which MacDonald said he was not wearing on the day of the explosion, and which was the fact. Thereupon, Goff tes-

tified herein, he held a finger over the mustache and MacDonald definitely stated that the picture of Mooney was a picture of the man he had seen at Steuart and Market streets. Investigation verified MacDonald's statement that he had related his observations almost immediately after the explosion to the several persons named by him. A police report filed by Goff, under date of August 10, 1916, and put in evidence herein, substantiates this portion of Goff's testimony. Goff also testified that neither the district attorney nor any member of his staff, at whom the "frame-up" charge is principally directed, was present when MacDonald identified Mooney and Billings from pictures in the "Safe Blowers" book. Contrary to MacDonald's version of the incident, Goff, likewise testified herein that, when MacDonald was taken to the county jail to see the petitioner, he was permitted to walk along the tiers of cells, alone, and, when he found the man he had seen at Steuart and Market streets, he indicated with a gesture. It was petitioner's cell. Goff denied that he had pointed out Mooney or Billings in their cells, as testified by MacDonald.

Capt. Matheson testified, among other things, that prior to the trials the police department made a thorough check of MacDonald's past history and his name was found to be without blemish. Likewise, that his story stood up under investigation. He was regarded as a very satisfactory witness and Matheson indicated he had no reason to question or doubt his testimony, until the execution of the 1921 affidavit.

Charles M. Fickert, who as district attorney headed the prosecution of petitioner, when on the stand in this proceeding, denied the charges made against him by MacDonald herein. He testified that MacDonald had identified both Mooney and Billings before he had met him; that his recollection was that he met MacDonald for the first time on August 1, 1916, before the grand jury session; that he never suggested or directed that MacDonald should say that Mooney and Billings were the men he had seen at Steuart and Market streets; and that after the Billings trial he had sent MacDonald to a ranch because he had been set upon and otherwise harassed upon several occasions.

Edward A. Cunha, the deputy district attorney who prosecuted petitioner, testified, as regards the witness MacDonald,

that before petitioner's trial he went over MacDonald's testimony with him; that he did not suggest any change in time or any other portion of such testimony; that he did not tell MacDonald that Mooney and Billings were the men they wanted; that MacDonald's testimony to that effect is false; and that he did not attempt to have MacDonald testify at the later trials of the other defendants (which trials the witness did not direct) that he had seen an automobile at Steuart and Market streets.

[5, 6] We could go on at greater length narrating other matters and circumstances, of which the record is replete, establishing the falsity of MacDonald's attempted repudiation of his trial testimony. We are satisfied that sufficient has been said upon the point. We therefore find and conclude that the evidence before us is insufficient to establish that MacDonald gave false testimony upon the trial of the petitioner; that his attempted repudiation of his trial testimony is false; and that the charge that the prosecuting officials were guilty of subornation of perjury in connection with the testimony of the witness MacDonald is without substantial evidence to support it.

[7, 8] On the same day (July 24, 1916), that MacDonald first reported to the police and related to them what he had seen at Steuart and Market streets 2 days earlier, certain written reports were made by Police Officers McCullough and Hughes of statements made to them by MacDonald. As introduced in evidence here they were pasted together, back to back. These reports, among other things, purport to contain descriptions of the men whom MacDonald had seen at the scene of the explosion. It is conceded by the respondent herein that they are not accurate descriptions of either Mooney or Billings. Based on this, and on the allegation that the existence of these reports was not ascertained by petitioner or his counsel until the 1930 Billings hearing, the petitioner charges herein that these reports were deliberately suppressed or negligently concealed from the defense at the time of trial. Nowhere in the record is there any showing that the district attorney or his deputies has seen or were aware of the existence of these reports during any of the bomb trials. Petitioner upon his trial was ably represented by competent attorneys, well experienced in criminal practice. In fact, one of his counsel had short-

ly prior thereto severed his connection with the office of the district attorney wherein he had prosecuted many cases. Properly directed cross-examination, followed by a request or demand upon the prosecution in open court at the time of the trial, undoubtedly would have served to produce the reports now under consideration.

However, while knowledge of the contents of these reports may have assisted the defense in their cross-examination of MacDonald, we do not attach the significance or materiality to said reports that petitioner does. The descriptions therein merely inaccurately stated the heights, weights, and ages of the persons involved. No glaring discrepancy appears. It is a matter of common experience that the power to reproduce a mental picture of an unknown, or even a known, person, sufficiently accurate in every particular to enable ready identification of such person by others, is, in a great majority of cases, quite impossible. The indescribable countenance and physiological characteristics cannot be satisfactorily conveyed to another by words or in writing, except in rare cases. But when the person whose identity is in question is brought again before the identifying witness, the latter may with greater accuracy state whether such person agrees with the mental picture on the mind of the witness. Such is the situation that confronted the prosecution in 1916. In opposition to MacDonald's meager and inaccurate oral descriptions of Mooney and Billings in his statements to Officers McCullough and Hughes, there was the subsequent positive and unequivocal identification of those individuals by MacDonald both from their pictures and persons. Under the circumstances, the prosecution might well disregard as immaterial the former verbal statements of the witness. That is exactly what transpired. Capt. Matheson, when on the stand as a witness for petitioner, testified that 30 years of police experience had established to his satisfaction that persons usually describe another inaccurately; that an oral description of a person usually "isn't of any great value"; and that after a witness has actually identified a person, as did MacDonald, a prior written statement ceases to have any active effect and no further consideration is given to it. The record discloses that Capt. Goff, a police officer of many years experience, shared this view. This would appear to be adequate explanation as to why the McCul-

lough and Hughes reports were permitted to rest as merely two of several hundred reports or exhibits in the police files. Other than the asserted fact that petitioner was without knowledge of the existence of these reports until 1930, the record herein is destitute of any evidence tending to establish their deliberate suppression. We, therefore, find and conclude that at the time of petitioner's trial there was no suppression of material evidence in connection with the testimony of the witness MacDonald.

In the interim between the Billings and Mooney trials, the prosecution located Frank C. Oxman who appeared as a witness against petitioner. Oxman, who then resided in Durkee, Or., and who has since died, testified, in substance, that he was engaged in the cattle business which frequently brought him to San Francisco; that on the day of the explosion he arrived in San Francisco between 12 and 1 p. m. and shortly thereafter was standing at the southwest corner of Steuart and Market streets (this would place Oxman on the same side of Steuart street whereon the explosion occurred and opposite to that side of the street upon which MacDonald stood); that while there he saw an automobile facing toward the ferry and containing Mooney, Rena Mooney, Billings, an unidentified man, and Weinberg, the latter driving; that Mooney, while sitting in front and to the right of the driver, was holding a suitcase on the running board; that the automobile stopped, whereupon "the little auburn-haired boy (indicating Billings) jumped out of the hind seat, very excitedly and very rapidly and took the suitcase"; that the second and unidentified man also got out of the rear seat, came on the sidewalk near the witness, and took the suitcase from Billings and the two walked down Steuart street a short distance; that Mooney got out of the automobile and looked after the others; that Billings then took the suitcase from the unidentified man and placed it on the sidewalk against the building; that Billings then came back and joined Mooney; that he thinks "They went in the door of the building there * * * I won't be sure whether all of them or not * * * and directly came out"; that Mooney and Billings were then talking, the former saying, "Give it to him and let him go; we must get away from here; the bulls will be after us"; that Billings gave something to the unidentified man, who then

left; that Billings went toward the automobile; that Mooney looked at his watch and at the ferry clock and proceeded toward the automobile; that the automobile then proceeded into Steuart street; and that the witness left and arrived at the Terminal Hotel on the north side of Market street and a little to the west of Steuart street at about 1:45 p. m., he estimated, because he was expecting a phone call from a Miller & Lux buyer at 2 p. m. On cross-examination of Oxman at the trial it was disclosed that he first told his story in Kansas City to someone who had phoned him and said he represented the district attorney of San Francisco; that he met the party later and told his story in response to questions; that he later got a letter from the district attorney inquiring when someone could be sent to interview him; that Lieut. Bunner thereafter came to his headquarters at Durkee, Or.; that he gave him a detailed story of the occurrences he had observed at Steuart and Market streets. Again, on cross-examination he traced his movements on the day of the explosion, and testified that the automobile referred to on direct examination came along and stopped for about 2 minutes; that he entertained "no question about the identification" of the persons therein; that as the automobile left he made a note of the license number, whereupon he produced an envelope on which was written "Ford No. 5187, think stolen 'grip' S.F. July 22nd"; that he wrote the number down because "they trace cattle thieves with the numbers"; that he heard about the explosion the next day but "didn't want to get mixed up in that connection with anybody that throwed a bomb" and "didn't want to come and testify" because he had 5,000 cattle on ranches in Oregon and Idaho requiring his presence; that he later identified Mooney in jail; that Mooney was not pointed out to him; and that he walked by several cells and picked out Mooney in cell No. 29 and wrote that number down, again evincing his characteristic or practice in this respect.

The foregoing represents the substance and material portions of Oxman's trial testimony. We shall now consider and dispose of petitioner's contention having to do with an asserted inconsistency between it and MacDonald's testimony. This contention is advanced in support of the charge of perjury in the testimony of the 2 witnesses. The alleged discrepancy is supposed to lie in the fact that MacDonald in

narrating what he had seen described only 2 persons, Mooney and Billings, and made no reference to the presence of an automobile. We perceive no irreconcilable conflict in the testimony of the 2 witnesses. It should be borne in mind, as already pointed out, that the 2 witnesses were standing on opposite sides of Steuart street, which street at the time was more or less crowded or congested with potential parade participants and onlookers. Each witness may well have seen different phases of the same transaction or event. In fact, this reasoning finds support in their testimony. MacDonald may well have noticed or observed, to the exclusion of everything else, that portion of the occurrences described by Oxman from the time Billings took the suitcase from the unidentified person mentioned by Oxman, proceeded to the wall of the building, placed the suitcase there, and then, continuing toward Market street from the direction of Mission street on the west side of Steuart street, met Mooney, whereupon the two emerged from the direction of the saloon door, as mentioned by both witnesses. Both witnesses, it will be recalled, thereupon described Mooney and Billings as talking, looking at a watch and the ferry clock and then leaving separately, Oxman stating that each proceeded "toward" the automobile while MacDonald said they became lost in the crowd.

[9] We shall not dwell longer on the point. In our opinion, the testimony of the 2 witnesses is not in irreconcilable conflict. We have discussed the point merely because of its possible bearing upon the charge of frame-up and perjury now and heretofore urged. A similar contention was advanced upon petitioner's appeal from the judgment. There, as here, this court concluded that the stories of the 2 witnesses were not incompatible and that it was well within the bounds of reason that the witnesses saw parts of the same occurrences, but that Oxman, because of his proximity to the happenings, saw more than MacDonald could observe from the place which he occupied on the opposite side of Steuart street.

We turn our attention now to the charge that the prosecution upon petitioner's trial suppressed material evidence which would have assisted the defense in their cross-examination of Oxman. This charge bears upon and has reference to Oxman's Kansas City affidavit under date of October 26, 1916. Prior to the execution of said affidavit it

appears that the district attorney had received certain information, to be later developed in another connection, of the existence of a witness who ultimately proved to be Oxman. The information was such as to warrant the district attorney employing the services of a nationally known detective agency in an effort to locate said witness. He was found in Kansas City by an operative of that agency and it was then that the much-discussed Kansas City affidavit was executed. The report of an operative, bearing date October 26, 1916, was read into evidence herein and it narrates Oxman's story substantially as he did upon petitioner's trial and this, at a time obviously prior to any possible association between Oxman and the officials here charged. In this Kansas City affidavit Oxman averred that he arrived in San Francisco on the day of the explosion "just before or about noon"; that he proceeded to the Terminal Hotel; that it was crowded, but he was promised a room by the clerk before night; that he left his grip and remained about the lobby for a few minutes; that he was unsuccessful in finding an uncrowded place to eat; that he remained "on the corner of a side street leading out from Washington street to the left, being I think, the first street leading out from the west after leaving Front street"; that he remained on the corner "a few moments, and my attention was called to a jitney—I think a Ford, stopped near me. * * * It was driven by a driver, three people in the back seat, two in the front seat, one of which was the driver. One of the five people was a lady. Very soon after the car stopped two gentlemen from the rear seat got out. The second gentleman to get out handed to the first gentleman to get out, a common looking suitcase, being of brown paper or cheap leather. While I was standing on the corner one of the gentlemen carrying the suitcase pushed me to one side. The second gentleman also rubbed up against me. They proceeded on a few feet when the gentleman carrying the suitcase handed it back to the gentleman which had given it to him after they left the automobile. This gentleman proceeded about ten feet and set it down by the side of a brick building. * * * They proceeded back and also seemed to be a little frustrated * * * I noted them talking in a foreign language. * * *" Oxman then went on to aver in his affidavit that pictures of Mooney, Billings, and Weinberg satisfied him that

they were the men he had seen, Weinberg being the driver and Mooney sitting to his right. The woman was described as wearing "a broad brimmed cheap hat, and had a very prominent and bold face."

In the main, there is no great deviation between the substance of the averments of the affidavit and the material portions of Oxman's subsequent testimony upon petitioner's trial. As to the persons he has observed, their manner of approach to the scene, and their conduct while there, the two are substantially the same. Much is attempted to be made of the improper designation or misdescription of the streets in the affidavit. This is explainable. As we have seen, Oxman lived in another state and was a stranger who came to the city only when business required. It is conceivable, under the circumstances, that he might improperly designate the streets. The testimony of Stephen Bunner, given before the grand jury on certain charges pending against Oxman before that body subsequent to the Mooney trial, discloses that, prior to coming to California as a witness, Oxman was interviewed by him in Durkee, Or., in November, 1916, the month following execution of the Kansas City affidavit, with a view to ascertaining what he knew of the events under investigation. Bunner testified that in the course of the interview the matter of the misnamed or misdescribed streets in the affidavit came up for discussion, whereupon Oxman took a paper and pencil and sketched what proved to be the Embarcadero, Sacramento, Market and Steuart streets, thus indicating he was at the scene of the explosion though improperly designated by him in the prior affidavit. Bunner was corroborated in this latter respect by Fickert and Cunha, each of whom, while on the stand in this proceeding, testified that when Bunner returned from his interview with Oxman in Oregon he had with him a diagram assertedly drawn by Oxman. Bunner further testified before the grand jury at that time that Oxman identified pictures of Mooney, Billings, Rena Mooney, and Weinberg and expressed a dislike to come to San Francisco and testify because he thought "a man is taking his life in his hands that goes and testifies against any of these people," but indicated he would testify later when necessary. Bunner, a former police captain, is out of the state and could not be located to testify upon this proceeding. His testimony was read into the record by petitioner.

The fact that Oxman averred in his affidavit that he "noticed them talking in a foreign language," which was not mentioned by him upon the trial, is stressed by petitioner as something worthy of cross-examination if the affidavit had been available or made known to him upon the trial. In response to this contention it might be argued that the "foreign language" may have been uttered by the unidentified man whom Oxman designated as being with the others at the scene of the explosion and, according to Fickert's testimony herein, whom Oxman designated on one occasion in the district attorney's office as "a foreigner." Moreover, said unidentified man may well have been the person described by the witness Crowley, upon the Billings trial, as the person he saw with Billings at Steuart and Mission streets, less than a block from the scene of the explosion, immediately prior thereto and shortly thereafter. He was described by Crowley, who is now dead and whose testimony was likewise read into this record by petitioner, as "either a Spaniard or a Mexican." Such a person may have uttered the "foreign language" referred to in the affidavit of Oxman and it is equally conceivable that he and Billings shortly after the placing of the suitcase abandoned the party, to be seen by Crowley at Steuart and Mission streets—the others, particularly Mooney and Rena Mooney, thereupon dispatching themselves, by the automobile described by Oxman, to other places, including possibly the roof of the Eilers building, where petitioner and his wife assert they were during all the times the prosecution witnesses had them elsewhere.

This rationalization is offered merely as a possible answer to petitioner's charge of frame-up and perjury based on asserted discrepancies in the statements and testimony of the several prosecution witnesses. It is not advanced as proof of the fact that the petitioner and his wife were or were not on the Eilers building roof as contended by them from early afternoon. That defense and issue was fully presented to the jury upon petitioner's trial and was impliedly found to be without merit upon the return of a verdict of guilty.

[10] However, even in the absence of the foregoing possible reconciliation of portions of Oxman's Kansas City affidavit with his testimony upon petitioner's trial, we cannot accede to the contention that such affidavit was suppressed and concealed upon

the trial so as to preclude proper cross-examination of the witness thereon. As we have already shown, upon petitioner's trial and during the cross-examination of Oxman, the defense itself disclosed in open court that he had first told his story in Kansas City in response to questions asked by one who said he represented the district attorney. With this information before them counsel representing petitioner, versed as they were in the practice of criminal law, by the simple expedient of a request or demand for such statement, theretofore admittedly made by the witness, could and would have procured the same for their own use on cross-examination. We therefore find and conclude that petitioner upon his trial had knowledge or information sufficient to charge him with knowledge of the existence of Oxman's Kansas City statement; that the prosecution did not deliberately or improperly conceal the same from petitioner; and that the prosecution did not in this respect suppress evidence material to the defense.

It should be noted, in passing, that the original Oxman Kansas City affidavit has not been found and was not introduced in evidence in this proceeding. Two documents, purporting to be copies of such affidavit, and found in widely separated places, caused the respondent herein to accept the same as true copies, though no incontrovertible proof of that fact appears in the record. We have proceeded upon the theory that they are copies of said affidavit.

The attacks upon the witness Oxman and his trial testimony have assumed many and varied forms. The attacks have not always been consistent, except in their objective to prove Oxman a perjurer. In our opinion, this inconsistency in a degree tends to lessen the force and effect of such assaults. As an illustration of the inconsistency of petitioner's attacks upon Oxman's testimony, it may be pointed out that, upon motion for new trial, the petitioner filed the so-called La Posee affidavit wherein the affiant averred that she saw Oxman in San Francisco on the day of the explosion at approximately 2 p. m. in front of the Phelan building on Market street. This point is considerably farther up Market street than Oxman's testimony upon petitioner's trial placed him at that time. The affiant also averred that she sat silent in the courtroom during the giving of Oxman's alleged false testimony and throughout the trial and until the motion for new trial, without informing defense coun-

sel of the contents of her affidavit. The affidavit appears to be absurd on its face and apparently carried little weight with the trial judge, who denied the motion for new trial. It is mentioned, as stated, merely to illustrate the inconsistency of petitioner's attacks upon Oxman and his testimony for, as will later appear herein, a subsequent assault thereon, contrary to the *La Possee* assault, undertakes to establish that Oxman was in another city, many miles away, at the time his testimony, and the *La Possee* affidavit filed by petitioner upon motion for new trial, had him in San Francisco.

An attempt is made to show that Oxman's introduction to the Mooney case was, in common parlance, "shady." This claim rests to some extent upon the testimony of one James A. Tate, 71 years of age, who testified herein on behalf of petitioner that about 3 or 4 weeks after the explosion he had a conversation with William F. Woods, a station agent at Durkee, Or., and who it will shortly be shown gave the district attorney the information which led to Oxman becoming a witness, in which conversation Woods is asserted to have informed Tate that he had been offered \$1,000 by a person (ostensibly Oxman) who wanted him (Woods) to "tip him off" as a witness to the San Francisco authorities. Tate testified further that he advised Woods against such an improper course. Upon motion, the evidence was properly stricken as hearsay but remained in the record herein as an offer of proof and upon promise of counsel to subsequently connect it up. Without waiving his objection thereto, the Attorney General cross-examined the witness. For present purposes we shall disregard the hearsay character of the evidence and consider it for what it is worth. Subsequent developments detract, materially from the value of the testimony of the witness and deprive it of all vestige of credibility. On cross-examination the witness testified that he imparted the information to two of defense counsel, naming them, *during the Mooney trial*, yet it does not appear to have been employed at that time in an effort to discredit Oxman. Tate also testified on cross-examination that he had read the newspapers all during the Billings and Mooney trial and read Oxman's testimony at the latter trial; that he was never asked to make an affidavit or to come to San Francisco and testify upon this matter; and that he knew Mooney was to hang (before commutation of sentence) but made no ef-

fort to inform the prosecuting authorities of the information he claimed to have possessed. His testimony in this proceeding comes 20 years after petitioners' conviction and lacks in evidentiary substance. Moreover, Woods, when on the stand herein upon call by the petitioner, denied on cross-examination that he had any such conversation with Tate. He testified further that the correspondence by which he first acquainted the district attorney with knowledge of Oxman's existence was not the result of prearrangement with Oxman. Under all the circumstances, we find and conclude that the testimony of James A. Tate herein is not worthy of credence.

Edward E. Lyon, assistant station agent under Woods at Durkee, Or., testified that in September, 1916, Oxman advised him he could make "a piece of money" by merely forwarding Oxman's name to the district attorney of San Francisco. This testimony, like that of Tate, the preceding witness, coming as it does more than 20 years after the occurrence, lacks in evidentiary value. This sudden desire to unburden himself, in the face of a prolonged silence when persons were faced with possible execution, places his testimony in an unfavorable light and tends strongly to deprive it of substance and credibility.

Petitioner also called as a witness upon this proceeding one Oliver O. Baisley who testified that in the latter part of September, 1916, he had overheard a conversation between Oxman and Woods in which the former stated, in substance, that "if this goes through there is \$2500 in it for you" and that he then heard Woods read aloud his letter thereafter mailed to the district attorney in which he offered to put the district attorney in touch with a witness for \$2,500. This evidence, like the Tate and Lyon testimony, obviously does not connect the district attorney with such asserted improper conduct and necessarily falls short of the burden resting upon petitioner. For this reason, an objection was properly sustained thereto and the same went in merely as an offer of proof. A motion to strike was thereafter properly granted. Without waiving his objection, and merely to assure a complete record, the Attorney General cross-examined the witness. On such cross-examination, it was revealed that the witness overheard the conversation when 12 or 14 feet from the parties. It is inconceivable that persons engaged in so nefarious a scheme would plan the same aloud in a rail-

road station, as indicated by the witness. On cross-examination the witness admitted that it "dawned" on him in 1917 after the Mooney trial that there was something wrong with the testimony of Oxman upon the trial but he did not desire to mix up in the case and therefore did not mention the matter to the Mooney defense until a week before this proceeding commenced in 1935. While admitting he had not seen a copy of the letter of Woods to the district attorney for 19 years, the witness recited the contents thereof almost verbatim. These matters, in our opinion, detract materially from the testimony and cause us to conclude that it is not worthy of credence.

This brings us to a consideration of the introduction of Oxman to the Mooney Case and certain interesting and subsequent developments upon which petitioner places much stress in his charge of frame-up and perjury. District Attorney Fickert, while on the stand in this proceeding, testified in this connection, in substance, that he first heard of Oxman from one Wotchorst, a former district attorney of Sacramento county, who informed him that he had heard from a friend of a man by the name of Oxman who apparently had indicated that he had observed a suitcase being placed at the scene of the explosion but who was reluctant to become a witness. Fickert testified that he communicated with his informant in an effort to locate the party who had seen the suitcase deposited. However, before receiving any additional information from this lead, Fickert testified he received a letter, which was introduced in evidence, bearing date September 21, 1916, from Woods, the station agent at Durkee, Or., referred to above. In that letter, Woods stated that 6 days after the explosion he had talked with a reputable Oregon business man who said he was in San Francisco and had witnessed the placing of a suitcase near the corner of Steuart and Market streets and felt he could identify the parties involved in the episode. The letter went on to state that rather than neglect his business the informant decided when in San Francisco not to disclose what he had seen and that he was still of the same view. Woods concluded his letter by saying "if his testimony in this case will be of service to you I will put you in touch with this party for \$2500.00 payable upon conviction of the guilty parties."

[11] On September 23, 1916, the district attorney replied to Woods asking for

additional information and descriptions of the persons so that he might ascertain "the correctness of the witness' statement to you. * * *" Woods' reply to this letter under date of September 27, 1916, could not be found and, based solely upon its absence, and without any definite knowledge of its contents, the petitioner charges suppression of material evidence by the prosecution. This charge is not directed at the Attorney General for his failure to produce the letter upon this hearing but rather at the prosecution officials upon the theory that the letter must have contained damaging information and hence was destroyed. This contention is based solely on surmise and conjecture. When on the stand in this proceeding, Woods answered "Yes" to a query inquiring whether the missing letter detailed what Oxman (then unnamed in the correspondence) had told him. He also testified that his copy of the missing letter had been destroyed several years earlier and that he could not remember all the details thereof. We find and conclude that petitioner's charge of suppression in connection with this letter is based wholly on suspicion and is without substantial evidence to support it.

The district attorney next addressed a letter to Woods on October 9, 1916, the opening sentence of which states "I received your communication of September 27th." Certainly, if the prosecution deliberately destroyed or concealed Woods' prior letter of September 27th, as assumed by petitioner, because of its implied damaging contents, it seems reasonable to conclude that the district attorney's reply thereto of October 9th, expressly referring to it, likewise would have "disappeared" in order to conceal the fact that the prior missing letter had been written.

In his letter of October 9, 1916, the district attorney stated to Woods: "In some particulars the information you give corresponds with the evidence given by the witnesses in the trial of the case (this has reference to the Billings trial which has just concluded). Of course, it will be impossible for me to tell what this information might lead to until I have a talk with the man who informed you. We have heard of a man from Oregon by the name of Oxman who has stated that he knew something about the explosion. * * * If you would give us the name and address of your informant there would not be likelihood of your getting into trouble on that account, as no good citizen would

complain about your taking such action. We would also not reveal the source of the information.

"In reference to the reward offered for information leading towards the arrest and conviction of the perpetrators of the bomb outrage, I have nothing to do with the disposition of that money. * * * I want it positively understood that no witness in the case should under any circumstances receive any part of the reward because I believe it is very bad policy and sometimes would tend to fabricate testimony. * * *

"If you feel like giving me the name and address of your informant mentioned in your letter, I wish you would send his name, address and employment to me so that I can get into communication with him. Any information you give will be treated as confidential. * * *

[12] On October 13, 1916, Woods wrote to the district attorney and named "F. C. Oxman, a big cattle owner and buyer of this vicinity," as his informant, and stated that Oxman could be reached at Durkee, Or., until October 18th, upon which date he would accompany a shipment of cattle to Chicago. The writer went on to point out that since his first conversation with Oxman they had not discussed the subject and, therefore, assured Fickert that no agreement existed between them regarding division of any reward. In fact, Woods testified herein that because of the district attorney's attitude, as expressed in the above-quoted letter, he did not anticipate receiving any portion of the reward money then offered. A series of communications, all introduced in evidence here, subsequently passed between Woods and the district attorney which culminated with telegraphic information from the former to the latter on October 18, 1916, that Oxman was going to Kansas City with his shipment of cattle. It was along about this time that the district attorney engaged the services of the detective agency, as already indicated, in an attempt to locate Oxman as a possible witness. As already shown, he was located at Kansas City and the so-called Kansas City affidavit, hereinbefore discussed, was procured on October 26, 1916. The Bunner interview with Oxman in Durkee, Or., also mentioned above, followed shortly thereafter and ultimately Oxman came to San Francisco and appeared as a witness at the trial of petitioner, which trial commenced January 3, 1917.

We find nothing in the record that suggests anything savoring of impropriety on the part of the prosecuting officials in producing the witness Oxman in the case.

[13] Petitioner's trial concluded on February 9, 1917, with the return of the verdict already mentioned. Shortly after the denial of petitioner's motion for a new trial, certain letters addressed by Oxman to Ed. Rigall, Grayville, Ill., came to light and received wide publicity. These letters are greatly relied upon by petitioner in his effort to establish perjury in the testimony of Oxman. Preliminarily, it is interesting to note that it appears from the testimony herein of one of petitioner's former counsel that before the so-called Oxman-Rigall letters were brought into the light of day, Rigall had demanded \$10,000 therefor. By talking all night to Rigall, counsel testified he succeeded in procuring the letters without the payment of any money.

The first letter from Oxman to Rigall was written approximately 3 weeks prior to the commencement of petitioner's trial. In it Oxman said: "Dear Ed has been a long time sence I hurd from you I have a chance for you to cum to San Frisco as a expurt witness in a very important case you will only hafta answer 3 & 4 questions and I will Post you on them you will get minegag (mileage) and all that a witness can draw Proply 100 in the cleare so if you will come ans. me quick in Care of this Hotel And I will mange the Balance it is all OK but I need a witness Let me no if you can come Jan 3 is the dait set for trile Please keep this confidential Answer hear Yours Truly F. C. Oxman."

In response to this, Rigall apparently wired he would come to San Francisco, whereupon he received a second letter from Oxman, stating: "Dear Ed Your Telegram Received I will wire you Transportation in Plenty of time allso expce necesry will route you by Chicago Omaha, M. P. Ogden S. P. to San Frisco I thought you can make the Trip and see California and save a lettel money As you will be allowed to Collect 10¢ Per mile from the state which will Be about 200 Besides I can get your Expences and you will only hafta say you seen me on July 22. in San Frisco and that will Be Easy dun I will try and meet you on the way out and Talk it over the state of California will Pay you but I will attend to the Expes The case wont come up untill Jan 3 or

4 1917 so start about 29 off this month You know that the silent Road is the one and say nothing to any Body the fewer People no it the Better when you ariv Registure as Evansville Ind little More Mileage Yours Truly F. C. Oxman."

As a result of his correspondence with Oxman, Rigall came to San Francisco, arriving here January 6, 1917. He remained until January 26, 1917, but did not testify upon the trial of petitioner. Therefore, granting that the above-quoted letters are suspicious and questionable in character and were written by Oxman for the purpose of improperly inducing Rigall, who it will shortly appear was not in San Francisco on the day of the explosion, to testify that he was here at that time and saw Oxman and thus to that extent corroborate the latter, the fact of the matter is that Rigall did not so testify, or appear at all upon petitioner's trial, and petitioner was not in any manner prejudiced upon his trial by such assumed corruption on Oxman's part. In addition, proof of such improper motive on the part of Oxman in writing the Rigall letters would not be the equivalent of establishing by substantial evidence that Oxman himself had committed perjury in testifying at petitioner's trial. At the most, the letters indicate an attempted subornation of perjury. However, subsequent to the publication of the Oxman-Rigall letters, the grand jury investigated the entire situation. At its sessions, Oxman and others testified. No charges were returned against him. Thereafter, Oxman was arrested on complaint of one of petitioner's supporters. A preliminary hearing was had and Oxman was held for trial on a charge of subornation of perjury. Upon his trial, he was acquitted. Before the grand jury and upon his trial, Oxman testified that the first letter, as quoted above, and as introduced in evidence here, is incomplete and that as originally written and mailed to Rigall it contained a third page on which he had penned a "P. S." telling Rigall "If you were not in San Francisco on July 22nd cannot use you as witness. Wire Answer. F. C. O."

Oxman, who is now deceased and who was not available as a witness in this proceeding, also gave testimony upon these occasions in explanation of the wording of the letters. In substance, he there testified that when he was interviewed by Capt. Bunner in Durkee, Or., which was prior to his coming here as a witness, he

had informed Bunner, in addition to narrating the events witnessed by him on the day of the explosion, that he had met "a boy" in San Francisco on that day whom he had known many years previously and whom he thought he could locate. (Bunner's and Fickert's testimony before the same grand jury, also read into this record, and Fickert's and Cunha's testimony herein, corroborated Oxman to this extent.) Upon those occasions Oxman further testified that, when he later arrived in San Francisco, the district attorney and his deputy Cunha in going over his testimony with him suggested that he write to the person whom he had previously mentioned he had seen here on the day of the explosion; that they told him of the difficulties they were experiencing in getting witnesses to testify against the "dynamiters" and that because of this suggested that he so frame his letter as to conceal the fact that the bomb cases were involved; that he thereupon wrote the letters to Rigall, believing he was the person he had met in San Francisco on the day of the explosion, and that the purpose of framing the letters as written was to get Rigall out here without betraying the fact that he was to be a witness against the bomb defendants; that the expression in the second letter to the effect the "silent road is the one and say nothing to anybody," was prompted by the admonition of the district attorney's office not to discuss the case with anyone; that neither District Attorney Fickert nor his prosecuting deputy, Cunha, suggested the form of the letters and neither had seen them after the witness had written them. A third letter written by the witness to Rigall's mother was explained as an attempt on his part to procure a character witness and thus lend weight to his testimony. Fickert and Cunha, when on the stand in this proceeding, substantiated Oxman's testimony given upon the earlier hearings to the effect that they were without knowledge of the form or contents of his letters to Rigall. Each testified, in substance, that Oxman, without suggestion or dictation from them, as to the phraseology of the letters, was permitted to contact the party he stated he had met here on the day of the explosion. They disclaimed all knowledge of the contents of the Oxman-Rigall letters until their publication subsequent to the trial of petitioner. Petitioner has produced no substantial evidence to the contrary. In fact, the testimony of Rigall given upon the Oxman

grand jury investigation and the later Oxman trial, tends to support the claim of the officials that they were without knowledge of the contents of the letters. In each instance, Rigall testified that when previously here in response to the Oxman letters he did not show them to anyone and told Cunha that they were at his home, in Illinois, when, in fact, they were resting secretly in his pocket. Under all the circumstances, we find and conclude that, even if Oxman was influenced by any improper motive in writing the quoted letters to Rigall, yet the prosecuting officials were not parties thereto and were without knowledge of their contents, until a time subsequent to petitioner's trial.

There is some conflict as to what transpired after Rigall arrived in San Francisco pursuant to the Oxman letters. Rigall, a victim of paralysis, could not be examined as a witness in this proceeding. It was stipulated, however, that he would testify substantially in conformity with an affidavit executed by him on April 4, 1917, and as he had upon three distinct occasions subsequent to petitioner's trial. The testimony so given by Rigall is now relied on by petitioner as establishing the alleged perjury of Oxman upon his trial. It is not our intention to separately state the testimony of Rigall upon these several prior occasions, viz., the Oxman grand jury investigation, the Oxman preliminary hearing, and the Oxman trial, all mentioned above. The substance and effect of his testimony upon those three occasions is that when he (Rigall) arrived in San Francisco pursuant to his correspondence with Oxman, he registered under the name of Charles, which he subsequently changed to Rigall, explaining to those concerned that he frequently employed the name of his stepfather; that he saw Oxman at the hotel, whereupon Oxman told him of the bomb cases and asked him to testify that he was in San Francisco on the day of the explosion and had met Oxman that day; that he told Oxman he could not so testify because he had not been here on that day; that Oxman then suggested to him that he was here "as much as I was"; that he met the district attorney a few days later and when introduced to him by Oxman told Fickert that it was the first time in 20 years, excepting the day of the explosion, that he had seen Oxman; that in so misleading Fickert he told an untruth because (though undisclosed to Fickert) he had not seen Oxman on the day

of the explosion; that he never did tell Fickert that he was not in San Francisco on that day; that he went over his testimony with Cunha and did not tell him he had not been in San Francisco on the day of the explosion; that he lied to Cunha in this respect on several occasions and caused him to believe he (Rigall) was in San Francisco on the day of the explosion and met Oxman; that the night before he was to take the witness stand upon petitioner's trial he told Cunha for the first time that he had not been here on July 22, 1916, whereupon Cunha said, "well, if that is the case, we can't use you"; that upon query of Cunha he told him that Oxman was an honest man and "on the square"; that he so assured Cunha in spite of the fact that Oxman had assertedly attempted to get him to perjure himself; and that he was "not accusing anybody in this transaction of anything wrong except Mr. Oxman. I am accusing him of attempting to bribe me to give false testimony. As far as the district attorney's office is concerned, I don't know whether they knew anything about it or not. I don't know that."

Therefore, if Rigall's testimony upon these prior occasions is accepted at its face value, it fails to establish any improprieties upon the part of the prosecution. It merely charges Oxman with improper conduct in his dealings with Rigall. However, in the face of Rigall's own admissions of falsehoods and of his admitted, but assertedly abandoned, effort to mislead the prosecuting officials as to his presence here on the day of the explosion, we are of the view, and accordingly find and conclude, that he has proved himself unworthy of belief. Oxman testified upon his trial for subornation of perjury that when he met Rigall at the Terminal Hotel on Saturday evening he realized he had made a mistake and that Rigall was not the person he had seen in San Francisco on the day of the explosion; that he so informed Rigall; that on Monday morning he saw Fickert in the Terminal Hotel, introduced Rigall to him and said to Fickert "I told you I was going to have a boy come out here and I have got an old gray-headed man. I have made a bad mistake"; that Rigall in response to Fickert's query then said it was his first visit to San Francisco; that Fickert said, "never mind, all of us make worse mistakes than this"; that he subsequently told Cunha of his mistake in getting the wrong

man out here and Cunha suggested that Rigall be kept here until he (Oxman) had testified in order to be prepared to meet a situation that might arise in the event the defense on cross-examination of Oxman attempted to make capital of Rigall's appearance here and his subsequent failure to take the stand; that after Rigall's arrival here and discovery of the mistake that had been made, he (Oxman) never contemplated Rigall as a witness in the bomb cases and never heard Fickert or Cunha refer to Rigall thereafter as a possible witness; and that he never offered to pay Rigall any money to be a witness.

Fickert's testimony before the grand jury that investigated the Oxman-Rigall situation, following publication of the above-quoted letters, substantiates Oxman's version or explanation of the happenings subsequent to Rigall's arrival here pursuant to said letters. Fickert there testified that he met Rigall for the first time at the Terminal Hotel on the 8th or 9th of January, 1917, which was 2 or 3 days after Rigall's arrival here; that on that occasion he inquired of Oxman whether the "boy" he previously stated he had met on the day of the explosion had arrived; that Oxman said "no, I have a man here. I have made a mistake. I will pay his expenses"; that Oxman thereupon called Rigall over and introduced him; that Rigall's testimony was not discussed because Rigall "informed me at that time that he had not been in the state"; and that Rigall was permitted or requested to remain here until after Oxman testified upon petitioner's trial because his presence in San Francisco was known and cross-examination of Oxman thereon was anticipated.

In their testimony in this proceeding, both Fickert and Cunha testified that, when they, respectively, first met Rigall, Oxman disclosed that he had made a mistake and had sent for the wrong person; that Rigall thereupon told them he was not in San Francisco on the day of the explosion; that from that time forward they entertained no intention of using and thereafter made no effort to use Rigall as a witness in the bomb cases; and that he was merely requested to remain here until Oxman had testified, to be available in the event he should be needed to meet any possible cross-examination of Oxman as to Rigall's presence in San Francisco but his failure to appear as a

witness. They each contradicted and denied, while on the stand herein, any prior statements or testimony of Rigall in conflict therewith and Fickert also testified herein that when he remonstrated with Rigall for coming to San Francisco in response to the Oxman letters when it definitely appeared therefrom that a person was being sought who had seen Oxman in San Francisco on July 22, 1916, Rigall explained his conduct by saying that he was an old friend of Oxman's son, whom he had previously helped out of minor "scrapes," and that he thought the letters were from the son who again needed his assistance.

For the reason already mentioned, the prosecution had Rigall remain in San Francisco until after Oxman had testified upon petitioner's trial. Thereupon he was paid approximately \$150 for expenses incident to his trip here and on January 26, 1917, left for his home in Illinois. After his arrival there, he addressed a letter to Cunha on February 6, 1917, wherein, among other things, he expressed the hope that Cunha was getting along well with the case. Three days later (February 9, 1917), the jury returned its verdict finding petitioner guilty as charged. Upon learning of this, and apparently "out of a clear sky," Rigall on February 12, 1917, and before denial of motion for new trial, sent a telegram to Cunha reading: "Congratulations on your conviction. I believe my evidence will get party new trial." Immediately upon receipt of this wire, Cunha, on February 13, 1917, which was only 4 days after the return of the verdict, telegraphed Rigall, saying: "Cannot understand your telegram. You told me your friend was thoroughly truthful and reliable. We have plenty of other witnesses and conclusive evidence supporting his testimony. Am astonished at your suggestion that you have testimony to help defendant. It is your duty to reveal to me at once any and all facts which you have because I certainly want this defendant to have a new trial if he is entitled to it. Wire me fully all details at once. Explain in detail your telegrams and your attitude. Be careful and fair because any witness who has testified falsely in this murder case must himself be prosecuted for murder. [This sentence undoubtedly has reference to section 128 of the Penal Code.] You should have told me anything you know before the witness testified.

After wiring write me every slight notion even which you have on the case and send all data. I am sure you know nothing to get defendant new trial but I personally feel responsible and would later on have the governor change penalty or pardon if I developed any kind of doubt. At present, I am thoroughly satisfied even without your friend's testimony just as the jury was in the first case, but I want everything cleared up in my mind. Wire immediately to me at Olympic club, San Francisco."

Rigall did not respond in any way to Cunha's request for enlightenment upon the surprising but obviously deliberately uninformative statement in his (Rigall's) telegram. In other words, nothing further developed in the matter at the time. Petitioner's motion for a new trial was denied on February 24, 1917. Based on Rigall's "congratulatory" telegram of February 12, 1917, petitioner now charges the prosecution with the suppression of material evidence because of its failure to call the telegram to the attention of the trial judge prior to his ruling on and denial of the motion for new trial. On the record now before us, we think the charge is without foundation. Accepting the Oxman-Fickert-Cunha version, as we do, of developments subsequent to Rigall's arrival here pursuant to the Oxman letters, the prosecution upon receipt of Rigall's "congratulatory" telegram was confronted with a situation which showed Rigall's arrival here, an immediately admitted mistake in sending for and getting the wrong person, and Rigall's then assurance of Oxman's honesty and integrity. Rigall's only connection with the case had been through Oxman and it is only reasonable that Rigall's equivocal telegram as to his undisclosed "evidence" getting petitioner "a new trial," should cause the prosecution to assume that he had reference to the testimony of his friend Oxman, which testimony at the time was unassailed and unimpeached. The natural and only course for the prosecution to pursue, and the one it did pursue, was to attempt to ascertain what "evidence" Rigall had that caused him to repudiate his prior recommendation of Oxman as an honest and upright man. Failing, upon inquiry, to receive any response or enlightenment from Rigall, there was nothing of substance before the prosecution that it should have called to the attention of the trial court upon the hearing of the motion for new trial.

On the other hand, should we accept the Rigall version, also set out above, as to what transpired after his arrival here in response to the Oxman letters, we find the prosecution, upon receipt of Rigall's "congratulatory" telegram, confronted with a situation where a person (Rigall) who had previously admitted his own duplicity and falsehood in a prior effort to mislead the prosecution as to his presence in San Francisco on the day of the explosion, thereafter asserting that he had undisclosed "evidence" that would secure a new trial for petitioner. Failing, as already indicated, to get any response to its inquiry for information and enlightenment, the prosecution, in this situation, might well and reasonably assume that Rigall was again attempting to mislead the prosecution for reasons best known to himself.

[14] To require the prosecution upon motion for new trial to disclose to the trial court Rigall's unsupported declaration that he had "evidence" that would secure a new trial for petitioner, would reasonably call for a similar report by the prosecution of all such unfounded and unsupported statements that might come to its attention, and in cases as widely publicized as the so-called bomb cases there undoubtedly existed many of such unsupported statements and claims. In this connection, we therefore find and conclude that the prosecution did not deliberately, or otherwise, suppress any evidence material to the defense.

It was shortly thereafter that Rigall asked the defense for \$10,000 for the Oxman letters which, as already shown, were ultimately published with the consequent investigation and trial of Oxman.

Several years later and in 1921 a new and decidedly different assault was directed by petitioner at the testimony of Oxman in an attempt to prove him a perjurer. At that time, one Earl K. Hatcher and his wife appeared before the grand jury and gave certain testimony which, if truthful, would prove that Oxman had perjured himself upon petitioner's trial. The Hatchers appeared in this proceeding as witnesses for the petitioner and gave substantially the same testimony. Hatcher testified that he lives in Woodland, Yolo county, Cal.; that he lived there on July 22, 1916, the day of the bomb explosion in San Francisco; that he was then engaged in the business of buying and selling sheep and cattle; that he had wired Oxman

to come from Portland to San Francisco, by way of Woodland, to close a deal the witness had started with Miller & Lux; that Oxman telephoned to him about 7 a. m. on the morning of July 22, 1916, from the Byrnes Hotel in Woodland; that he met Oxman in the lobby of the hotel approximately one-half hour later and talked with him there until 10:30 or 11 a. m., whereupon they repaired to the home of the witness for luncheon; that, after eating at the home of the witness, Oxman had a sleep from approximately 1 to 1:50 p. m.; that at the latter time the witness awakened Oxman, accompanied him to the train leaving Woodland at about 2:15 p. m. for San Francisco; and that Oxman telephoned to him from San Francisco at about 6 p. m. concerning the cattle transaction.

Obviously, if this testimony is true, Oxman could not have been in San Francisco prior to 2 p. m. on the day of the explosion, as he testified upon petitioner's trial. However, for reasons presently to be mentioned, the testimony of Hatcher, and that of his wife, who corroborated him to the extent of stating that Oxman had luncheon in her home on the day of the explosion and did not depart from there until approximately 2 o'clock in the afternoon, must be rejected as unworthy of belief. Their stories are indisputably disclosed to be a tissue of falsehoods by reason of their own prior contradictory statements and conduct and by the testimony of others. We shall develop the several matters which, in our opinion, deprive the testimony of the Hatchers of every vestige of credibility.

After narrating on direct examination herein, the story stated in substance above, Hatcher also testified and admitted, apparently in fear of its disclosure on cross-examination, that during the Mooney trial he had heard and read about the Oxman testimony and assertedly knew then that it was untrue; that he had previously told one Leake, publisher of a Woodland newspaper, that if Oxman testified he was in San Francisco in time to see the events described by him upon petitioner's trial, "he must have been"; that he (Hatcher) knew at the time he made this statement to Leake it was untrue, but that loyalty to Oxman prompted it; that in 1920 or 1921 he told Charles Sooy, an attorney, of the matters here testified to by him; and that in May, 1921, he narrated them under oath for the first time before the grand jury. On cross-examination

herein, he admitted that he may have said to a dozen or 50 persons that Oxman was in San Francisco on the day of the explosion in time to witness the events he testified to on petitioner's trial; that he was in San Francisco with Oxman during the latter's trial for subornation of perjury, mentioned above; that upon his acquittal upon that charge Oxman was rearrested the same day on a charge of perjury (ultimately dismissed) and that he (Hatcher) arranged bail for him; that prior to his 1921 disclosures, his wife had been annoyed, intimidated, and threatened with prosecution by a named attorney who had formerly represented petitioner; that prior to the Oxman trial he had been offered \$5,000 over the telephone by an unknown person for information (before the grand jury in 1921 he testified he had been offered \$5,000 by letter to testify against Oxman upon his trial and that "a world" of money passed in the case); that though he assertedly knew that Oxman had perjured himself upon petitioner's trial, nevertheless in subsequent cattle deals he "trusted him (Oxman) implicitly" and had no writing showing his interest or share in profits aggregating a quarter of a million dollars; and that during the Oxman trial in 1917 he had signed an unsworn statement, which he now asserts he did not read but signed merely out of friendship for Oxman, attesting to the fact that Oxman departed from Woodland on the day of the explosion on a train that left at about 9:10 a. m.; that subsequent to Oxman's trial he (Hatcher) on several occasions by letter asked Oxman to lend him \$10,000, which requests Oxman rejected; and that while he was aware of the possibility that Mooney might hang because of Oxman's assertedly false testimony, he refrained until 1921, out of friendship for Oxman, to disclose the matters here testified to by him. It was not until after Oxman refused to loan him \$10,000 that he made any claim that he did not leave Woodland until afternoon.

Mrs. Hatcher, while on the witness stand in this proceeding, offered the same unsatisfactory explanation for her silence for approximately 4 years.

There was introduced in evidence here, the two unsworn statements signed by Hatcher and his wife wherein, in contradiction of their 1921 disclosures and their testimony in this proceeding, they averred, in effect, that Oxman was in Woodland on the day of the explosion at

about 7 a. m. and departed on a San Francisco bound train leaving at approximately 9:10 a. m., which would cause him to arrive in San Francisco in time to have witnessed the events described by him on the witness stand in the Mooney trial. There is testimony of other witnesses herein to the effect that the Hatchers read these statements before signing them and that they were not sworn to solely because signed on a Saturday afternoon when a notary was unavailable.

Cunha testified herein that after Oxman's arrest and during his trial, Hatcher had told him that he put Oxman on the 9:10 a. m. train.

Paul Leake, called by the respondent herein, testified that he was the editor and co-owner of a Woodland newspaper; that he had known Hatcher for over 20 years; that in June, 1917, Hatcher told him, in the presence, he thought, of Mrs. Hatcher, that on the day of the explosion he (Hatcher) had put Oxman on the 9:08 a. m. train at Woodland; that he (Leake) wrote an article in his newspaper on June 14, 1917, which was placed in evidence, concerning his conversation with Hatcher and in which he quoted Hatcher as stating that Oxman left Woodland on the "9:08 o'clock train, in time to arrive at the San Francisco ferry to witness everything that he testified to at the Mooney trial" and that he (Hatcher) had "known Oxman for some time and have always found him square."

Railroad timetables, properly identified and introduced in evidence, established that on the day of the explosion a passenger train arrived in Woodland at 9:08 a. m. and left for San Francisco at 9:13 a. m., arriving at Oakland at 12:23 p. m. and connecting with the boat that arrived in San Francisco at 12:50 p. m.

The time of arrival of said train in San Francisco checks substantially with the time specified by Oxman upon petitioner's trial for his arrival in San Francisco and the time of its departure from Woodland checks substantially with the time designated by the Hatchers in their signed, but unsworn, 1917 statements giving the time of Oxman's departure for San Francisco and likewise checks with Leake's testimony herein as to the time Hatcher informed him that Oxman left Woodland.

On the other hand, these same timetables fail to disclose any passenger train leaving Woodland for San Francisco at about 2:15 p. m., the time now fixed by Hatcher

for Oxman's departure from Woodland. They do disclose such a train leaving Woodland at 2:55 p. m., which did not, however, come direct to San Francisco but necessitated San Francisco bound passengers to transfer at Davis to another train that connected with a boat arriving in San Francisco at 6:30 p. m. It must be remembered, in this connection, that Hatcher testified herein that Oxman phoned him from San Francisco about 6 p. m. Had Oxman taken the 2:55 p. m. train he could not have phoned from San Francisco at 6 p. m.

[15] In view of their prior inconsistent and contradictory statements, in view of their admitted falsehoods, and in view of the other testimony and documentary evidence in conflict with their 1921 disclosures and their testimony herein, we find and conclude that the Hatchers are not worthy of belief. Whether the "world" of money that Hatcher referred to upon another occasion as having passed in this case, had anything to do with their change of story, or whether Oxman's failure to "lend" them \$10,000 when requested, prompted their change of attitude, shall probably always remain a matter of conjecture.

[16] We disregard with mere passing mention, petitioner's improper and abortive effort to establish herein that Oxman upon another occasion and in another court proceeding, foreign to the bomb cases and arising in another state, had assertedly perjured himself and attempted there too, to procure Rigall as a corroborating witness. Objection was properly sustained to this evidence and the same was properly stricken out as hearsay and as entirely irrelevant and incompetent to the issues here involved. It presents but one of many instances wherein petitioner has encumbered the present record with highly improper evidence. However, inasmuch as the evidence appears in the record by way of an offer of proof, we experience no hesitancy in saying that, even if properly before us, it fails, in our opinion, to show either that Oxman upon said prior occasion committed perjury or improperly sought Rigall as a corroborating witness.

Before leaving the Oxman phase of this proceeding, we desire to also point out that the district attorney testified herein that prior to putting Oxman on the stand in the Mooney Case, he had been assured, upon inquiry, by certain named officials of the Western Meat Company and the

Kern County Land Company, who had previously had dealings with Oxman, that Oxman was a substantial citizen and a person of honesty and integrity. Of course, also pertinent here, is the additional testimony of the district attorney and his prosecuting deputy, referred to above in another connection, that they at no time or in any manner attempted to influence any witness in the giving of his or her testimony.

In an effort to establish that an automobile could not have been at Steuart and Market streets as testified by Oxman, petitioner has read into the record herein the testimony given at the later trial of Weinberg by the 18 police officers, constituting the traffic detail on Market Street on the day of the explosion. Many indicated that they were not on Market street all of the time but were otherwise engaged on intersecting streets. Others intimated they were too occupied with the crowds to definitely state whether or not an automobile had gone down Market street. A few said they saw or recalled only an official parade car. Still others testified that cross-town traffic, or traffic crossing Market street, was permitted to proceed until the parade was within one block. It is not for us to speculate as to the course taken by the automobile prior to Oxman's observation of it. We do not think the testimony of the officers is capable of all that petitioner claims for it. Moreover, it should be pointed out, that Oxman was not alone in his testimony as to the presence of an automobile at Steuart and Market streets shortly prior to the explosion. Ralph Doscher, a dentist, testified herein that on July 22, 1916, he was on Steuart street near Market street between 1:30 and 2 p. m. and that he saw an automobile there. Henry Doscher, father of said witness, and now dead, was produced at petitioner's trial, according to the transcript thereof, to testify on rebuttal to the same fact but the trial judge rejected the evidence on the ground it was properly part of the prosecution's case in chief. The incident is mentioned in substantiation of Fickert's testimony herein that he had other witnesses available during petitioner's trial corroborative of the presence of an automobile, and thus tending to rebut the charge that Oxman perjured himself. Henry Doscher did testify for the prosecution in the Rena Mooney and Weinberg trials and, pursuant to the agreement of counsel herein, the same was copied

into this record for all purposes and as though given at petitioner's trial, all the bomb cases being treated as one in this attack. Upon those trials he testified that shortly prior to 2 p. m. an automobile, with several persons in it, came down Steuart street from the direction of Market, causing him and others forming for the parade to move aside.

Similarly, the testimony of Robert Bramlitt, upon both the Rena Mooney and Weinberg trials was read into the present record. In each instance he testified that on the day of the explosion and about 20 minutes prior thereto he saw a small automobile on Steuart street proceeding toward Mission street.

Gertrude Jackson testified herein that on July 22, 1916, she witnessed the parade from the mezzanine floor of a building on the north side of Market street, opposite Steuart street. Approximately 10 or 15 minutes before the explosion, she testified she saw an automobile turn into Steuart street. Her testimony upon the Weinberg trial was to the same effect and was placed in evidence herein.

Albert Brady, one of the participants in the parade, testified that he was on Steuart street, ready to fall into line, when about 15 or 20 minutes before the explosion he was required to step aside to permit a small black touring car to pass. He also testified he was subpoenaed for petitioner's trial but was not called as a witness (again substantiating Fickert as to the availability of such witnesses), though he testified in the Rena Mooney and Weinberg trials. His testimony upon those occasions appears in the record.

There also appears in the record herein the testimony of J. Walter Smith, now deceased, given upon the Rena Mooney and Weinberg trials and to the effect that shortly prior to the explosion he saw an automobile "diagonally across the corner facing towards Steuart Street, facing east * * * as if it were turning out of Market Street into Steuart Street" with "a man at the wheel and a woman sitting in the back seat," the latter looking in the direction of a group of men standing near the saloon door. This substantiates that part of Oxman's story to the effect that Mooney, Billings, and the unidentified man had temporarily gone from the automobile, leaving Weinberg at the wheel and Rena Mooney in the back seat.

The testimony of Walter G. Logan, a police officer, given at the Rena Mooney and Weinberg trials and received herein pursuant to agreement, indicates that, while the witness was stationed at Steuart and Mission streets on July 22, 1916, he observed an automobile some time between 1:30 and 2 p. m. approaching on Steuart street from the direction of Market and that it turned west on Mission street. The Eilers building, where petitioner claims to have been all of the time, is west of Steuart street.

Israel Weinberg testified herein on behalf of petitioner that he had known Mooney prior to the explosion but that he (Mooney) had not ridden in the jitney bus of the witness for several weeks prior to the explosion. Weinberg also testified that he was not on Market street or near 721 Market street between 1:30 and 2 p. m. on the day of the explosion. On cross-examination, he admitted that this was in conflict with his statement given to the police on July 31, 1916, shortly after his arrest, wherein he admitted that he was in his jitney bus on Market street near Third street (and it should be kept in mind that 721 Market street, where the Edeaus and Officer Moore placed him, is between Third and Fourth streets) at a time when he could see the parade near the ferry, which necessarily had to be after 1:30 p. m., the starting time of the parade. He attempted to explain herein that said statement was the result of third degree measures applied by the police. In view of his prior inconsistent statements, the mass of contradictory evidence, and the additional fact that Weinberg testified at petitioner's trial where his testimony was impliedly rejected by the verdict of the jury, we place no credence in his story.

In passing it should also be pointed out that there was ample credible evidence upon petitioner's trial (see *People v. Mooney*, 177 Cal. 642, 647, 171 P. 690) and upon the trial of the other bomb cases, corroborating both MacDonald and Oxman as to the presence of a suitcase at the place of the explosion. Much of said evidence appears in the present record.

Louis Ferrari, the deputy district attorney who prosecuted the later Rena Mooney and Weinberg cases, gave as his reason for not calling Oxman as a witness therein, the fact that Oxman himself was then under investigation and a defendant, as already explained, and the prosecution did not desire to be confronted with such col-

lateral issues. This is interpolated at this point merely because of petitioner's effort to draw an unfavorable inference from Oxman's nonappearance at the later trials.

[17] With all of the foregoing before us, together with a vast number of other matters, we find and conclude that petitioner has not established by any substantial, credible evidence his charge that Oxman perjured himself when upon the witness stand during the petitioner's trial; and that likewise petitioner has not established by any substantial, credible evidence that the prosecuting officials were guilty of any irregularities or improprieties in the production of Oxman's testimony.

We turn our attention now to the testimony of Mellie and Sadie Edeau, mother and daughter, given upon the trial of petitioner and which testimony is also here assailed as perjurious in character. For all material purposes, they told substantially the same story when on the stand. Mellie Edeau testified, in effect, that on the day of the explosion she came to San Francisco, from her home in Oakland, in company with her daughter; that they were standing in the vicinity of 721 Market street, near the entrance to the adjacent Kamm building, at approximately 1:30 p. m.; that between that time and 1:40 or thereabouts she saw Billings on the roof of the building situate at 721 Market street (which is a low, two-story building), leaning over the parapet, holding a suitcase which was resting thereon; that at the time he was talking to someone on the sidewalk below; that shortly thereafter she saw Mooney and Rena Mooney rush into the entrance of the Kamm building where they remained for 3 or 4 minutes; that they came out of the entrance to said building whereupon petitioner fixed something for his wife to sit on; that she next saw Billings on the sidewalk, close to the curb, talking to a policeman, identified by her as Officer Moore, who "had been honking the horn" of an automobile parked at the curb; that Mooney and Rena Mooney then joined Billings, who was still carrying the suitcase, and the three of them "brushed right past me," Billings saying that they would "have to make the Ferry before two o'clock", and that shortly thereafter Weinberg (whom the witness indicated from the stand) cranked the automobile and drove "towards the Ferry," with "a dark man"

who had climbed into the rear seat of the car. (This unidentified, "dark man," might well be the "Spaniard" or "Mexican" described by Crowley, as indicated above, and the unidentified "foreigner" mentioned to the district attorney by Oxman, who possibly uttered the "foreign language" referred to in the Oxman Kansas City affidavit.) Mellie Edeau testified further that all of said persons had left the vicinity of 721 Market street "quite a few minutes" before the parade came along.

The Edeaus also testified at the prior Billings trial and at the later Rena Mooney and Weinberg trials and their testimony in each instance has been read into this record at petitioner's request. Inasmuch as the charge of perjury directed at the testimony of the Edeaus is based in part at least upon asserted discrepancies in their testimony at the several trials, we shall first point our attention in that direction. Preliminarily, it should be stated that upon each trial they positively identified Billings as the man they had seen with a suitcase between 1:30 and 1:40 p. m. on the day of the explosion, first on the roof of 721 Market street, then talking to a police officer at the curb, then meeting and departing with a man and woman, in an easterly direction toward the ferry. In the foregoing respects their testimony was consistent throughout the several trials. Reference is made to the fact that upon the Billings trial, which preceded the others, the Edeaus did not designate or name Mooney, Rena Mooney, or Weinberg, as they did upon the later trials, as the other persons they had observed. This same point was made and developed upon cross-examination of the witnesses during petitioner's trial and judging from the verdict was apparently found by the jury to lack significance. Be that as it may, an additional explanation therefor exists. When cross-examined upon the matter in petitioner's trial, the Edeaus testified that upon the prior Billings trial they had not named petitioner, his wife, or Weinberg, because the queries there propounded to them did not require it. Each did, however, as already shown, testify upon the Billings trial that Billings had met "a man and woman" in the vicinity of 721 Market street. By the propounding of a single question upon cross-examination, the defense, in all probability, could have ascertained the identity of the "man and woman" referred to by the Edeaus. The failure of the prosecution in the Billings

case to ask the Edeaus on direct examination the identity of said "man and woman," finds explanation in the theory that the prosecution in trying that case elected to concentrate upon the defendant then on trial without any special effort being made to uncover or identify the others involved. James Brennan, the deputy district attorney who prosecuted Billings, gave testimony herein that he proceeded with the trial upon this theory. He is substantiated by the fact that not only were the Edeaus not asked on direct examination to identify the "man and woman" whom they testified Billings had met at 721 Market street, but upon the same trial the witness MacDonald, whose testimony has been discussed, after narrating what he had observed at Steuart and Market streets, was not asked on direct examination to identify the "man" whom he observed meeting Billings at the saloon door. Inadvertently or otherwise, the defense in that case put the question to MacDonald on cross-examination and he unhesitatingly named Mooney as the man. The defense on cross-examination made no effort to have the Edeaus enlighten the jury as to the identity of the persons they had observed with or near Billings at 721 Market street.

At this point it may be well to interpolate a possible explanation for the presence, approximately one-half hour before the explosion, of Billings, Mooney, his wife, and Weinberg in the vicinity of 721 Market street, which place is several blocks west of the scene of the explosion. Such possible explanation appears in the testimony herein of Cunha, the deputy district attorney who prosecuted petitioner, who declared, in part, that "directly across from 721 Market street was the headquarters of the preparedness day parade committee, or something to that effect and the general theory with regard to what the people were up to with the bomb, and all of that, was to break up the parade, strike terror into the marchers, and all that, and break up the parade. That was the general idea. But as to any other theory as to 721 Market street, or any other place, I had no particular theory as to what they were doing at any particular place." At another point we shall have more to say about petitioner's active opposition to the parade whose participants and onlookers were ruthlessly struck down by the bomb explosion. The reason assigned by Cunha for the presence in the vicinity of 721

Market street of persons interested in stopping the parade lends substance to the testimony of the Edeaus and tends to minimize or destroy petitioner's charge of perjury and frame-up.

To revert to the Edeaus, we find that in his effort to show that Mellie Edeau, the mother, perjured herself upon his trial, petitioner has offered testimony herein intended to establish that prior to her appearance on the witness stand in the first of the bomb cases (the Billings Case) she assertedly had made statements tending to indicate that she was not in the vicinity of 721 Market street as testified by her upon all of the trials, including petitioner's, but had remained several blocks easterly thereof, near the scene of the explosion. In this effort, petitioner upon this proceeding produced as witnesses, among others, Thomas J. Stout, William H. Burgess, William H. Smith, Walter J. Peterson, and, being unable to locate Muriel Stewart, her testimony given upon the trial of Rena Mooney was read into the record.

Stout testified, in substance, that 3 or 4 days after the explosion Mellie Edeau told him at Foreman & Clark's in Oakland, where both parties worked, that on the day of the explosion she had seen two middle-aged men, with a suitcase, at Steuart and Market streets, and had seen the explosion; that the witness suggested that she get in touch with Chief Peterson of the Oakland police department; that a day or two later she told the witness she had been to San Francisco and could not identify the two "boys" they were holding there as they were too young; that he had read Mellie Edeau's testimony in both the Billings trial and the subsequent Mooney trial; that at the time of reading her testimony in the newspapers he did not know, but assumed, that 721 Market street was one and the same location with Steuart and Market; that he was afraid of being "canned" from his job and therefore "kept quiet" during the Billings and Mooney trials and made no disclosures until the later Rena Mooney trial at which time he telephoned a newspaper and told his story and signed an affidavit averring, among other things, that Mellie Edeau had told him she could not identify Mooney or Billings. On cross-examination, the witness admitted the affidavit was executed by him on February 19, 1917, which was during the pendency of petitioner's motion for new trial and in his testimony

in the subsequent Rena Mooney trial, which has been read into this record, the witness testified that he had told his story to the newspaper "before the Mooney case was finished". Yet, he testifies in this proceeding that his testimony upon the Rena Mooney case "was a mistake" and that, in fact, he kept quiet until after the "Mooney Case was finished".

[18] In addition to the witness's own admission of a "mistake" in his story as told under oath upon an earlier occasion, which tends to detract from the credibility of the witness, we have the admission of defense counsel in the Rena Mooney case, where an assault also was being made upon the testimony of Mellie Edeau, that the Stout "affidavit was made on this motion for a new trial" in petitioner's case. It was, therefore, available upon motion for new trial and may not now be urged on habeas corpus. Moreover, the Stout affidavit, which appears in the record herein, tends to indicate that he knew of Mellie Edeau's alleged perjury during or at the end of the Billings trial while his testimony herein tends to indicate he did not know of it until a later date. The uncertainty and vacillation of the witness deprives his testimony of value. Finally, we have the positive denial of Mellie Edeau in her testimony upon the later Weinberg trial, read into this record by petitioner, that she had ever talked with Stout in connection with "this case."

Burgess and Stewart, mentioned above, were also fellow employees of Mellie Edeau at the firm of Foreman & Clark. The former, in his testimony in this proceeding, and the latter, in her testimony upon the Rena Mooney trial, read into this record because the witness could not be located to testify herein, told substantially the same story as the witness Stout, viz., that at their place of employment they had heard Mellie Edeau state a few days after the explosion that she had seen two middle-aged men carrying a suitcase near Steuart and Market streets and that Mooney and Billings were too young and were not the men. Each admitted having informed one of petitioner's then counsel of the entire situation prior to denial of petitioner's motion for a new trial. Each also executed an affidavit prepared by said counsel. It is significant that although Stout, Burgess, and Stewart have testified that Mellie Edeau informed them of being only at Steuart and Market streets on the day of the explosion, and not at 721 Market street

as she testified upon the several trials, that the affidavits prepared by one of petitioner's then counsel from the information given to him by said witnesses at or during the Mooney trial, and respectively executed by Burgess and Stewart in February, 1917, are, and each is, singularly free of any and all reference to Steuart and Market streets. Mellie Edeau having testified at the Billings and Mooney trials that she was in the vicinity of 721 Market street, several blocks west of Steuart and Market streets, it seem inconceivable, if she had previously told three persons of being only at Steuart and Market streets and they had told one of petitioner's then counsel of the situation and he had thereupon prepared and had them execute affidavits, that two of such affidavits should remain silent upon and make no reference to Steuart and Market streets.

Moreover, it is significant to note that the Stewart affidavit contains an averment that Mellie Edeau had told the affiant that "she had been right near where the explosion had occurred but fortunately I had moved on further up the street." As will presently appear, this averment is in substantial accord with the explanation given by Mellie Edeau of her movements on the day of the explosion. It should also be mentioned, that Mellie Edeau when testifying in the Rena Mooney and Weinberg cases, which testimony we have indicated was read into this record at petitioner's request, denied, as she did with the witness Stout, having ever discussed "this case" with Burgess or Stewart. Under all the circumstances, we can attach little credence to the Stout, Burgess, and Stewart testimony.

In his effort to destroy Mellie Edeau's testimony that she was in the vicinity of 721 Market street about one-half hour prior to the explosion and while there had observed petitioner and his wife with Billings, who carried a suitcase, petitioner also produced Peterson and Smith, already mentioned, as witnesses in this proceeding. Peterson testified that in 1916 he was the chief of police of the city of Oakland; that on July 27, 1916, 5 days after the explosion, Mellie Edeau appeared at his office and said she was at Steuart and Market streets on the day of the explosion and had seen two middle-aged, medium sized men with a suitcase, whom she thought she could identify; that she also informed him that she had heard the explosion, had seen the ambulances that responded, and that

she was unable by reason of the crowded condition of the streets to get farther west on Market street; that she inquired if she might use her maiden name so that she would get out of the case with a minimum of publicity and disturbance in the event she should be unable to identify the persons she had seen; that he told her such a course would be proper provided she gave her correct name if she should identify anyone; that he thereupon detailed Officer Smith, whose testimony will be later set forth, to accompany Mellie Edeau to San Francisco; that Smith later reported to him that she had told him Mooney and Billings, whom she had viewed in jail in San Francisco in company with Smith, were not the men she had seen; that Smith's report of Mellie Edeau's visit to San Francisco was made a part of the Oakland police records; that he and Smith had several conversations concerning the story assertedly told to them by Mellie Edeau and the story subsequently narrated by her on the witness stand; that the last conversation with Smith on the subject was approximately 3 months after the Mooney trial, at which time he detailed Smith to accompany several of the defense counsel in the bomb cases and Fremont Older to the home of Mellie Edeau, a visit admittedly undertaken in the hope of procuring from her a repudiation of her testimony; that while said group was at her home they summoned him because she refused to talk in his absence; that he joined the others at her home and there inquired of Mellie Edeau how she could testify she had been at 721 Market street in view of her earlier story to him that she had been unable to get beyond Steuart and Market streets, whereupon the witness said she replied "my natural body was at Steuart and Market and my astral body was at 721 Market street."

We are not inclined to attach much credence to the testimony of Peterson. On cross-examination, he proved to be a most evasive, uncertain, and forgetful witness. He was equivocal and indefinite in many instances and upon occasions appeared to be unable to justify his conduct in the premises. He could not recall the times and places he had talked with the San Francisco police officers about the matters he testified to on direct examination. He did not know whether he had talked with Goff about Mellie Edeau prior to the Mooney trial. He did not think that the Oakland police reports were sent to the

San Francisco police for inspection but explained if the latter wanted them they were available. He admitted having read the newspapers during the Billings trial which, as we have shown, preceded the petitioner's trial, and at which trial Mellie Edeau also testified, but said that the first information he had about her testimony was when Officer Smith "told me about her changing her testimony." However, a little further on in his cross-examination he admitted that the "first" time Mellie Edeau "changed" her story (which, if the witness' version of "change" in story is accepted, would be during the prior Billings trial), Smith informed him it was the same woman who had come to his (the witness') office shortly after the explosion. He admitted that he knew and read in the newspapers that Mooney had been convicted and probably would be sentenced to be hanged and that he "knew at that time that Mellie Edeau had told me a different story, had told a different story on the witness stand than she had told me in July," yet he admitted that he did nothing to direct the attention of either the prosecution or the defense to such asserted change of story by Mellie Edeau. In a feeble effort to explain his silence, he asserted that he "was never called into court" and that he did not tell the defense because he was "not trying to barge into a case" and disrupt the San Francisco police department's theory. He also stated that though he was aware that a man's life was in the balance at the time, he did not regard it "as my sworn duty as a police officer and as a chief of police" to inform either the prosecution or the defense, "because it was not my case" and his office was "not furnishing information for the defense until we were asked to and brought into court to do it in a legal way" and "that as far as the police department is concerned it is usually on the side of the prosecution" and "part of our job is to convict." By such declarations the witness discloses a questionable moral standard. He further testified on cross-examination that he did not know how the defense first learned of the matters testified to by him herein but said they came to him upon an earlier occasion and made inquiry and that he testified for the defense in the later Rena Mooney and Weinberg trials. Prior to so testifying, and assertedly without any change in the "policy" which placed him "usually on the side of the prosecution," he admitted having been with a group of defense coun-

sel at the home of Mellie Edeau subsequent to petitioner's trial but before Rena Mooney's trial, in a visit planned and intended for the sole purpose of procuring a retraction or repudiation by her.

As already indicated, Peterson here testified that when Mellie Edeau first came to his office she described to him what she had observed at Steuart and Market streets and then informed him that she was unable because of the crowd to proceed farther west on Market street. He also testified herein that he thought he so testified in the Rena Mooney and Weinberg cases but when shown transcripts of his testimony in those two trials he admitted he found nothing therein (when his memory was undoubtedly fresher) about Mellie Edeau telling him she was unable to proceed farther west on Market street than Steuart. In attempted explanation of his prior silence on this particular point he stated herein "I perhaps did not tell all I knew then." Mellie Edeau has never denied that she merely told Peterson and Smith of having seen two middle-aged men with a suitcase at Steuart and Market streets but she has denied (in her testimony in the Rena Mooney and Weinberg cases, read in by petitioner) that she told them she was unable to get beyond Steuart street on Market street, testifying that on her first visit to Peterson's office she told him she had proceeded beyond Steuart street. In those cases she also testified that, when she came to San Francisco with Officer Smith, after having seen Peterson, she did so merely to ascertain whether the men then held in custody (Billings and Mooney) were the men she had told Smith and Peterson she had seen with a suitcase at Steuart and Market streets between approximately 12:15 and 1 p. m. on the day of the explosion; that she saw them and informed Smith they were not the men. But, she went on to testify in that case, she did recognize them as two men she had observed in the vicinity of 721 Market street, whence she had proceeded from Steuart street, about 1:30 or 1:40 p. m., acting in the manner described by her at the several trials; that though she so recognized them as the parties seen at 721 Market street she did not inform Smith of the fact, though she indicated to him "they have got the right men"; that she did not acquaint Smith with her experience at 721 Market street because she had promised her daughter she would not bring them into the bomb cases until they had first talked the matter

over; and that not until questioned later by members of the San Francisco police department, but prior to any of the trials, did she disclose the matters testified to by her upon the trials. In other words, Mellie Edeau reconciled her story to Peterson and Smith with her testimony upon the trials and explained her conduct by stating that she did not tell "all she knew" when she first talked with them. It did not then appear material. The explosion had occurred at Steuart and Market streets and, knowing this, it was her original purpose to disclose what she had observed at that place. Subsequent developments, and the testimony of several other witnesses who placed Billings at 721 Market street, disclosed the relevancy of the other matters which she had observed on the day of the explosion in the vicinity of 721 Market street, and as to which she thereafter testified consistently throughout the several trials. Her explanation that she had gone beyond and west of Steuart street on Market street finds support in her testimony in the Rena Mooney and Weinberg trials where, in describing the men she had seen with the suitcase near Steuart street, she testified that she had observed them on Market street "between Steuart and Spear," the latter street being west of the former.

At this point, it may be well to also state that in her testimony in said Weinberg trial, Mellie Edeau denied the assertion herein of Peterson and McKenzie, the latter one of former defense counsel, that she had stated subsequent to the Mooney trial, and upon the occasion of the "visit" at her home, already mentioned, by two of the former defense counsel, together with Smith, Peterson, and Older, that her natural body was at Steuart and Market streets while her "astral body" was at 721 Market street. She also there testified that following her appearance as a witness at the Mooney trial she had been harassed to such an extent that her home had been guarded day and night.

[19] Under all the circumstances, we conclude that by reason of his equivocation, indefiniteness, lack of memory of important details, and his personally disclosed questionable moral standard, illustrated by his admitted silence when a life was in the balance, Peterson cannot be accepted as a credible witness.

We turn now to the testimony herein of Officer Smith who, as already shown, was

detailed by Peterson, his chief, to accompany Mellie Edeau to San Francisco on the occasion of her first visit to see the persons then held in custody. He testified, as did Peterson, that Mellie Edeau at that time told him she had seen two middle-aged men carrying a suitcase on the day of the explosion near Steuart and Market streets, and that she did not mention being farther west in the vicinity of 721 Market street. He also testified that he brought her to San Francisco to see Mooney and Billings, who were then held in custody; that after seeing them she told "me that she never saw the men before"; that no statement was taken from her; and that he made and filed his official report with the Oakland police department. Examination of the report so filed by him, which report was copied into the record herein, discloses that it significantly states that "she failed to identify them (Mooney and Billings) *as the two men she saw around Steuart and Market streets.*" This is not the equivalent of his statement here that Mellie Edeau said she "never saw the men before," and it should be kept in mind that the report of the witness was made many years ago, immediately after the transaction, and when the matter was fresh in his mind, whereas his testimony was given in this proceeding after the lapse of more than 21 years. It may be said that, on the whole, Smith's narrative of Mellie Edeau's story to him is reconcilable with the testimony given by her upon the trials, having in mind the explanation offered by her, and discussed above in connection with the Peterson testimony, as to the purpose of her original visit being merely to ascertain whether the men then held in custody were the persons she had seen with a suitcase near Steuart and Market streets. Moreover, accepting the testimony of Smith at its face value, as a witness he is subject to the same criticism made of Peterson for having remained silent throughout the Billings and Mooney trials when human lives hung in the balance.

Petitioner also attempted to prove by Smith when on the stand in this proceeding that he (Smith) had informed District Attorney Fickert *during* the Mooney trial of the alleged change in the story of Mellie Edeau. This effort proved futile. Smith did testify he had talked with Fickert about the failure of Mellie Edeau to identify Mooney or Billings on the occasion of her visit to San Francisco with him, but went on to testify that he did not recollect

whether that conversation occurred prior to the termination of the Mooney trial, and he also testified he did not recall Fickert saying at the time he would be "a good witness for the defense." In an effort to establish that the witness had previously stated that his conversation with Fickert occurred on January 30, 1917, during the Mooney trial and that Fickert then said he (Smith) "would make a good witness for the defense," petitioner produced and read to the witness, over objection of the respondent, what purported to be an affidavit containing averments to that effect, and assertedly executed by the witness on April 8, 1918. As originally typewritten the affidavit fixed the date of the alleged conversation between the affiant and Fickert as "July" 1917 (which would be several months after petitioner's trial) but the word "July" is stricken out and over it in handwriting is written "January" (which would fix the conversation as having occurred during petitioner's trial). No satisfactory explanation of the alteration appears.

The witness testified he had no recollection of reading or executing such an affidavit and that the averments thereof did not refresh his recollection. Smith likewise failed to recollect the details of his testimony in the Rena Mooney trial, though the respondent stipulated that the witness had there testified, contrary to his testimony here, that he thought Mellie Edeau had called upon him during the trial of petitioner to explain why her testimony differed from her earlier statement to him. The recollection of the witness was faulty in many other particulars. His testimony in this connection is indefinite and falls short of showing that the witness had informed District Attorney Fickert during the Mooney trial of the asserted "change" in the story of Mellie Edeau.

Fickert testified herein that Smith did not confer with him until after the Mooney trial and that he did not, as petitioner urges, tell him to keep quiet, that he would make a good witness for the defense. Cunha testified upon this proceeding that at no time during the Mooney trial or on motion for new trial had he ever heard or learned of any prior and assertedly inconsistent statements of Mellie Edeau and that neither Peterson nor Smith informed him of any.

At this point it is well to note that the testimony of Stout, Burgess, Stewart,

Peterson, and Smith leaves the testimony of Sadie Edeau unimpaired. The testimony of the named witnesses had for its purpose the establishment of alleged prior inconsistent statements by Mellie Edeau. But, as pointed out earlier in this opinion, Sadie Edeau testified upon all four trials in a manner corroborative of her mother's testimony as to the presence of Billings, Mooney, and Rena Mooney in the vicinity of 721 Market street, and her testimony remains unimpeached.

In addition to the matters already mentioned, there were many other circumstances developed both at the Mooney trial and upon this proceeding that tend to substantiate the testimony of the Edeaus and refute the charge of perjury made against them. Reference may first be had to the testimony herein of Police Officer Earl Moore, who also testified at all four of the bomb trials, including that of petitioner. He testified that on the day of the explosion he was detailed on the south side of Market street between Third and Fourth streets; that he succeeded in removing all automobiles but one from that area; that at about 1:40 or 1:45 p. m. he sounded the horn (a broken klaxon) of said remaining automobile, an old Ford jitney bus, which was standing in front of 721 Market street; that several days later he was sent to the North End Police Station, where he again saw the identical automobile (otherwise shown to be Weinberg's jitney bus) with the same broken horn; that when he was sounding the horn on the day of the explosion, a man, whom he identified as Billings upon the several trials and here, came up to him and said the owner "will be here in a minute"; that he was positive Billings was the man he talked with in front of 721 Market street. The witness identified a police report filed by him on July 31, 1916, wherein he recounted the incident here testified to and described the person to whom he had talked. Generally speaking, the description fitted Billings at the time but for the color of the hair therein designated. This, however, is not fatal in view of the witness' actual subsequent identification of the person as Billings. The witness declared that Thomas Doidge, whose testimony at the Mooney trial was read into this record, was not the man he talked to in front of 721 Market street and that "the man I saw at 721 Market Street I am positive as I am sitting here was Warren K. Billings."

Pursuant to the understanding of counsel, there was also read into the present record the testimony of other and reputable witnesses given during the trials of certain of the other bomb defendants, which testimony lends color to or tends to substantiate that of the Edeaus. In this category is the testimony of George Robertson and his wife, both now dead. Robertson, then a professor at the University of Redlands, testified at the Rena Mooney and Weinberg trials, in substance, that he and his wife were in the vicinity of 721 Market street on the day of the explosion at about 1:30 p. m.; that he saw an automobile parked at the curb there which a man shortly thereafter cranked and drove east toward the ferry; and that he also saw a suitcase there behind a box and near the building line. His wife testified at both trials to the same general effect.

Similarly, we have before us the testimony of Herbert Wade, a school principal in the Hawaiian Islands. Wade testified at the Billings, Mooney, and Rena Mooney trials. In substance, he declared that he was in San Francisco on the day of the explosion; that Billings carrying a heavy suitcase, passed him shortly after 1 p. m. in the entranceway of 721 Market street; that he also saw a man and woman there, the latter resembling Rena Mooney. It is conceded herein that other witnesses testified upon the several trials to having seen Billings in the vicinity of 721 Market street.

[20] We are satisfied, upon a consideration of the entire record, and we find and conclude that petitioner has not here established by substantial, credible evidence that either Mellie or Sadie Edeau committed perjury upon his trial and that he has similarly failed to establish any improper conduct upon the part of the prosecuting officials in connection with the production or testimony of said witnesses. However, even were we to conclude that Mellie Edeau has been discredited, as petitioner urges, we would have no alternative but to find and conclude, and we do so find and conclude, that there is no credible evidence connecting the prosecuting officials with any such discrediting circumstance. Proof of such knowledge, as we have already pointed out, is an indispensable requisite of petitioner's cause.

[21] In our consideration of the charges made against MacDonald, Oxman, and the Edeaus, we have purposely refrained from making any reference to the testimony here-

in of Draper Hand, an ex-police officer. At the time of the explosion, Hand was a "rookie" in the police department of San Francisco. He was assigned to the Bomb Bureau and in the course of his duties came in contact with many of the prosecution witnesses. Not until 1920, however, did he make certain charges of perjury and frame-up in connection with the witnesses Oxman and Edeau, and then only after he admittedly had been associating with and going over the matter for a period of 3 or 4 years with Fremont Older, whose activities upon behalf of the bomb defendants had not always been commendable. (Billings report, supra.) It is not our purpose to narrate the charges made by Hand, for he comes to us as a thoroughly discredited and impeached witness. Inconsistencies appear in his statements through the years and much of his testimony herein was flatly contradicted by Fickert, Cunha, Matheson, and Goff. In fact, early in this proceeding it appears to have been petitioner's intention not to call Hand as a witness because, as then stated by petitioner's counsel, Frank P. Walsh, "you cannot hand him to me to vouch for his credibility * * * we know where he is and we would not vouch for his credibility." In the face of such a declaration by petitioner's counsel, no disappointment should attach to our refusal to accept him as a truthful witness when a subsequent change of policy or strategy by petitioner brought him to the witness chair. Moreover, and under the provisions of section 2051 of the Code of Civil Procedure, Hand stands impeached by reason of his conviction in 1931 or 1932 of grand theft, a felony.

[22] Petitioner made some effort herein to establish irregularities or improprieties in the conduct of the prosecuting deputy and the foreman of the jury that sat upon his case. Testimony was offered to the effect that throughout the trial the jury foreman was clandestinely meeting with Cunha, the prosecuting attorney, and reporting the reactions of the jury to the evidence and the progress there being made by the prosecution. It was also attempted to be shown that, upon the return of the jury to the courtroom with its verdict, the foreman, by drawing his hand across his throat, had signaled or conveyed the verdict to Cunha. What purpose such an asserted signal could serve a few moments prior to the public announcement of the verdict is difficult to perceive. None of the testimony addressed to the jury situation comes within the issues of this proceeding. The referee properly

ruled it out on that ground. Much of it was likewise hearsay, and objection thereto was also properly sustained on this ground by the referee. Most of the testimony, therefore, appears in the transcript merely as an offer of proof. We have examined it, however, and conclude that, even if admissible, the persons so testifying lack in persuasiveness and conviction by reason, in some instances, of prior inconsistent statements or conduct, and by virtue of their tardiness in bringing into the light such asserted improper practices. It is difficult to reconcile the testimony herein, on this and other matters, of one of the former counsel in the bomb cases with the statements of said counsel before the members of this court in the 1930 Billings hearing, wherein he asserted he made no charges against the prosecuting officials and was happy they had an opportunity there to exculpate themselves. Said counsel admitted on cross-examination herein that he made no effort during the Mooney trial or on motion for new trial to convey to petitioner's then attorneys the information possessed by him at the time as to the asserted clandestine association between the jury foreman and the prosecuting deputy or as to the alleged signal from the former to the latter. He further admitted he had not divulged the information until after he had been employed as counsel in the Weinberg case and that he "was careless" not to have disclosed it earlier. His testimony is also weakened by prior inconsistent statements. To illustrate: He testified here that he was in the building where the Mooney trial was being conducted "three or four times a week during the time that the trial was going on," whereas inspection of his testimony given at the Oxman preliminary hearing, discussed above, discloses that he there testified that he was sick for 3 weeks during the Mooney trial and "I wasn't in or about the Hall of Justice during that trial with the exception of one of the first days when they started to impanel the jury." It does not appear how he was able to see the asserted signal from the jury foreman to the prosecutor on the *last* day of the trial. Moreover, Cunha, the prosecuting attorney, when on the stand herein, denied all of the charges made by his fellow-practitioner. The jury foreman, prior to his death, executed an affidavit, proffered by the Attorney General as an offer of proof to be admitted only in the event petitioner's evidence on the subject was admitted, wherein he denied the material portions of the mentioned

charges. The district attorney and his prosecuting deputy when on the stand in this proceeding likewise specifically denied all charges of irregularity or impropriety with any member of the trial jury, and branded as false all testimony to the contrary.

[23] On the day of the explosion petitioner and his wife, Rena Mooney, resided in a studio in the Eilers building situate on Market street between Fifth and Sixth streets, more than a mile from the scene of the explosion. By way of defense upon his trial and up to the present moment, petitioner has always contended that he and his wife, in company with the latter's sister and aunt, were on the roof of the Eilers building, for the purpose of watching the parade, at the times the prosecution witnesses had them farther east at 721 Market street and at Steuart and Market streets. This defense has been grounded principally upon certain photographs purporting to show the group leaning over the parapet of the building at approximately 1:58, 2:01, and 2:04 p. m., respectively. Admittedly, petitioner appears only in the latter two pictures. The pictures were taken by one Wade Hamilton, a young man who was then employed in the Eilers building. Hamilton took the stand in this proceeding and testified, in part, that the pictures were taken by him from the roof of said building principally for the views of the parade depicted therein and that the presence in the foreground of the group above mentioned, including petitioner, was incidental and accidental.

It appears that shortly after the explosion, the police, in the course of their investigation, came in contact with Wade Hamilton and procured from him the negatives of the pictures so taken by him. Petitioner here testified that when his counsel during the trial requested the pictures they were given "blurred" copies thereof. Thereafter, he testified that upon demand and court order, the negatives were produced and enlarged so as to show the times above indicated on the face of a clock on the street several floors below and considerably easterly of the Eilers building. As so enlarged, they were put in evidence by petitioner upon his trial. It is not our intention to here develop and discuss the innumerable arguments that since have been advanced, pro and con, as to the accuracy or genuineness of the enlargements that purport to make visible the times on the face of a distant clock and thus assertedly fix the times peti-

tioner and his wife were on the roof of the Eilers building. During the trial, apparently no attack was made by the prosecution upon the genuineness of the enlargements. At least petitioner failed to accept the challenge of the Attorney General in this proceeding to point out in the Mooney trial transcript any instance wherein the prosecution questioned the genuineness of said enlargements. In other words, petitioner's alibi defense was fully developed and presented upon the trial, and the jury by its verdict impliedly rejected the same. In the affirmance of the judgment of conviction (*People v. Mooney*, 177 Cal. 642, 653, 171 P. 690, 695), this court in 1918 had the following to say about said defense: "Appellant's counsel * * * contend that the showing of Mooney's absence from the corner of Steuart and Market streets at the time when the suitcase was left there is so complete as to amount to a demonstration. * * * There was testimony which, if believed by the jurors, would have corroborated this account. Certain pictures were introduced in evidence. These were the work of a young man who photographed the people on the roof of the Eilers Building. Some of the photographs showed defendant at that place, which was more than 6,000 feet from the corner of Steuart and Market streets and more than 7,000 feet if a journey were made between the two places by way of Mission street, which is parallel with Market street. These pictures also show a clock on a building near by, and, according to the time indicated Mrs. Mooney was on the roof at 2 minutes of 2 o'clock, and she and her husband were there at 1 minute after 2 and at 4 minutes after 2. Assuming that the clocks involved in the testimony were correct, we cannot see that the alibi is, as counsel for defendant contend, scientifically established. All of the testimony regarding the time when the suitcase was placed on the sidewalk merely approximated the hour. The length of time during which the suitcase was seen by the witnesses who testified that they observed it was estimated by them, and we cannot say that within the estimates as given, if they were taken as substantially correct by the jury, the defendant could not have proceeded by automobile from the scene of the purposed explosion to the Eilers Building and to the roof before the operation of a time device to detonate the bomb. All of these matters pertaining to the alleged alibi were before the jury. It was for the jurors to say from

the evidence whether or not any real alibi was established."

The foregoing represents the attitude of the Attorney General in this proceeding. He has not undertaken to directly question the genuineness of the enlargements of the Hamilton pictures or the accuracy of the times shown thereon. Rather, has he assumed this, and contended that they are not inconsistent with the prosecution theory that petitioner was also present at 721 Market street and Steuart and Market streets as testified by the witnesses Edeau, MacDonald, and Oxman. We find no occasion to depart from the earlier disposition of this issue.

We have mentioned the point having to do with the pictures merely because petitioner asserts herein that as part of the alleged frame-up the prosecution, until ordered by the court during his trial to produce the negatives, had furnished him with "blurred" copies from which the time on the clock could not be ascertained. This argument hardly checks with the publication, as part of the defense propaganda, of a pamphlet entitled "The Frame-Up System," which made its first public appearance on December 1, 1916, *prior* to the commencement of petitioner's trial, and on the first page of which appears a reproduction of one of the Eilers building pictures with an arrow pointing to the clock and printed thereon the following: "Clock under microscope shows one minute past two."

In this connection, it seems only logical to conclude, also, that if the prosecution were engaged upon the trial in the frame-up or suppression charged to them, in all probability they would have suppressed or destroyed the negatives before the trial. Be that as it may, petitioner, as shown, had the full benefit upon his trial of the pictures and the times disclosed thereon.

While our determination as to the "alibi defense" assertedly established by the Hamilton pictures equally disposes of the attempt to establish this same defense by the testimony of persons on the roof at the time, which testimony was read into the record herein by petitioner, we do not hesitate to state that an examination of the record discloses that the testimony of many of said witnesses failed to place petitioner upon the roof of the Eilers building at the times disclosed by the clock. Moreover, the statements made by many of these same persons to the police shortly after the ex-

plosion, which statements were also copied into the record at petitioner's request, disclose, in most instances, that petitioner and his wife did not arrive on the Eilers roof until after 2:30 p. m. on the day of the explosion. However, as already stated, even if petitioner and his wife were on the Eilers roof at approximately 2 p. m., it was for the jury to decide whether they had immediately dispatched themselves to that location from Steuart and Market streets, where the prosecution witnesses placed them. As pointed out above, the jury by its verdict impliedly so resolved.

At this point, it is well to state that petitioner attempted, without the aid and against the advice of his counsel, to establish herein that the district attorney at the time of trial had sent a message, through a common friend, to petitioner's sister-in-law, offering her immunity for her sister, petitioner's wife, in the event she would change the time that they assertedly had gone on to the Eilers roof to watch the parade. All of the principals in the asserted offer, including petitioner's wife, his sister-in-law, the common friend, the district attorney, and petitioner's counsel at the time, failed and refused to testify that such an offer was made by or came through or from the office of the district attorney.

[24] By the witness Charles A. Griffen, petitioner sought to establish that the witness had informed Fickert that Mooney was not involved in the explosion, because he had seen him on the Eilers roof at approximately 1:45 p. m., and that Fickert assertedly told the witness to remain silent as Mooney should have "been hung long ago." On cross-examination, the witness admitted that though he subsequently read in the newspapers that petitioner was to be hanged he did nothing toward informing the trial court or defense counsel of the matters here narrated by him. Under the circumstances, we conclude the witness is not worthy of belief. In addition, Fickert, while on the stand in this proceeding, denied knowing Griffen and characterized his testimony as false.

[25] Petitioner next urges that his arrest and prosecution were the result of antipathy upon the part of certain large corporations because of his prior activities in attempting to unionize their employees. Our examination of the record herein satisfies us that this is an assertion unsupported by substantial evidence. The only possible connection shown between the

prosecuting officials and said corporate interests was the employment by the district attorney, shortly after the explosion, of one Swanson, now deceased, who formerly had been employed as special agent for the Public Utility Protective Bureau. All other "evidence" relied upon by petitioner to establish this contention is not of a tangible character but such as, at best, merely gives rise to a suspicion. Much of it is hearsay in character and not properly admissible.

Shortly after the explosion, Swanson was employed by the district attorney as an investigator, at a salary of \$165 a month, solely because of his knowledge, gained through his former employment, of known dynamiters and of the thefts of dynamite from certain places. Such information would naturally serve a most useful purpose in tracking down the then unknown perpetrators of a dastardly crime committed by means of high explosives. The district attorney, his deputies, and police officials denied in this proceeding that Swanson produced or coached any witness or in any manner directed the prosecution. The record herein bears them out. The production of MacDonald, Oxman, and the Edeaus upon the trial has been accounted for and explained in this record, and we fail to discover therein the hand of Swanson, the alleged arch-conspirator. Nor is there any credible evidence that Swanson ever procured or influenced any witness in the case.

In contemplated substantiation of the charged conspiracy, petitioner points to the patently hearsay testimony herein of one of his former counsel to the effect that after petitioner's acquittal in Martinez on a prior charge of possession of explosives, one of the attorneys for the utility then involved had stated that they had a "red shirt on the * * * now," meaning petitioner, and would get him. Aside from the hearsay character of the testimony, the declaration may well be said to be open to the construction that the person uttering it was still convinced of petitioner's guilt on the Martinez charge, in spite of his acquittal, and that on some future day petitioner would not again be so fortunate as to escape the consequence of his wrongful acts. The remark is not capable exclusively of an interpretation that they would "get" petitioner by "framing" him. However, were we to consider such hearsay testimony, the effect of it would be more or less balanced or offset by the testimony, also hearsay in character,

which attributes to said former counsel a declaration, assertedly made immediately after hearing of the explosion, to the effect that "I bet that is an old client of mine, Tom Mooney, who I defended in Martinez." Fremont Older, during his lifetime an untiring supporter of petitioner, admitted before the members of this court in 1930 that when he heard of the explosion he immediately suspected petitioner. These matters tend to destroy the contention that the charge against petitioner was manufactured out of whole cloth by a corrupt district attorney conspiring with certain antagonistic corporate interests. Moreover, it appears anomalous, at least, that a district attorney, who, according to the contradicted testimony herein, was elected to office with the union labor indorsement and had appointed to his staff as deputies, among others, seven persons who had direct union labor affiliations or had been recommended for appointment by union organizations, would prosecute a man for murder solely because of his alleged union activities. Many other matters could be discussed along this line, but they would serve merely to prolong this opinion without changing our conclusion on this phase of the case. We therefore find and conclude on the evidence now before us that petitioner's arrest and conviction were not the result of a frame-up or conspiracy engineered or directed by corporate interests or agencies.

[26] As additional evidence tending to overcome the charges of frame-up and perjury, and as pointing to the guilt of petitioner, reference may well be had to the evidence produced upon the trial disclosing the discovery at his residence of certain incriminating articles. In the opinion of this court upon the appeal from the judgment of conviction, *supra*, at page 645 of 177 Cal., 171 P. 690, it was declared that they indicated possession by the petitioner of the means for the perpetration of the crime.

Upon this proceeding, Detective-Sergeant Proll, who participated in the search of petitioner's studio a few days after the explosion, testified that certain cartridges shown to him after the explosion and apparently constituting a portion of the bomb were similar to cartridges found in petitioner's studio. He also testified that there was found in petitioner's studio at the time four pamphlets, offered in evidence here, issued by the Hercules Powder Company and having to do with the handling of gun-

powder and dynamite. This witness testified at several of the bomb trials, including petitioner's trial.

Arthur B. Riehl, a retired inspector of police, testified in the present proceeding that shortly after the explosion he, with others, searched the basement at the home of Nolan, one of petition's original codefendants, and found therein petitioner's motorcycle (which petitioner here admitted he stored in Nolan's basement), certain .32 and .38 caliber cartridges, several pounds of scrap iron, and many ball bearings, all of which were more or less similar to articles found at the scene of the explosion. This witness further testified that there was also found in said basement a box of ignition powder, a package of clay, some sand, and four or five pounds of thermite, fused with aluminum dust. The witness added that he had handled explosives for the police department and that his study of explosives had established to his satisfaction that thermite when fused with aluminum dust is highly explosive and is employed by the United States government in the manufacture of bombs. Thermite so fused, he added, when confined in a container lined with fire clay or other base, generates an intense heat which, being unable to escape, creates "the strongest explosive there is."

[27] In passing, we have no hesitancy in rejecting as unworthy of belief the testimony given herein on behalf of petitioner by Warren K. Billings who, although not a party to this proceeding, was likewise convicted of participating in the bomb explosion. There are many matters that serve to deprive Billings' testimony of credibility. He is an admitted burglar. In his earlier life he worked in the mines in Utah, where he acquired a knowledge of dynamite. He admits having stolen eighteen sticks of dynamite on one occasion, and, concededly, he was convicted in 1913 for illegally transporting dynamite to Sacramento, a felony. His 1930 testimony, included herein, discloses that the dynamite was carried by him with the connivance of petitioner, to be used for the destruction of power lines. Admittedly, he had been previously employed by petitioner to walk certain power lines to ascertain the number of guards maintained therein. At the time of his arrest for the preparedness day parade explosion, Billings resided in the home of Belle Lavin, a known rendezvous for anarchists. He was an acquaintance,

at least, of Alexander Berkman, an avowed anarchist, and others of similar character.

While on the stand in this proceeding, Billings denied having been with petitioner on the day of the explosion. He likewise denied being on Market street below Grant avenue, which is considerably west of the scene of the explosion. His testimony indicates that at 1:20 p. m. he proceeded from his home and by a circuitous route finally located himself at Sixth and Market streets to watch the parade. Other points reached in his devious march failed to offer proper vision of the parade.

In 1930, when testifying in support of his pardon application, Billings declared that on the day of the explosion, when prosecution witnesses placed him elsewhere, he was engaged in spraying parked automobiles with acid or paint remover, and that at the time of his trial for murder growing out of the bomb explosion he did not inform counsel, court, or jury of these acts of sabotage, of misdemeanor character, even though they might have furnished an unimpeachable alibi, particularly when, at the time of his arrest, he still assertedly possessed a cigarette paper on which he had written the license numbers of the automobiles so sprayed. He testified further in 1930 that at the time of trial he felt he could otherwise establish his innocence and had agreed with petitioner herein and Nolan when in jail not to reveal the story of sabotage. He thereupon assertedly smoked the cigarette paper bearing the license numbers. Upon cross-examination in this proceeding, he denied that he had agreed with the petitioner and Nolan to conceal the acid-throwing episode. He admitted he had testified to the contrary in 1930, and attempted to explain herein by stating that he could not presently recall such agreement. Other inconsistencies exist between his 1930 testimony and his present testimony. To be specific, he testified positively in this proceeding that he had been "framed" by the officials and then went on to testify that his 1930 testimony was false wherein he declared he had not been framed, but that his conviction was the result of mistaken opinion by the officials. Moreover, he admitted in 1930 that he has not always spoken the truth when under oath.

[28] We leave Billings, and direct our attention to the petitioner's activities prior to the explosion, with a view to determining whether his own words and acts tend

to demonstrate his connection therewith. A very commonplace rule which plays a large part in the formation of judgments in the affairs of life is incorporated in section 1960, subdivision 2, Code of Civil Procedure, under the heading of "inferences and presumptions." It is there provided that an inference must be founded on a deduction from a fact proved such as may be warranted by a consideration "of the * * * particular propensities or passions of the person whose act is in question." With this rule in mind, we will make reference, as indicative of the propensities of petitioner, to his revolutionary activities which clearly establish his aim and purpose to weaken and undermine, with the view of ultimate destruction, both by violent and insidious means, the entire social and political structure of the nation. Such was the character of his associates and his own professed writings. In other words, he was outspokenly hostile to our system of government. Much could be written of his radical activities, as disclosed by his writings. Petitioner admittedly was the founder of a radical newspaper called *The Revolt*. Shortly after its demise, and in 1915, petitioner became interested, with the well-known anarchist Alexander Berkman, in the newly-founded revolutionary paper known as *The Blast*. Copies of said paper were here offered as exhibits. Unquestionably, the paper and its supporters were opposed to this country preparing itself for participation in the World War. We shall not quote from the numerous unpatriotic and defamatory articles of that paper except to refer to one written by the petitioner in the issue of April 1, 1916, which article petitioner here admits has lived to plague him to the present moment. In that article, after referring to those seeking to prolong the war and thus enhance their profits, petitioner concluded by declaring that "This move of the League to trap the workers must be pushed back in the teeth of the Labor crushers." He denies that the quoted sentence had reference to the preparedness day parade. However, he admitted here that he is a social revolutionist and that he opposed the preparedness day parade. Of course, he denies that his opposition called for direct action of the type that greeted the commencement of the parade and which, as shown, left 10 dead and many injured.

For several years prior to 1916, petitioner managed an organization known as the

International Workers Defense League, which had for its purpose the defense of all persons under prosecution or conviction for crimes of direct action, including dynamiting. From the writings and other documents here in evidence it is apparent that the guilt or innocence of a person so charged was an immaterial factor. In this connection, petitioner wrote threatening letters, suggesting violence, to the Governors of California and Utah unless certain offenders were accorded their liberty.

In 1913, petitioner and two persons known as Joseph Brown and H. G. Hanlon, were arrested in Martinez for the possession and transportation by boat of explosives, consisting of certain wire, batteries, an alarm clock, fulminating caps and guns. Although several trials were had, petitioner was never convicted on the charge. He has always maintained the articles were "planted" by antagonistic corporate interests. However, there is testimony in the record herein, given by former counsel for petitioner upon those trials, to the effect that subsequently, and upon affidavit by petitioner, certain of the articles were reclaimed. Petitioner denies having made such an affidavit of ownership. It is also interesting to note that the present record discloses that in May, 1916, 2 months before the explosion, petitioner made inquiry by letter of Hanlon as to the whereabouts of Brown. Evidence of these and other matters tends to overcome the charge of frame-up made by petitioner.

Points not discussed herein are lacking in merit and do not require further notice.

[29] For the reasons stated, we conclude that petitioner has not established by substantial, credible evidence that his conviction was the result of perjury on the part of prosecution witnesses or that the prosecuting officers caused or suffered to be introduced at petitioner's trial any testimony which they knew, or had reason to believe, was false, or that they were guilty of suppressing or preventing the introduction of any evidence which, had it been given, would have been favorable to the defense of petitioner at his trial.

The writ is discharged and the petitioner is remanded.

LANGDON, Justice (dissenting).

I dissent.

The question here involved is not the guilt or innocence of Thomas J. Mooney.

The issue, as defined by the United States Supreme Court, is whether he was accorded due process of law on his trial for murder. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406.

In this dissenting opinion, no useful purpose would be served by reviewing the evidence. The preponderance of the material, credible evidence in the record leads me to conclude that on his trial petitioner was not accorded due process of law.

For that reason, the writ of habeas corpus should issue.



BELLMAN v. SAN FRANCISCO HIGH SCHOOL DIST.*

S. F. 15850.

Supreme Court of California.

Nov. 22, 1937.

Rehearing Granted Dec. 20, 1937.

1. Appeal and error ⇨1001(1)

An implied finding that school district employees were negligent was conclusive where there was substantial evidence which, when read with inferences most favorable to high school girl, supported verdict in her favor for injuries sustained in a tumbling class (School Code, § 2.801, as amended by St.1931, p. 2487).

2. Appeal and error ⇨930(1)

The intendments on appeal in negligence action were in favor of the judgment.

3. Schools and school districts ⇨89

That high school girl received injury because she did not do "roll over two" gymnastic exercise correctly did not necessarily convict her of contributory negligence, nor absolve school district from liability for her injury (School Code, § 2.801, as amended by St.1931, p. 2487, §§ 3.731, 3.733, 3.735).

4. Schools and school districts ⇨89

In determining whether school district was negligent in carrying on gym class, test was whether school officials used same care as persons of ordinary prudence charged with duty of carrying on a public school system would use under same circumstances (School Code, § 2.801, as amended by St.1931, p. 2487, §§ 3.731, 3.733).

*For subsequent opinion see 81 P.2d 894.

5. Schools and school districts ⇨89

In determining whether school district is responsible for injury to pupil allegedly resulting from failure of its employees to use ordinary care, what is ordinary care depends upon circumstances of each particular case, and is to be determined as a fact with reference to situation and knowledge of parties (School Code, § 2.801, as amended by St.1931, p. 2487).

6. Schools and school districts ⇨89

In passing on school district's liability for injuries sustained by high school girl in doing "roll over two" exercise in tumbling class, jury could properly consider whether exercise was inherently dangerous and whether girl should have been allowed or required to take tumbling instruction (School Code, § 2.801, as amended by St.1931, p. 2487, §§ 3.731, 3.733, 3.735).

7. Evidence ⇨14

It is common knowledge that some students in school show more aptitude for athletics than others.

8. Schools and school districts ⇨89

As respects liability of school district for injuries sustained by high school girl in tumbling class, teachers, in exercise of ordinary care, were required to take into consideration variation in capacities of students for physical training and fact that some forms of exercise are undesirable for girls (School Code, § 2.801, as amended by St.1931, p. 2487, §§ 3.731, 3.733, 3.735).

9. Schools and school districts ⇨121

Evidence that high school girl enrolled in tumbling class under protest, that teacher did not give instructions directly, that girl had a bad knee, and that "roll over two" gymnastic exercise required complete co-ordination, *held* to justify judgment for girl for injuries resulting from her failure to do "roll over two" exercise properly, either on theory that exercise was not suitable for high school girls, that teacher knew or should have known that girl was not in proper condition for such instruction, or that teacher did not properly instruct her (School Code, § 2.801, as amended by St. 1931, p. 2487, §§ 3.731, 3.733, 3.735).

10. Schools and school districts ⇨121

Evidence that high school girl, injured in tumbling class because of her failure to do "roll over two" gymnastic exercise properly, had enrolled in class under protest because other gymnasium classes were filled

and that she was told when she wished to withdraw, because of bad knee, that she would have to continue to get her credits, *held* to establish that girl was not contributorily negligent (School Code, § 2.801, as amended by St.1931, p. 2487, §§ 3.731, 3.733, 3.735).

11. Schools and school districts ⇨122

In action against school district for injuries sustained by high school girl while doing "roll over two" gymnastic exercise in tumbling class in which she was compelled to enroll because other classes were filled, whether school district was negligent in giving such exercise to high school girls, in giving exercise to this girl, or in not having given her proper instruction, *held* for jury (School Code, § 2.801, as amended by St. 1931, p. 2487, §§ 3.731, 3.733, 3.735).

12. Schools and school districts ⇨122

In action against school district for injuries sustained by high school girl while doing exercise in tumbling class, instruction that jury should consider only whether girl's injury was caused by negligence of a school employee in carrying out physical education work was properly refused, since it unduly limited district's liability to negligence in teaching of school subjects (School Code, § 2.801, as amended by St.1931, p. 2487).

13. Trial ⇨68(1)

A motion to reopen case in order that plaintiff's guardian ad litem, who had testified in case, might be asked whether she had ever been convicted of a felony was properly denied, where police department record upon which motion had been made showed only the imposition of a jail sentence (Code Civ.Proc. § 2051).

14. Witnesses ⇨344(1), 345(1)

A witness may not be impeached by evidence of particular wrongful acts, but conviction of a felony may be shown (Code Civ. Proc. § 2051).

15. Witnesses ⇨252

The admission of photographs or diagrams for purpose of illustrating testimony rests largely within trial judge's discretion.

16. Witnesses ⇨252

In action against school district for injuries sustained by high school girl while performing exercise in tumbling class, refusal to permit witness to illustrate her testimony by use of pictures in textbooks was not an erroneous abuse of discretion (School

Code, § 2801, as amended by St.1931, p. 2487).

17. Schools and school districts ⇨121

In action against school district for injuries sustained by high school girl while performing exercise in tumbling class, admission of a junior high school bulletin on physical education offered by defendant was properly denied as irrelevant (School Code, § 2801, as amended by St.1931, p. 2487).

18. New trial ⇨76(1)

Although amount of damages to be allowed for personal injuries is left to jury's sound discretion, it is subject to review by trial judge in ruling upon motion for new trial (Code Civ.Proc. § 657).

19. Damages ⇨95

The measure of damages in personal injury action is amount which will compensate for all detriment proximately caused by defendant's negligence (Civ.Code, § 3333).

20. Appeal and error ⇨1004(1)

An appellate court may not interpose its judgment as to proper amount of damages for personal injuries, unless it appears that recovery was so excessive as to shock sense of justice and raise presumption that amount was arrived at as result of passion and prejudice, rather than upon a fair and honest consideration of facts (Civ.Code, §§ 3333, 3359).

21. Damages ⇨24

Recovery in personal injury action is limited, so far as physical suffering, pain, or mental anguish are concerned, to compensation for consequences which have occurred up to time of trial or which it is reasonably certain will follow in the future, and jury may not consider consequences which are only likely to occur (Civ.Code, § 3283).

22. Damages ⇨130(3)

\$15,000 for injuries sustained by 17 year old girl in high school tumbling class causing a nystagmus, a lack of planar reflex on the left side, and a possible brain injury, and claimed to have caused headaches, dizziness, occasional vomiting and loss of weight, held excessive in the amount of \$10,000, where girl had been in bed only three weeks and had thereafter assisted in doing housework (Civ.Code, §§ 3333, 3359).

23. Appeal and error ⇨1178(6)

That damages awarded a high school girl in negligence action against school dis-

trict were excessive did not require reviewing court to set aside verdict of jury that school district was guilty of negligence and liable for girl's injuries.

24. Appeal and error ⇨1140(1)

Where verdict in personal injury action was erroneous only to extent of excess damages, defendant was awarded new trial on sole issue of damages conditional upon plaintiff's refusal to remit excess damages.

NOURSE and SHENK, JJ., dissenting.

—◆—
In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Belva Bellman, a minor, by and through her guardian ad litem, Ordell Cohen, against the San Francisco High School District. Judgment for plaintiff, and defendant appeals.

Affirmed upon condition of remittitur, otherwise to stand reversed and remanded.

Prior opinion, 64 P.(2d) 1143.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for appellant.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, amici curiae in support of appellant.

James F. Brennan and Walter McGovern, both of San Francisco, for respondent.

EDMONDS, Justice.

While a student in the Polytechnic High School at San Francisco, Belva Bellman, a 17 year old girl, sustained personal injuries when endeavoring to do an exercise taught in the tumbling class which was conducted by the school as one of the courses in physical education. Through a guardian ad litem she brought suit against the San Francisco High School District and by the verdict of a jury was awarded damages in the sum of \$15,000. A judgment was thereafter entered in her favor, and the school district has appealed from the judgment and from the order by which it was denied a new trial.

The respondent was a student in the high sophomore class of the school for the spring term of 1934 and enrolled in a "Beginners' Tumbling Class." There were

18 separate exercises or stunts prescribed for this class. It was necessary to do successfully at least 10 of the 18 in order to obtain a passing grade and the more stunts which were satisfactorily performed, the higher the grade which was given. One of these exercises is known as the "roll over two." To do it the performer takes a short run and dives over two persons who are on the floor on their hands and knees, alights on outstretched arms, and, with the head curled under in order to complete a forward roll, comes to a standing position. While trying to accomplish this feat the respondent struck her head. The appellant contends that there is no evidence of any negligence of the school district, or of its officers or employees, which resulted in the injuries complained of and that they were caused by the contributory negligence of the student. It is also claimed that the damages awarded are excessive and that errors were committed by the trial court entitling the school district to a reversal of the judgment.

Contrary to the rule of the common law, the Legislature of this state has declared that school boards shall be "liable as such in the name of the district for any judgment against the district on account of injury to [any pupil] arising because of the negligence of the district, or its officers or employees." Section 2.801, School Code, as amended by St.1931, p. 2487, Deering's Gen. Laws 1931, Act 7519. The School Code also requires high school boards to prescribe suitable courses in physical education (section 3.731) and makes it the duty of such boards "to enforce the courses of physical education prescribed by the proper authority, and to require that such physical education be given in the schools under their jurisdiction or control." Section 3.733. All high school students except those in cadet companies or excused on account of physical disability must "attend upon such courses of physical education for at least two hours each week that school is in session." Section 3.735.

Prior to the term in which she was injured, the respondent had been a student in the same school and was enrolled in the gymnasium classes. According to her testimony, in January, 1934, when the new semester commenced, she asked to continue in the gymnasium class but was told by the teacher in charge of registration that the gymnasium classes were full and that she would have to take physical education in the tumbling class. The school officials

deny that this occurred. In any event, the respondent entered the tumbling class taught by Miss Thompson and attended regularly from January until May, when the accident occurred. In that time she learned to do a number of the exercises, including the "roll over two." The accident happened during a regular class period while the respondent was attempting to do the exercise with Miss Thompson watching her. This teacher testified that as the respondent "took off and jumped over the girls, her hands were not extended as they should be for the proper landing, but were about half bent, and consequently when her hands hit the floor her head was there also instead of the hands taking the weight so that the head could tuck under."

[1-5] The implied finding of the jury that the employees of the school district were negligent is conclusive if there is substantial evidence which, when read with the inferences most favorable to the respondent, support the verdict. The intentions are in favor of the judgment (*Hassell v. Bunge*, 167 Cal. 365, 139 P. 800, *Hind v. Oriental Products Co.*, 195 Cal. 655, 235 P. 438) and while the evidence shows that the respondent received injury because she did not do the exercise correctly, this does not necessarily convict her of contributory negligence nor absolve the school district from liability. The question is whether the school officials used the same care as persons of ordinary prudence, charged with the duty of carrying on the public school system, would use under the same circumstances. The Legislature has made school districts responsible for the injury of any pupil resulting from the failure of their officers or employees to use ordinary care. What is ordinary care depends upon the circumstances of each particular case and is to be determined as a fact with reference to the situation and knowledge of the parties.

[6-8] In deciding whether the employees of the appellant used ordinary care it was proper for the jury to consider not only whether the exercise was inherently dangerous but also whether they should have allowed or required the respondent to take instruction in tumbling. It is a matter of common knowledge that some students show much more aptitude for athletics than do others. Some enjoy physical exercise; others find games or stunts of any kind very difficult. Frequently students of the

same age have very different capacities for physical training. Also, some forms of exercise are considered entirely proper for boys while too strenuous or otherwise undesirable for girls. In the exercise of ordinary care it was the duty of the teachers employed by the school district to take all of these factors with others into consideration in determining the kind of instruction to be given the respondent.

In her testimony Miss Thompson, the teacher of the tumbling class, said that in order to do the "roll over two" the student should make an approach to the persons on the floor by a run in good rhythm, neither too fast nor too slow, and take off from the two feet, not from one, making a good spring over the backs of the other students to clear them from 12 to 18 inches. The important thing, she said, is the landing. Describing this she said the performer must land on the hands, with the hands taking the weight of the body almost straight but under control with the head tucked in. The exercise is completed, according to her, by dropping on the shoulders and coming to a standing position with the feet together.

[9-11] Of the 18 exercises taught in the tumbling class the "roll over two" is the only one where the body is entirely off the floor for a portion of the time it is being performed. The evidence presented to the jury shows that it requires complete co-ordination, and the teacher admitted that, if for any reason the rhythm required for that type of work is broken, the arms must momentarily stand the full weight of the body going through the air 4 or 5 feet; also, that unless there is complete co-ordination in relaxing the arms and tucking in the head, "there is liable to be difficulty." If the student failed to tuck the head under at the proper moment, the teacher said, "then the head would get it."

In addition to this enumeration of the requirements for the exercise, the jury had before it the testimony of the teacher of the tumbling class that proper performance depends not only upon a girl's agility and muscular strength but also upon her mind. Muscular strength is not all that is required, she said. "You might have muscular strength and not be able to do it." The jury was told by the respondent that she took the tumbling class work under protest; that Miss Thompson gave her no instruction directly but that she was shown how to do the exercises by advanced students in the class; that in doing the "roll over two"

she had many times fallen on top of the girls on the floor; that she had a bad knee that "went out" at times; that two weeks before the accident she had fallen in the locker room and Miss Thompson had dressed her knee with hot compresses; and that she had then told Miss Thompson that her knee was bad and that she did not want to take tumbling; but that Miss Thompson said "I would have to in order to get my credits." This and other evidence, if believed by the jury, is sufficient to support a verdict for the respondent either upon the theory that the "roll over two" is not an exercise suitable for senior high school girls or that appellant's employees knew or should have known that because of the respondent's mental or physical condition she was not a proper subject for such instruction, or that the class teacher did not properly instruct and supervise her. It also justifies the implied finding of the jury that the respondent was not guilty of contributory negligence. While there was testimony from teachers of physical education that the "roll over two" is not dangerous, the evidence also shows that injury could result if it was not performed in a particular way. That the respondent sustained some injury while attempting the exercise is certain. Under the circumstances shown in this case the issue of negligence was solely one for the determination of the jury. *Mastrangelo v. West Side U. H. School District*, 2 Cal. (2d) 540, 42 P.(2d) 634.

The case of *Kerby v. Elk Grove Union H. S. District*, 1 Cal.App.(2d) 246, 36 P. (2d) 431, 94 A.L.R. 1502, relied upon by the appellant, presents a different situation. There the student died after being struck on the forehead by a basketball while engaged in playing the game at school. But the boy was considered a proficient basketball player and no one knew that he had the physical difficulty which the medical testimony showed was aggravated by the blow and caused death. The court properly held that the instructor was not negligent in permitting the student, a vigorous, robust boy, to participate in the game in the absence of any knowledge of his malady. The injury in *Hack v. Sacramento City Junior College District*, 131 Cal.App. 444, 21 P. (2d) 477, was caused by the negligent act of students in doing something not particularly directed by the teacher and while he was not present. In *Underhill v. Alameda E. School District*, 133 Cal.App. 733, 24 P. (2d) 849, the court held that the statute

imposing liability upon school districts is broad enough to cover injuries received by a pupil while playing in a school yard if such injuries are caused by the negligence of the district or its officers or employees, but found the complaint insufficient in its allegations of negligence. Applicable to the instant case is the rule stated in *Goodman v. Pasadena City H. S. District*, 4 Cal. App.(2d) 65, 40 P.(2d) 854, where it was said that a plaintiff may recover by proving either the existence of a danger known to the authorities who neglected to guard the pupils against it or that there was an unknown peril which by the exercise of ordinary care under the same circumstances a reasonably prudent person would have discovered.

[12] The appellant contends that the trial judge erroneously refused to give to the jury the following instruction proposed by it: "You are instructed that you are not to substitute your judgment with regard to what is correct and sound educational policy in the conduct of physical education for that of the Board of Education, but you are only to determine whether or not in the carrying out of said physical education work there was any negligence by an employee of defendant which proximately caused the injury suffered, if any, by Belva Bellman." This ruling was correct. While it does not lie within the province of the jury to determine whether a certain subject should be taught, school authorities may be guilty of negligence in requiring a student to take a particular course of study. The instruction complained of limited the liability of the appellant to negligence "in the carrying out of said physical education work." Of course, a school district would not be guilty of negligence if it prescribed a course of study which no student ever took. But the statute does not limit liability to negligence which occurs in teaching a subject, and the instruction may reasonably be interpreted as placing this restriction upon the right of the respondent to recover.

After the taking of evidence was concluded but before the case was submitted to the jury the appellant asked leave to reopen its case for the purpose of asking Ordell Cohen, the guardian ad litem of the respondent and a witness in the case, whether she had ever been convicted of a felony and also whether she had been arrested on certain occasions. To support its request made at that time, counsel for the appellant

presented to the trial judge in the absence of the jury a record which he said he had just then received from the police department. He also said that he had no information other than was shown by it.

[13, 14] When the motion was made the judge said "You can ask her if she has been convicted of a felony, of course." This was followed by a discussion between counsel concerning the record after which the motion was denied, apparently for the reason that the record or written memorandum giving certain information concerning Ordell Cohen does not show any conviction of a felony but only an arrest and conviction with a sentence of one year in a county jail. Appellant's counsel made no showing that he believed Mrs. Cohen had suffered conviction of a felony at any time and, as the motion was made upon the record which was submitted to the court, it was properly denied. A witness may not be impeached by evidence of particular wrongful acts, but the conviction of a felony may be shown. Section 2051, Code Civ.Proc.

[15-17] Appellant also complains that a witness was not allowed to illustrate her testimony by the use of pictures in textbooks. The admission of photographs or diagrams for this purpose rests largely within the discretion of the trial judge. No abuse of that discretion has been shown. Also, there was no error in refusing to admit in evidence a junior high school bulletin on physical education. The appellant insists that evidence showing "that the same exercises or stunts were authorized for junior high school girls and performed by them" was relevant to the issues before the court. But the fact that the same exercises were prescribed for younger girls has no evidentiary value. It may be even more negligent to require girls of junior high school age to take certain physical exercises than to make the same requirement for older girls. The fact that the exercises were prescribed for one group does not prove that the school authorities used due care in requiring students of another group to take them.

[18-20] Concerning the amount of damages awarded to the respondent by the jury, the appellant contends that it is so out of proportion to the injuries shown by the evidence as to require a new trial. While the sum to be allowed as damages for personal injuries is left to the sound discretion of the jury, it is subject to review by the

trial judge in ruling upon a motion for a new trial (section 657, Code Civ.Proc.), and the power of this court to relieve a defendant from a judgment for damages in an amount so plainly and outrageously excessive as to indicate that it was arrived at as the result of passion or prejudice has often been recognized and exercised. *Livesey v. Stock*, 208 Cal. 315, 281 P. 70; *Epply v. Los Angeles Creamery Co.*, 216 Cal. 194, 13 P.(2d) 664; *Reneau v. Hirsch*, 88 Cal. App. 1, 262 P. 1100. The measure of damages in an action for personal injuries is the amount which will compensate for all the detriment proximately caused by the negligence of the defendant. Section 3333, Civ.Code. "Damages must, in all cases, be reasonable." (Section 3359, Civ.Code), but what is a reasonable amount is a question upon which there may legitimately be a wide difference of opinion. Before an appellate court may interpose its judgment as to the sum which will compensate a plaintiff for personal injuries, it must appear that the recovery is so excessive, when compared with a sum reasonably warranted by the evidence showing the nature and extent of the injuries received, as to shock a sense of justice and raise the presumption that the amount was arrived at as the result of passion and prejudice rather than upon a fair and honest consideration of the facts. *Slaughter v. Van Winkle*, 213 Cal. 573, 2 P.(2d) 789.

The respondent claims that her skull was fractured when she fell and the medical evidence offered by her confirmed the fracture and was to the effect that it might result in serious and permanent consequences. On the other hand, while the history given by the respondent showed that after the accident she developed a severe headache and was nauseated and that she later suffered from headache, dizziness, occasional vomiting, and loss of weight, her physicians found few objective symptoms. One of her physicians testified that the physical and neurological examinations were negative except for a nystagmus, which is an involuntary oscillation of the eyeball, and the lack of planar reflex on the left side, indicating a mild interference with the nerves of the spinal column. Another physician testifying in her behalf found the nystagmus, which he said was a disturbance of the co-ordination of the eye muscles, indicating some organic disturbance within the pathways that control the muscular movements of the eye but "was not a pronounced thing," and some abnormal re-

flexes. He said that her tendon reflexes were exaggerated, but he added, "I would not place very positive significance on that except that it was in keeping with the diagnosis as finally made." He also mentioned that a Babinski test showed some mild disturbance. Concerning this test he said: "By itself it could not be given, in my mind, a very positive significance, but taken in connection with other findings it might." He stated as his opinion of the respondent's injuries that at the time of the trial she was suffering from the local and general effects of a brain injury which made prognosis difficult, and that the symptoms complained of might persist for a long time with a "fair probability" of more serious manifestations.

Viewing this evidence most strongly in favor of the respondent and giving her the benefit of all reasonable inferences, a verdict of \$15,000 is much in excess of the reasonable amount which the law fixes as the measure of damages which the respondent may recover and impels the conclusion that it was arrived at as a result of passion or prejudice. The appellant charged the respondent and her guardian with exaggerating the extent of the injury which the respondent received. In support of this claim the appellant called one witness who testified that, immediately before an examination of the respondent by a physician, the guardian directed her to run in order to increase the rate of her heart beats and make her condition appear more serious than it was. Other unfair and misleading practices were charged to the respondent and the guardian. While both the respondent and the guardian denied that the injuries had been exaggerated by them, each admitted that the respondent walked much more than a mile just before one physical examination.

[21] But assuming that the respondent and her guardian have not exaggerated the injuries, the medical testimony fails to show any certainty of serious permanent injury. The respondent's own physician testified only to a probability of permanent disability. Under section 3283 of the Civil Code, "damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." By this section, in an action for personal injuries recovery is limited, so far as physical suffering, or pain, or mental anguish are concerned, to compensation for the consequences which have occurred up to the time of the trial,

or it is reasonably certain under the evidence will follow in the future. *Melone v. Sierra Ry. Co.*, 151 Cal. 113, 91 P. 522. The jury may not consider consequences which are only likely to occur. "To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." *Silvester v. Scanlan*, 136 Cal.App. 107; 28 P.(2d) 97, 99; *Bailey v. Yosemite Portland Cement Corporation*, 136 Cal.App. 111, 28 P. (2d) 65. No such certainty is shown in the evidence in this case.

[22-24] Considering the medical evidence presented by the respondent, an award of \$15,000 is grossly excessive and raises the presumption that it could not have been based upon a fair consideration of the facts relating to the injuries which the respondent suffered. The average citizen looks upon school authorities as protectors of the children in their charge and the circumstances of the injury, as related by the respondent to the jury, would particularly arouse the passions and prejudices of parents. But the respondent was only in bed three weeks and has since admittedly assisted in doing housework and performed the duties of a young woman in a home. Measuring the respondent's evidence by the rules which have been stated, the sum of \$5,000 is the maximum amount which may be permitted to stand. There is no reason to set aside the verdict of the jury that the appellant was guilty of negligence and liable to the respondent for the injuries proximately occasioned thereby. *Pretzer v. California Transit Co.*, 211 Cal. 202, 294 P. 382. But the appellant is entitled to a new trial upon the sole issue of the amount of damages unless, within thirty days from the filing of the remittitur in the court below, the respondent shall remit from the judgment the sum of \$10,000. If such remission be so made, then the judgment shall stand affirmed with neither side to recover costs upon appeal; otherwise, it shall stand reversed and the cause remanded for trial upon the issue stated.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

NOURSE, Justice pro tem. (dissenting).

I dissent:

The complaint charges the district with negligence in general terms. To hold it

liable for injuries received in this manner it is necessary to prove that the district was guilty of some act of omission or commission which this court can say as a matter of law is actionable negligence. "The law does not make school districts insurers of the safety of the pupils at play or elsewhere." *Goodman v. Pasadena City H. S. Dist.*, 4 Cal.App.(2d) 65, 40 P.(2d) 854, 855.

The record is silent in so far as proof of any act of negligence is concerned. If it be argued that it was negligent for the school district to give the course of instruction in the first instance, the answer is that it is one prescribed and accepted in thousands of other schools. If it be argued that this particular stunt is inherently dangerous, the same answer holds. Since the true test of negligence is what a reasonable person would do under similar circumstances, the directors of the school district cannot be held negligent in prescribing these exercises in view of the common acceptance of the course by others. Here is a standard of "due care" established by accepted practice throughout our common schools. One district cannot be held negligent in simply following this general standard.

There is nothing left but the asserted negligence of the instructor, first, in her method of handling the class, and second, in permitting plaintiff to do this stunt at this particular time. As to this, there is no evidence of incompetency or neglect in her manner of instruction. To the contrary the only evidence on the subject shows that the class was brought on carefully and skillfully until the close of the semester when the girls were all prepared to perform these stunts for their grades. The plaintiff frankly testified that she had gone through all this development successfully and had performed this particular stunt more than forty times before and during the day in which she was injured.

It is intimated that the instructor might have been negligent in permitting plaintiff to do the stunt on this particular day because of a previous knee injury. The alleged injury to the knee occurred two weeks before the date of the injury sued on. During the period following, plaintiff continued to perform this stunt and others on numerous occasions twice a week without complaint and without notice to her instructor that she had any difficulty or distress. The "knee injury" was plainly an afterthought greatly overemphasized by her counsel. But, assume it to be true,

still after this injury the plaintiff continued with the course unhampered, participated in all her other class activities, and, on the day of the accident she voluntarily went to her teacher, told her she had accomplished the stunt, that she was ready for her test, and asked her teacher to observe her for her marking. The injury resulted from her improper use of her hands. She did not at any time attribute it to her knee. Her explanation is: "Q. What happened to you. A. As I was running up to go over the girls my hands went over and they went underneath me and I went down on the mat and I hit my head on this side." A number of other girls in the class who witnessed the accident testified that plaintiff "took off" on one foot, whereas, they had all been trained to take off on both feet. This is what caused her fall, and this is not controverted in any respect whatever. The stunt was the last of a series of 18 given in the course. It was necessary for the pupil to pass but 10 of the 18 to get her grade. It was not necessary for her to do the "roll over two." She chose this voluntarily and never complained to her instructor that it was too hard or too dangerous or that she had any difficulty or pain. Her protest was to the course as a whole. She wanted to take any easier course for the same grade—a very common desire among pupils in all schools.

This case is of far greater importance than the amount of the verdict. It charges the school district with negligence when it has done nothing more than follow the rules and regulations in accordance with universal practice; it condemns as careless and negligent a competent and faithful teacher who just did her duty as prescribed for her in the rules and regulations. It opens the door to suits for damages for any injury which a pupil may sustain—not only upon the school premises, but on the street or at home, because it holds that the jury is the final judge of what is negligence and hence, may give damages at its will. In effect it holds that each jury may determine what in its judgment is a proper course of instruction, whereas the state has committed that function to the school authorities.

The opinion is unfair to the school district and to the entire structure of education throughout the state. No district and no teacher can tell whether physical education is condemned as negligence in all cases, or whether it is the duty of the

teacher to examine and know the physical and mental condition of every pupil, and assume liability if any injury occurs to a pupil by reason of such physical and mental condition at any time and at any place.

Confusion must result from the opinion because of the difficulty in determining its rule. What is the rule of this case? Is it that if there is any hazard in a course of instruction the district is liable for any injury resulting therefrom? If so the schools are negligent as a matter of law for giving that course, though the state school law may authorize or require it. Is it intended to hold that a teacher is negligent if she permits a pupil to take a course which carries some hazard, or if the pupil is later found to have been physically unfit? If so the teacher must have medical training to determine the physical fitness of each pupil. Is it the rule that negligence results when injury arises in a course which is taken under protest? The opinion states that some girls enjoy the exercises, but that this plaintiff took it under protest. The same is often true as to Latin, algebra and the sciences. Would it follow that the district is liable if a girl gets a headache when she takes algebra under protest? This girl was a healthy specimen weighing 117 pounds and had never before complained to the teacher of physical weakness or sickness—except as to the so-called knee injury. How can it be said that the district was negligent in permitting her to take the course in the first instance? Is it the rule of the case that this course is "inherently dangerous" or is this confined to the particular stunt of "roll over two"? The opinion states that the stunt might be inherently dangerous—that means injury might result if it is not done properly. Every athletic event, the R. O. T. C., the courses in physics, chemistry, the simple game of tennis or hockey, even the old fashioned "wand" exercises, would likewise be "inherently dangerous" because injury might result in any of them. The opinion states that the exercise might have been "too strenuous or otherwise undesirable for girls." This goes to the entire course of physical education for girls throughout the entire school system of the state. Does the opinion hold that the district is negligent in prescribing the course in the first instance, because girls are too weak generally, or because they are unable to absorb instruction to perform properly? Or is it intended merely to hold that the courts and not the school authorities should

determine what courses of instruction should be given?

The opinion fails to pass on any of these elements positively. It does say that all these circumstances taken together would support an inference of negligence. This is sound any of the "circumstances" is negligent in itself. But this is not sound if no one of the elements is actionable negligence as a matter of law. The sum of nothing equals nothing.

Where the standard of conduct required of persons under given circumstances is so obvious as to be applicable to all persons under such circumstances a question of law is presented. *Ross v. Pacific Elec. R. Co.*, 39 Cal.App. 658, 179 P. 538; *Hamlin v. Pacific Elec. R. Co.*, 150 Cal. 776, 89 P. 1109. It is error to say that negligence is always a question of fact for the jury. The truth of the facts is to be determined by the jury, but if these facts do not as a matter of law constitute actionable negligence it is a question of law for the court. Negligence cannot be inferred when the only facts proved are such that reasonable minds, not sympathy, can draw but one conclusion, that there was no negligence. It must be borne in mind that this is not a question of conflict in the evidence. We have given to the respondent every presumption of truth in her evidence and still there is no evidence of any act of commission or of omission by the school district or by its employee which can, as a matter of law, be designated as actionable negligence.

I concur: SHENK, J.



10 Cal.2d 99

**DEMAREE et al. v. SUPERIOR COURT
IN AND FOR VENTURA COUNTY.**

L. A. 16450.

Supreme Court of California.

Nov. 17, 1937.

Rehearing Denied Dec. 16, 1937.

I. Depositions ⤵32

Where petition for order of examination, filed after institution of personal injury action against driver and owner of automobile, alleged that owner carried policy

with omnibus clause that as soon as petitioners recovered judgment they intended to bring suit on policy and intended to join driver and owner as defendants, that owner would be necessary witness, and that petitioners expected to prove by owner's testimony that he was in fact insured, petitioners had laid sufficient basis for issuance of order for perpetuation of testimony and production of policy (Code Civ.Proc. §§ 2083-2086; § 1985, as amended by St.1933, p. 1479).

2. Mandamus ⤵180

Failure of petition for writ of mandate to superior court to designate a judge of the superior court against whom the writ was sought did not preclude issuance of peremptory writ, where one of the judges of the respondent court in writing accepted service of the alternative writ of mandate.

In Bank.

Proceeding for mandate by Geraldine Demaree and another against the Superior Court of the State of California in and for the County of Ventura.

Peremptory writ of mandate granted.

Eckman & Lindstrom and Robert L. Moore, all of Los Angeles (Charles F. Blackstock, of Oxnard, of counsel), for petitioners.

Rogers & Rogers, M. J. Rogers, and Burton L. Rogers, all of Ventura, for respondent.

Charles E. R. Fulcher, of Los Angeles, amicus curiæ.

WASTE, Chief Justice.

Application for mandate. There is pending in the respondent court, and undetermined, an action instituted by petitioner Marjorie Nell Demaree, by her guardian ad litem, against C. E. Appling and Charles E. Dawley, to recover from said Appling and Dawley damages suffered by Marjorie Nell Demaree through being struck by an automobile alleged to have been negligently driven and operated at the time by Dawley with the consent of Appling. In a petition seeking an order for examination of Appling, filed in said superior court, it was alleged that Appling carried a policy of insurance, effective at the time of the accident, with the Pacific Indemnity Company, to indemnify him against liability imposed by law on the assured on account of injuries suffered by any person as the

result of an accident occurring and caused by reason of the use of the automobile by the assured or anyone driving it with the assured's consent, express or implied. It was alleged, upon information and belief, that the policy of insurance contained an omnibus clause indemnifying any other person operating said automobile with the consent, express or implied, of said Appling against such liability. It was further alleged that, as soon as petitioners recovered a judgment against Appling and Dawley in the pending action, they intended to bring suit on the policy of insurance against the Pacific Indemnity Company, and intended to join Appling and Dawley as proper parties defendant in said suit. It was also alleged that Appling will be a necessary witness at the trial of the anticipated action; that he has knowledge, information, and documents pertaining thereto; and that petitioners expect to prove by his testimony, to be adduced at the examination here concerned, that he was in fact insured as petitioners on their information and belief alleged.

On the filing of this petition, the respondent superior court issued its order authorizing the examination of C. E. Appling and the taking of his deposition for the purpose of perpetuating his testimony, and a subpœna duces tecum was duly issued, directing Appling to appear before a notary public to testify as a witness in regard to the anticipated controversy, and to bring with him to said examination that certain policy of automobile accident insurance and all attachments relating thereto issued by the Pacific Indemnity Company to Appling as the assured, which policy was in effect at the time of the accident.

Thereafter, counsel for Appling moved the court to vacate the order for examination and to quash the subpœna duces tecum issued pursuant thereto. The respondent court denied the motion. The date for the taking of the deposition having expired, the court made its order directing the clerk to issue a new subpœna duces tecum directed to said Appling, similar in form and content to the supœna duces tecum theretofore issued, but fixing another date for the examination. For convenience, and on stipulation of counsel, the taking of the deposition was continued to be taken at another date and before another notary public. On the date agreed upon, Appling appeared before the notary, and it was stipulated by counsel for all parties that his deposition be taken at that time and place

for the same purpose and effect as if taken before the notary originally specified in the court's order. Appling was duly sworn by the notary and was there examined by counsel for petitioners. Although directed by the notary to do so, he failed to produce the policy of insurance as directed in the subpœna duces tecum, and, during the ensuing examination and interrogation, refused to answer certain material questions then and there propounded to him regarding the insurance policy and its provisions. The questions are, with particularity, set forth in the report of the notary. However, Appling admitted the existence of the policy and that it had been in his possession two days before the examination.

On the filing of a petition for an order to show cause why Appling should not be ordered to produce the policy and answer material questions propounded to him in regard thereto, or be punished for contempt of court, such order was issued. After a hearing thereon before the respondent court, another judge presiding, the court discharged the order to show cause and vacated the previous order of the court for the issuance of the subpœna duces tecum requiring Appling to appear and testify and produce the insurance policy. The court now refuses to enforce the original order for examination and perpetuation of testimony in regard to the anticipated controversy on the ground that that order was inadvertent and made by mistake. The court also refuses to issue another subpœna duces tecum, or in any manner whatsoever to compel Appling to produce the policy or answer material questions propounded to him in reference thereto. Hence this proceeding for mandate. C. E. Appling and the Pacific Indemnity Company appeared and demurred, generally and for uncertainty, to the petition for mandate.

At the time of the hearing in this court, these demurring parties claimed the writ was uncertain in that it did not appear therein what, if any, judge of the superior court was the object of the writ. At that time, and for reasons explained in the argument, no return to the petition for the writ had been made. Since that date, however, Honorable Edward Henderson, one of the judges of the respondent superior court, in writing accepted the service of the alternative writ of mandate directed to the respondent court, "as though said service had been made on [him] personally," and adopted, as the return of the court to the alternative writ, the demurrer interposed by

Appling and the Pacific Indemnity Company. The matter therefore stands as submitted on the appearance of the judge and the demurrer.

From the allegations of the petition it appears that the petitioners have met the requirements of sections 2083-2086 of the Code of Civil Procedure. It definitely appears, from the allegations of the verified petition for the order for examination produced to the judge of the court, that the petitioners expect to be parties to an action, and give the names of the persons who, it is expected, will be adverse parties. It also definitely appears that the proof of facts is desired and necessary to establish matters which it may hereafter become material to establish. The name of the witness to be examined and a general outline of the facts expected to be proved also appear. The application, considered also as an application for a subpoena duces tecum, sufficiently specifies "the exact matters or things desired to be produced," and sets forth in sufficient detail the materiality thereof to the issues involved in the case, and sufficiently shows that the witness Appling had the insurance policy in his possession or under his control. Section 1985, Code Civ.Proc. (as amended by St.1933, p. 1479).

[1] We think it must be conceded that the provisions of the policy of insurance are germane to petitioners' cause and material to their anticipated action, when and if brought. We are of the view, therefore, that the applicants laid a sufficient basis for the issuance of the order providing for the perpetuation of testimony and the production of the insurance policy.

[2] If an answer be deemed necessary to the further objection, raised and argued at the hearing, that the petition did not sufficiently designate a judge of the superior court against whom the writ was sought, that objection has been disposed of by the written acceptance and consent of Judge Henderson, one of the judges of the court. See *Alexander v. Superior Court*, 91 Cal. App. 312, 317, 266 P. 993; *Goble v. Appellate Dept., Superior Court*, 130 Cal.App. 737, 20 P.(2d) 345.

Respondent's principal contention seems to be that to permit the examination and to require the production of the insurance policy in question would result in unreasonable search and seizure, in violation of the provisions of the Constitution. The authorities cited in support of this conten-

tion fail, in our judgment, to meet the case. They relate, for instance, to a subpoena to produce "all books," without specific description of particular and material documents. *Ex parte Clarke*, 126 Cal. 235, 58 P. 546, 46 L.R.A. 835, 77 Am.St.Rep. 176. In *Funkenstein v. Superior Court*, 23 Cal.App. 663, 139 P. 101, it was sought to inspect books without showing that any certain book was material; and in *Pyper v. Jennings*, 47 Cal. App. 623, 191 P. 565, the subpoena referred to "certain books," without showing that any book or document contained evidence relevant or material to the issue before the court.

The comparatively recent decision of this court in *Kutner-Goldstein Co. v. Superior Court*, 212 Cal. 341, 298 P. 1001, 1003, sufficiently disposes of the issue. The author of the opinion in that case reviews the question at length, and says (212 Cal. 341, at page 345, 298 P. 1001): "Ordinarily nothing more than the statutory requirements is necessary to be shown in the application, and the courts of this state have so stated on several occasions" (citing leading previous decisions sustaining the point).

Let the peremptory writ of mandate issue as prayed for.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



10 Cal.2d 95

TOLLE v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.

L. A. 16404.

Supreme Court of California.

Nov. 16, 1937.

1. Divorce ⚭=243

A decree of divorce may be rendered which permanently relieves the husband from obligation to pay alimony in any sum, and the decree has such effect where it expressly so provides, or where it neither awards alimony to wife nor reserves right thereafter to make an allowance for her support.

2. Divorce ⚡243

Final divorce decree directing husband to pay wife \$50 per month alimony "until" their minor child, then 16 years of age, reached age of 18, was conclusive not only as to relief granted, but as to relief denied or withheld, and precluded court from granting additional alimony 17 years after payments of alimony had been completed, where original final decree did not reserve right to change or modify alimony provision.

The word "until" is a restrictive word and a word of limitation, and its use in a final decree directing husband to pay monthly alimony to wife until their minor child reached age of 18 years only meant that the payment of alimony continued to date of minor's eighteenth birthday, and use of the word "until" fixed a definite term during which alimony was required to be paid.

[Ed. Note.—For other definitions of "Until," see Words & Phrases.]

3. Prohibition ⚡10(2)

Under disclosure that final divorce decree provided definite term during which alimony should be paid, that after expiration of such period wife filed application for additional alimony, and that husband moved to dismiss application on ground that court was without jurisdiction, but that motion to dismiss was denied, remedy of prohibition was available to husband.

In Bank.

Prohibition proceeding by Charles Hayes Tolle against the Superior Court of the State of California, in and for the County of Los Angeles, and the Honorable George A. Dockweiler, one of the Judges of such court.

Writ of prohibition granted.

George R. Larwill, Thomas J. Dixon, and Chester E. Howell, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, Meserve, Mumper, Hughes & Robertson, and Roy L. Herndon, all of Los Angeles, for respondents.

WASTE, Chief Justice.

Petition for a writ of prohibition to restrain the respondent court and the judge thereof from further proceeding with the hearing of an application for the modification of an order granting alimony to the

divorced wife of petitioner. The final decree, made April 16, 1919, directed the defendant, petitioner here, to "pay plaintiff [his wife] the sum of \$50.00 per month alimony for the support and maintenance of herself and said minor child [of the parties], Irma Pauline Tolle, and that he pay the same monthly in advance on the 15th day of each month until said minor child, Irma Pauline Tolle, reaches the age of eighteen years." Irma was then sixteen years of age, and reached the age of eighteen years in February, 1921.

It is not disputed that petitioner complied with the terms of the order and paid the sum of \$50 per month until the minor reached the designated "age of eighteen years," and is nowise in default. Seventeen years after the payments of alimony ceased, the divorced wife has moved the superior court to modify the decree of divorce and "make a further, different or additional order" requiring petitioner to pay her for "her support and maintenance the sum of \$400 per month from and after the date of the modification." (*Italics added.*) Petitioner, contending that he has fully performed the terms of the decree of 1921, moved the court to dismiss the application of his former wife. The motion was denied, and petitioner seeks by prohibition to restrain the court from proceeding with hearing the application.

[1] Petitioner's contention that he has fully complied with the requirements of the decree that he pay alimony is supported by the authorities. Our decision in *McClure v. McClure*, 4 Cal.(2d) 356, 49 P.(2d) 584, 100 A.L.R. 1257, discusses the exact question. It was there held [4 Cal.(2d) 356, at page 359, 49 P.(2d) 584, 100 A.L.R. 1257] to be "well settled that a decree of divorce may be rendered which permanently relieves the husband from the obligation to pay alimony in any sum. The decree has this effect where it expressly so provides, or where it neither awards alimony to the wife nor reserves the right thereafter to make an allowance for her support." Many authorities are cited as supporting the text. Accepting this to be the settled rule, we are brought to a consideration of the question: Did the court here permanently relieve this petitioner from the obligation to pay alimony after the minor child of the parties reached the age of eighteen years?

[2] There is no express answer to this question, but impliedly there is. The order

provided for the payment "until said minor child reaches the age of eighteen years." The effect of this order was to fix a period as definitely as though payment had been ordered from the date of the decree to and including the 4th day of February, 1921. The use of the word "until" determines the question. It is a restrictive word—a word of limitation. Its use in the order before us meant, and can only mean, that the payment of the alimony continued to the date of the minor's eighteenth birthday. *State v. Kehoe*, 49 Mont. 582, 144 P. 162; *Maginn v. Lancaster*, 100 Mo.App. 116, 73 S.W. 368. By the use of the word "until," the court provided a definite term during which the alimony should be paid, and there was no reservation of the right to change or modify the term. There being no provision for alimony after the minor reached the age of eighteen years, and the terms of the decree providing for payments until that date having been fully satisfied, nothing remained to modify. There was no appeal from the decree of divorce. When that judgment became final, the plaintiff in the case was no longer the wife of petitioner, and he owed her no marital duty. From that time she could enforce against him no obligation not imposed by the court at the time of the judgment. *Howell v. Howell*, 104 Cal. 45, 37 P. 770, 43 Am.St.Rep. 70. The judgment rendered was a final adjudication of the rights of the parties, and was conclusive, not only as to the relief granted, but as to the relief denied or withheld. Under its entry, the jurisdiction of the court over the subject-matter of the suit and the parties was exhausted, unless preserved in the mode authorized by statute. *White v. White*, 130 Cal. 597, 599, 62 P. 1062, 80 Am.St. Rep. 150. The court, in the present case, made no provision for further action in order to furnish any other or additional relief. The order now sought by petitioner's former wife is not designed to carry into effect the decree rendered, and, if granted, would be a mere nullity. *Barry v. Superior Court*, 91 Cal. 486, 27 P. 763.

[3] The contention that prohibition is not the proper remedy in this case is an-

73 P.(2d)—39

swered by the fact that this petitioner appeared in the trial court in answer to the order to show cause, and objected to the making of any order therein on the ground that the court was without jurisdiction in the matter.

Two authorities strongly relied on by the respondents may be distinguished as not applicable to the cause here, for the orders there under consideration were not made after the judgments providing for alimony had been fully executed, as in this case. In *Smith v. Superior Court*, 89 Cal. App. 177, 264 P. 573, the application for a modification of the order for payment of alimony concerned a provision in the interlocutory decree, and before the final decree was entered. The court there, of course, had jurisdiction. In *Bechtel v. Bechtel*, 124 Cal.App. 617, 12 P.(2d) 970, the trial court granted an interlocutory decree of divorce to the plaintiff and, among other things, provided that the defendant should pay as permanent alimony the sum of \$150 a month, commencing on a fixed date, for the period of five years, when the payment should cease. The plaintiff appealed from portions of the decree, among other matters, claiming that the court, by limiting the alimony payments to the period mentioned, abused its discretion, and asked that the error be corrected on the appeal. The decree was affirmed, but, in discussing the case, and without even referring to the period of limitation, the court held that the lower court might modify its order (for alimony) by requiring, if necessary, suitable payments to be made after expiration of the five-year period, notwithstanding the limitation contained in the decree. The question of whether or not such modification might be made after the termination of the five-year period was not considered.

Let a writ of prohibition issue as prayed for, restraining the respondent court from proceeding further in the matter of the application for modification of the order providing for alimony.

We concur: EDMONDS, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

23 Cal.App.2d 428

PEOPLE v. RICHARDSON.

Cr. 3034.

District Court of Appeal, Second District,
Division 2, California.

Nov. 12, 1937.

1. Criminal law ☞1144(13)

On appeal from a conviction, evidence will be viewed most favorably to prosecution.

2. Homicide ☞254

Evidence supported conviction of murder in the second degree.

3. Homicide ☞166(1)

In murder prosecution, evidence of threats by accused against life of deceased is admissible to show accused's motive and state of mind.

4. Homicide ☞166(1)

In murder prosecution, testimony of deceased's brother and sister as to whether they had ever heard accused say that he was going to kill their entire family was admissible to show accused's motive and state of mind.

5. Homicide ☞156(f)

In murder prosecution, evidence of deceased's state of mind toward woman who was present at killing, but not involved in quarrel between accused and deceased, was inadmissible, as being immaterial.

6. Criminal law ☞448(11)

In murder prosecution, under evidence that accused stabbed deceased shortly after they left automobile, testimony of woman who was also in automobile as to whether she knew why accused did not strike deceased when deceased left automobile was inadmissible as a conclusion.

7. Criminal law ☞1156(3)

In absence of abuse of discretion by trial court, denial of motion for new trial on ground of newly discovered evidence will not be disturbed on appeal.

8. Criminal law ☞1123

A proposition relied on for reversal of conviction, that verdict was a compromise, would not be considered, where record was devoid of any competent supporting evidence.

9. Criminal law ☞1023(10)

An appeal does not lie from a sentence.

10. Criminal law ☞1023(10)

An appeal does not lie from a verdict.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Walter Richardson was convicted of murder in the second degree, and he appeals from the judgment and an order denying his motion for a new trial, and attempts to appeal from the verdict and sentence.

Purported appeals from verdict and sentence dismissed, and judgment and order affirmed.

Lloyd Cornelius Griffith, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury of murder in the second degree. From the judgment and order denying his motion for a new trial, he appeals. There is also a purported appeal from the verdict and sentence.

[1] Viewing the evidence most favorable to the prosecution (*People v. Dukes*, 90 Cal.App. 657, 659, 266 P. 558), the facts are these:

June 11, 1937, at about 1 o'clock in the morning, while Roy Brown, Miss Gertrude Brown, defendant, his wife, and others were riding in defendant's automobile, Roy Brown and defendant engaged in an argument over the amount of gasoline then in the car. Shortly afterward they arrived at defendant's home and all of the occupants of the automobile alighted, whereupon defendant walked up behind Roy Brown, called him "a dirty rat," and stabbed him with a knife, from which wound he died.

Defendant relies for reversal of the judgment on these propositions:

First. There was no substantial evidence to sustain the verdict of the jury.

Second. The trial court committed prejudicial error in permitting, over objection, deceased's brother and sister to answer the following question: "Did you ever hear him (referring to defendant) say that he was going to kill your entire family?"

Third. The trial court committed prejudicial error in refusing to permit defend-

ant to show: (a) Deceased's state of mind toward Gertrude Brown; (b) if Gertrude Brown knew any reason why defendant did not strike deceased when the latter got out of the automobile.

Fourth. It was prejudicial error for the trial court to deny defendant's motion for a new trial.

Fifth. The verdict of the jury was a compromise.

[2] As to defendant's first proposition, we have examined the record and find there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain every material finding of fact upon which the jury's verdict was necessarily predicated. Further discussion of the evidence is unnecessary. *Thatch v. Livingston*, 13 Cal.App.(2d) 202, 56 P.(2d) 549; *People v. Groves*, 9 Cal.App.(2d) 317, 321, 49 P.(2d) 888, 50 P.(2d) 813; *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 245, 128 P. 399.

[3, 4] The second proposition urged by defendant is untenable. It is the established law in California that evidence of threats against the life of the decedent, made by a defendant, are properly received in evidence for the purpose of showing defendant's motive and state of mind. *People v. De Moss*, 4 Cal.(2d) 469, 474, 50 P.(2d) 1031. In the instant case, the question fell clearly within this rule of law, and the objection thereto was properly overruled.

[5] The point urged in paragraph (a) of defendant's third proposition is without merit. Deceased's state of mind toward Gertrude Brown, a third person who was not in any way involved in the quarrel between defendant and the deceased, was not material to any issue before the jury.

[6] The objection was properly sustained to the evidence set forth in paragraph (b) of defendant's third proposition, for the reason that the question called for a conclusion of the witness.

[7] Defendant's fourth proposition is also untenable. The law is settled that in the absence of an abuse of discretion the ruling of the trial judge in denying a motion for new trial on the ground of newly discovered evidence will not be disturbed on appeal. *People v. Jacklin*, 17 Cal.App.(2d) 406, 410, 62 P.(2d) 173. In the instant case, there is an entire absence of

any showing that the trial judge did not exercise a wise discretion in denying the motion for a new trial.

[8] Defendant's final proposition will not be considered by us for the reason that the record is devoid of any competent evidence that the verdict of the jury was the result of a compromise.

The foregoing are the only suggestions of error worthy of discussion.

[9, 10] An appeal does not lie from (a) the verdict of a jury [*People v. Allen* (Cal. App.) 65 P.(2d) 382], or (b) the sentence [*People v. Smith* (Cal.App.) 70 P.(2d) 677]. Therefore, the purported appeals from the verdict and sentence are dismissed.

The judgment and order are, and each is, affirmed.

We concur: CRAIL, P. J.; WOOD, J.



23 Cal.App.2d 422

ITALO PETROLEUM CORPORATION OF AMERICA v. SHINGLE et al.

Civ. 10563.

District Court of Appeal, First District,
Division 2, California.

Nov. 12, 1937.

Rehearing Denied Dec. 11, 1937.

Hearing Denied by Supreme Court
Jan. 10, 1938.

1. Bills and notes 518(1)

In action to cancel and enjoin prosecution of action on notes, production of notes made prima facie showing of consideration therefor (Civ.Code, § 3105).

2. Corporations 155(4)

Under agreement of corporation that manager of syndicate attempting to raise money for acquisition of oil properties by corporation should receive stock deposited in escrow in proportion that sums advanced by syndicate in payment on properties should bear to total syndicate obligation, where large sums were advanced prior to declaration of dividends, but stock was not actually transferred, note of corporation, accepted by syndicate manager in settlement of claim for dividends, was supported by consideration.

3. Bills and notes ⇨92(2)

The surrender of a check by payee to drawer before payment, in exchange for drawer's note, constituted sufficient consideration for note.

4. Corporations ⇨155(4)

In action to cancel and enjoin prosecution of action on notes given by corporation to syndicate manager for dividends on stock acquired by syndicate manager under agreement that, in connection with attempt of syndicate to raise money for acquisition of oil properties by corporation, syndicate manager should receive stock deposited in escrow in proportion that sums advanced by syndicate in payment on properties should bear to total syndicate obligation, evidence did not authorize cancellation of notes for illegality of consideration, "conspiracy to loot and defraud," constructive fraud, or illegality of issuance of stock under permit issued by Commissioner of Corporations.

5. Appeal and error ⇨856(1)

Where finding on which judgment was based was unsupported by evidence, judgment could not be sustained on other theories not supported by evidence or findings.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Italo Petroleum Corporation of America against Fred Shingle, Syndicate Manager, and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Wallace Sheehan and Faulkner & O'Connor, all of San Francisco (Gregory, Hunt & Melvin, of San Francisco, of counsel) for appellants.

A. J. Scampini, Hugh K. McKevitt, Jack Howard, and Hettman & Scampini, all of San Francisco, for respondent.

SPENCE, Acting Presiding Justice.

Plaintiff sought by this action to obtain the cancellation of two promissory notes executed by plaintiff in favor of defendant Fred Shingle, syndicate manager, and to enjoin the prosecution of any action for the purpose of collecting upon said notes. From a judgment granting to plaintiff said relief, defendants have appealed. For the purpose of this discussion, defendant Fred Shingle, syndicate manager, may be treated as the sole defendant and appellant.

The transcript and the briefs are rather voluminous, but the essential facts, as shown by the pleadings and the uncontradicted evidence, may be briefly stated. This action was brought in August, 1934, to cancel a note in the sum of \$9,476.13, dated January 20, 1929, and a second note in the sum of \$35,222.25, dated April 20, 1929. Said notes had been executed by plaintiff in favor of defendant Fred Shingle, syndicate manager, following certain conferences in which said defendant, as the manager of a syndicate of 78 persons, had asserted a claim on behalf of said syndicate for dividends on certain preferred stock of the plaintiff corporation and in which said plaintiff had asserted claims in the sum of approximately \$42,000 as an offset to said dividend claims. Those claims had arisen under the circumstances hereinafter set forth.

Plaintiff was incorporated in Delaware in 1928, and shortly thereafter it launched upon a plan for the acquisition of a number of oil properties. Agreements were entered into with various oil companies, and plaintiff sought to obtain a permit for the issuance of 4,500,000 shares of its preferred stock and 7,500,000 shares of its common stock to Maurice C. Myers, as trustee, to be disposed of by him in the acquisition of the properties described in the application subject to liens, incumbrances and indebtedness of not to exceed \$2,750,000. The agreements with the various oil companies provided for a consideration of approximately \$3,500,000 in cash in addition to shares of stock of the plaintiff corporation, and the raising of the necessary cash was undertaken by the syndicate under an agreement with plaintiff whereby the syndicate was to receive 3,000,000 shares of common and 3,000,000 shares of preferred stock of the plaintiff corporation from the trustee. The trustee was authorized to deliver the necessary shares of stock to consummate the agreements with the various oil companies and to deposit with Shingle, Brown & Co., as escrow holder, 3,000,000 shares of common and 3,000,000 shares of preferred stock "with instructions and authority to deliver the same to said Syndicate Manager ratably in the proportion that the sums advanced by the Syndicate in payment on said properties bear to the total syndicate obligation of \$3,500,000." A third supplemental permit was issued by the Commissioner of Corporations in August, 1928, authorizing the issuance of 4,500,000 shares of preferred and 7,500,000 shares of common stock to the trustee "for the uses and purposes recited in the applica-

tion and the papers filed therewith, and in exchange for the transfer and assignment to applicant of the properties described in the application and the papers filed therewith, and in the manner recited therein, subject to liens, encumbrances and indebtedness of not to exceed \$2,750,000.00."

The syndicate obtained approximately \$1,900,000 from its members, and this sum, together with further sums derived from the sale of the escrowed stock, was used to make up the sum of approximately \$3,500,000 which was required. That amount had been paid out by the syndicate manager for the benefit of plaintiff during the months of June, July, August, September, October, and December of 1928. In December, 1928, the purchase of the properties had been completed and on December 20, 1928, letters were written by plaintiff to the escrow holder and the syndicate manager acknowledging that the syndicate manager had "paid in full all obligations" to plaintiff and authorizing the escrow holder to deliver to the syndicate manager the balance of the escrowed stock. This was done, but the stock was not transferred of record from the name of the trustee to the name of the syndicate manager until March 28, 1929.

In the meantime, two quarterly dividends had been declared on the preferred stock of the plaintiff corporation. On September 24, 1928, a dividend was declared on the preferred stock payable to stockholders of record as of September 30, 1928, and on December 7, 1928, a dividend was declared on the preferred stock payable to stockholders of record as of December 31, 1928. On April 2, 1929, a third dividend was declared on the preferred stock payable to stockholders of record as of March 31, 1929. The first of said dividends was paid on all preferred stock, including that which had been disposed of by the trustee prior to September 30, but excepting the stock which actually stood in the name of the trustee on that date. The second dividend was paid on all preferred stock, including that which had been disposed of by the trustee prior to December 31, 1928, but with the following exception: A check for approximately \$46,000 was originally drawn in favor of the trustee, but this check was subsequently canceled. Two checks representing that total were later made out to the trustee; one for approximately \$4,000 which was indorsed by plaintiff and deposited in its own account, and the other for approximately \$42,000, which was not signed and which was later canceled.

As large sums of money had been advanced by the syndicate prior to the declaration of these first two dividends and as the agreements called for the delivery of the stock to the syndicate manager ratably in proportion to the sums advanced, the question of the payment of dividends to the syndicate was discussed as early as September, 1928. These discussions continued until the conferences held in May, 1929. In the meantime, the third dividend had been declared on April 2, 1929. This dividend was payable to stockholders of record as of March 31, 1929, at which time the stock in question had been transferred of record to the name of the syndicate manager. A check for the sum of \$35,222.25 was therefore issued and delivered to the syndicate manager on April 20, 1929, in payment of said dividend. This check was not cashed, as plaintiff requested the syndicate manager to hold it because of a certain contemplated adjustment of accounts with the syndicate manager and because plaintiff was short of money at the time.

Conferences were then held to adjust the claims of the syndicate with respect to dividends and the claims of the plaintiff with respect to certain contingent liabilities incurred in the acquisition of the properties which plaintiff claimed brought the liabilities up to a figure which exceeded \$2,750,000 by the sum of \$42,367.37. With the assistance of their respective accountants, it was figured and agreed that the amount due as dividends on the syndicate stock on the first two dividends above mentioned was \$51,843.50. It was further agreed that plaintiff should be allowed a set-off of \$42,367.37, and that a note should be issued in favor of the syndicate manager for the difference amounting to \$9,476.13. Said note was issued and was dated January 20, 1929. It was further agreed in said conferences that the syndicate manager would return the check given in payment of the third dividend, and that a note in the same amount, to wit, \$35,222.25, dated April 20, 1929, would be accepted in lieu thereof. This was done at the request of plaintiff. Both notes were actually executed in July, 1929; execution being delayed because the officers of plaintiff thought plaintiff might shortly be in a position to pay said obligations without the necessity of issuing notes therefor.

The complaint herein was in three counts. The first count involved the note for \$9,467.13, and alleged that said note was issued without consideration. The second

count involved the note for \$35,222.25, and alleged that said note was issued without consideration. The third count involved both of said notes, and plaintiff states in its brief that this count was "based upon fraud and mistake." The trial court found that said notes were issued without consideration, but found against plaintiff on the issues of fraud and mistake.

Appellant raises several points on this appeal, but the main contention is that the findings to the effect that said notes were issued without consideration are not supported by the evidence. In our opinion this contention must be sustained.

[1-3] In addition to the *prima facie* showing of consideration made by the production of the notes (Civ.Code, § 3105), all of the evidence showed that said notes were issued for a sufficient consideration. The note set forth in the first count was given in settlement of the balance which the parties agreed was due upon the claims asserted by appellant and respondent. Appellant's claims were based upon his alleged right as syndicate manager to the first two dividends which were declared during the time that the preferred stock stood of record in the name of the trustee. Under the agreement of the parties, the syndicate manager was entitled to said stock "ratably in the proportion that the sums advanced by the syndicate in payments on said properties bear to the total syndicate obligation of \$3,500,000." Large sums were advanced by the syndicate before the first dividend date and further sums were advanced before the second dividend date, but the stock was not actually transferred of record from the name of the trustee to the name of the syndicate manager until shortly before the third dividend date. Even if it be assumed that the claim of the syndicate manager to the first two dividends was of doubtful validity, the settlement and compromise of said claim by the syndicate manager was sufficient con-

sideration for the execution of said note. *San Francisco Mercantile Union v. Muller*, 18 Cal.App. 174, 122 P. 828; *Randisi v. Simone*, 26 Cal.App. 661, 147 P. 1176; 19 Cal.Jur. 842, § 38. As to the sufficiency of the consideration for the note set forth in the second count, there appears to be no doubt whatever. A check in the same amount as the note had been previously given to appellant by respondent as a stockholder of record entitled to the third dividend. At the request of respondent, this check was surrendered before payment in exchange for said note and this constituted a sufficient consideration. *Drovers' National Bank v. Browne*, 88 Cal.App. 716, 264 P. 265; *First National Bank v. Williams*, 54 Cal.App. 537, 202 P. 164; *Simpson v. Smith*, 43 Cal.App. 94, 184 P. 507; *Shoenhair v. Jones*, 33 Cal.App. 545, 165 P. 971.

[4, 5] In its brief, respondent speaks of "a general illegality of consideration"; of a "general conspiracy to loot and defraud" respondent; and of "constructive fraud." It further claims that entire issue of stock to the syndicate was illegal and void because contrary to the permit issued by the Commissioner of Corporations. Assuming, without deciding, that these theories were put in issue by the pleadings, there is neither evidence nor findings to sustain them. Upon the record before us, the judgment of the trial court may stand only in event that there is evidence in the record to support the findings that said notes were issued without consideration. As above indicated, we are of the opinion that there is no evidence to support said findings.

In view of the conclusions which we have reached, we deem it unnecessary to discuss the remaining points raised by appellant.

The judgment is reversed.

We concur: STURTEVANT, J;
GOODELL, Justice pro tem.

**GRANT v. SUN INDEMNITY CO. OF
NEW YORK. ***

Civ. 11529.

District Court of Appeal, Second District,
Division 2, California.

Oct. 29, 1937.

Rehearing Denied Nov. 15, 1937.

1. Judgment ⇨18(2)

A complaint which is prematurely filed will not sustain a judgment notwithstanding that subsequent to filing of complaint and prior to rendition of judgment facts occur which complete plaintiff's cause of action, and such facts are alleged in a supplemental complaint.

2. Action ⇨65

Plaintiff's cause of action must exist at the time the complaint is filed and no recovery can be predicated upon a cause of action arising after entry of suit and before time of trial, even though the material allegations omitted from the complaint are supplied in a supplemental complaint, since a supplemental pleading is proper only in aid of the case made by the original complaint.

3. Insurance ⇨591½

Under liability policy providing that no action should be brought against the insurer until a "final judgment" should have been recovered against assured, injured pedestrian who was struck by assured's automobile was not entitled to recover in action wherein the complaint was filed while an appeal from the judgment which he had obtained against assured was still pending, since such judgment was not a "final judgment," notwithstanding that final judgment was rendered prior to rendition of judgment in the instant case (Gen.Laws 1931, Act 3738).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

4. Appeal and error ⇨1170(1)

Under liability policy which provided that no action should be brought against insurer until a final judgment should have been recovered against assured, where complaint in action against insurer was filed while an appeal from judgment against assured was still pending, Court of Appeals was required to reverse judgment against insurer, though it was rendered after judgment against assured had become final, not-

withstanding constitutional provision that no judgment shall be set aside unless there has been a miscarriage of justice (Gen.Laws 1931, Act 3738; Const. art. 6, § 4½).

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Minnie Grant against the Sun Indemnity Company of New York. Judgment for plaintiff, and defendant appeals.

Reversed, with direction to enter judgment for defendant.

Elbert E. Hensley, of Los Angeles (W. H. Abrams, of Los Angeles, of counsel), for appellant.

Paul Taylor and Noel B. Martin, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to enforce liability on an insurance policy pursuant to the provisions of section 1, Act 3738, Deering's General Laws of California 1931, volume 2, page 1896, defendant appeals.

Viewing the evidence most favorable to plaintiff, the facts are these:

October 7, 1932, plaintiff received injuries on being struck by an automobile owned by Thomas T. Harbeson and operated with his consent by Herndon Ryon. At the time of the accident there was in force a policy of indemnity insurance issued by defendant covering the operations of the automobile by Mr. Harbeson, the named insured, and in addition any one driving the car with his knowledge and consent. This policy insured to the benefit of any person who should sustain bodily injury by reason of the operation of the automobile by Mr. Harbeson or any other person with his knowledge and consent. It also contained the following provision: "The Company shall not be liable to pay any loss, nor shall any action be brought against the Company to recover under this policy, until a final judgment shall have been recovered against the Assured in a suit covered hereby."

July 18, 1934, plaintiff recovered a judgment in the superior court against Herndon Ryon, from which an appeal was taken to the District Court of Appeal of the State

*For subsequent opinion see 80 P.2d 995.

of California, Second Appellate District, *Grant v. Ryon*, 11 Cal.App.(2d) 101, 53 P.(2d) 170, and, on affirmance of the superior court's judgment, a petition for a hearing before the Supreme Court of the State of California was denied *March 2, 1936*.

The complaint in the present action was filed *November 16, 1934*. A demurrer was interposed on the ground that the complaint failed to state a cause of action, and on the overruling of the demurrer an answer was filed in which defendant set up as a separate defense the claim that the action had been prematurely filed.

[1,2] This is the sole question presented for determination:

Will a complaint prematurely filed sustain a judgment if subsequent to the filing of the complaint and prior to the rendition of judgment facts occur which complete plaintiff's cause of action, and such facts are alleged in a supplemental complaint?

This question must be answered in the negative. It is the established law of this state that plaintiff's cause of action must exist at the time the complaint is filed and no recovery can be predicated upon a cause of action arising after entry of suit and before the time of trial, even though the material allegations omitted from the complaint are supplied in a supplemental complaint. *Kirk v. Culley*, 202 Cal. 501, 507, 261 P. 994; *Turney v. Shattuck*, 96 Cal. App. 590, 596, 274 P. 442; 1 Cal.Jur. 377, § 54 (1921); 1 Cal.Jur. 10 Yr.Supp. 67, § 54 (1936); 21 Cal.Jur. 172, § 118 (1925); 9 Cal.Jur.Supp. 238, § 118 (1936).

In *Kirk v. Culley*, supra, 202 Cal. 501, at page 507, 261 P. 994, 996, our Supreme Court said:

"A plaintiff's cause of action must have arisen before the filing of the complaint [citing cases]. Plaintiff may not recover on a cause of action arising after entry of suit and developed by the evidence only during the trial. [Citing cases.]"

In *Turney v. Shattuck*, supra, the district court of appeal said (96 Cal.App. 590, at page 596, 274 P. 442, 445): "Furthermore, since a supplemental pleading is proper only in aid of the case made by the original complaint, relief cannot be granted upon a supplemental complaint, where the proof shows that the plaintiff had no cause of action when his original complaint was filed. 'If a party has no cause of action at the time of the institution of his action he

cannot maintain it by filing a supplemental complaint founded on matters which have subsequently occurred.' [Citing cases.]"

[3] It is clear from the facts as stated above that on November 16, 1934, the date the complaint in the present action was filed, a cause of action did not exist in favor of plaintiff and against defendant, because the judgment in *Grant v. Ryon et al.* was not a final judgment, as the case was still pending on appeal. *Jennings v. Ward*, 114 Cal.App. 536, 537, 300 P. 129. Thus plaintiff could neither allege nor prove at the date of the filing of the complaint in the instant action a fact essential to his cause of action; i. e., that a final judgment had been obtained against defendant's assured. This was a condition precedent to defendant's liability, since the insurance policy issued by defendant provided that "the Company (defendant) shall not be liable to pay any loss, nor shall any action be brought against the Company (defendant) to recover under this policy, until a final judgment shall have been recovered against the Assured. * * *

[4] Section 4½, article 6 of the Constitution of the state of California; *Etienne v. Kendall*, 202 Cal. 251, 259 P. 752; *Houglan v. Roth Blum Packing Co.*, 99 Cal. App. 631, 279 P. 159; *Parry v. Campbell*, 72 Cal.App. 748, 238 P. 127, and *Meyer v. Moore*, 72 Cal.App. 367, 237 P. 550, to which our attention has been directed, are inapplicable to the present situation, for the reason that in each of the cases cited plaintiff's cause of action existed at the time the complaint was filed, while, as pointed out in the instant case, plaintiff's cause of action did not arise until some months subsequent to the filing of the complaint.

For the foregoing reasons the judgment is reversed and the trial court is ordered to enter judgment in favor of defendant.

I concur: CRAIL, P. J.

WOOD, Justice (dissenting).

I dissent. In my opinion the judgment should be affirmed for the reason that there has been no miscarriage of justice. Plaintiff was injured by an automobile owned by Thomas T. Harbeson and driven with the consent of the owner by Herndon Ryon, brother-in-law of Mr. Harbeson and a minor at the time of the accident. An action was commenced against Thomas T. Harbeson, Herndon Ryon, and the father

of Herndon Ryon, who had signed the latter's application for an operator's license. Before the action was tried Thomas T. Harbeson came to his death when his home was destroyed by fire, and as to him the action was dismissed. Judgment was rendered in favor of the plaintiff against the two Ryons on July 18, 1934, in the sum of \$6,963.70. An appeal was taken, and the judgment was affirmed. Upon supplementary proceedings the two Ryons were found to be insolvent.

Mr. Harbeson had been the owner of a Studebaker automobile, and received from the defendant carrier a policy containing a provision for insurance against loss or damage resulting from injury suffered by other persons. Harbeson disposed of his Studebaker automobile and purchased a Chrysler automobile. Upon his request defendant changed the liability coverage so that the Chrysler was substituted for the Studebaker and proper endorsements were made upon the policy. In addition to the provisions set forth in the majority opinion the policy contains this provision: "(a) The liability of the company under this policy shall become absolute whenever loss or damage covered by the policy occurs, and the satisfaction by the assured of a final judgment for such loss or damage shall not be a condition precedent to the right or duty of the company to make payment on account of such loss or damage. Upon the recovery of a final judgment against the assured for any such loss or damage the judgment creditor shall be entitled to have the insurance provided by this endorsement applied to the satisfaction of the judgment." The present action was commenced against the insurance carrier on November 16, 1934, and defendant filed an answer denying that the Chrysler was covered by the policy. At the time of trial plaintiff filed a supplemental complaint setting forth that the judgment against the Ryons had become final.

Section 4½ of article 6 of the Constitution of California provides: "No judgment shall be set aside * * * for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." It has frequently been held that the constitutional provision may be applied to cases in which judgments have been ob-

tained upon complaints lacking in essential allegations when the reviewing courts have been satisfied that there was no miscarriage of justice. It is incumbent upon the appellant to demonstrate that the error complained of has resulted in a miscarriage of justice. *Houglan v. Roth Blum Packing Co.*, 99 Cal.App. 631, 279 P. 159; *Parry v. Campbell*, 72 Cal.App. 748, 238 P. 127; *Meyer v. Moore*, 72 Cal.App. 367, 237 P. 550; *Etienne v. Kendall*, 202 Cal. 251, 259 P. 752. In addition to the provisions above set forth, the policy in question contains the following provision: "No suit or action on this policy or for the recovery of any claim hereunder shall be sustainable in any court of law or equity unless the Assured shall have fully complied with all the foregoing requirements, nor unless commenced within twelve (12) months next after the happening of the loss * * *" It is apparent that defendant has placed provisions in its policy which, if strictly enforced, would put it in position to prevent the recovery of a judgment against it. It is provided in Act 3738 Deering's General Laws of 1931, that no policy of insurance of the nature of the policy under discussion shall be issued unless there shall be contained therein a provision that in case a judgment be secured against the insurer in an action brought by an injured person the judgment debtor may be required on supplementary proceedings to exhibit any policy carried by him insuring against loss or damage for which the judgment shall have been ordered. In the present case Mr. Harbeson lost his life by a fire which also consumed the insurance policy upon which the action was commenced. It was not possible for plaintiff to examine him under supplementary proceedings and to require the production of the policy. Plaintiff therefore was not in position to learn of the provisions contained in the policy specifying the time when an action upon it might be commenced and it was not until the trial of the present action was in progress that the policy was actually produced. Plaintiff was then confronted with the provisions of the policy prohibiting the filing of the action before the other judgment became final and requiring that it be commenced within twelve months from the date of the accident. There is nothing in the record to indicate that defendant has been prejudiced by the commencement of the present action pending the appeal in the action in which judgment was obtained against the Ryons.

Defendant was promptly informed of the accident and at once made an investigation of the facts surrounding it. Defendant's attorneys appeared on behalf of the Ryons, conducted their defense, and prosecuted their appeal. The trial in the present action was conducted a year after the judgment against the Ryons had become final. After a fair trial the court held that defendant is liable upon the policy. If plaintiff erred as to the proper date for filing the action, it cannot be held that "the error complained of has resulted in a miscarriage of justice." It would be more fitting to hold that a reversal of the judgment would result in a miscarriage of justice.



23 Cal.App.2d 543

FOY v. FOY.

Civ. 10064.

District Court of Appeal, First District,
Division 2, California.

Nov. 22, 1937.

Hearing Denied by Supreme Court

Jan. 20, 1938.

1. Divorce ⇨295

In husband's suit to vacate an interlocutory decree of divorce wherein court annulled provisions of decree granting alimony, etc., but refused to disturb award of child's custody to wife, court was not precluded from ordering husband to pay wife for support of child pending new trial, notwithstanding annulment of provision in decree for child's support, since the decree awarding custody was not binding in such respect as a "final adjudication."

[Ed. Note.—For other definitions of "Final Adjudication," see Words & Phrases.]

2. Divorce ⇨293

Under statute authorizing an order for child's support only in a pending divorce action, action was pending until custody of child was finally determined (Civ.Code, § 137).

3. Divorce ⇨301

In husband's suit to vacate an interlocutory decree of divorce awarding custody of child to wife, wherein issue was raised as to which parent was entitled to custody, court had duty, sitting in equity, to deter-

mine issue of custody and not leave it to further litigation.

4. Infants ⇨18

Equity has inherent jurisdiction, independent of statute, to award and control the custody of children and as an incident thereto to provide for maintenance pending a determination.

5. Divorce ⇨295

In husband's suit to vacate an interlocutory decree of divorce awarding custody of child to wife, wherein court annulled provisions of decree granting alimony, etc., but refused to disturb award of child's custody to wife, court was authorized by statute to order payment by husband of a designated amount for support of child pending new trial as in a "pending divorce action," since suit was in substance a continuation of the divorce action (Civ.Code, § 137).

6. Judgment ⇨403

An action in equity to vacate an interlocutory decree is analogous to a motion for new trial, since it involves a re-examination of the issues.

7. Divorce ⇨295

Husband's attack of interlocutory divorce decree awarding custody of child to wife by independent equitable proceeding rather than by a motion in the divorce action did not destroy court's power to provide for child's maintenance under statute during pendency of suit (Civ.Code, § 137).

8. Divorce ⇨307

Under statute, in nonresident husband's suit to vacate interlocutory decree of divorce awarding custody of child to wife, service of notice of motion for support of child pending suit upon husband's attorney rather than upon husband was authorized (Code Civ.Proc. § 1010, as amended by St.1935, p. 1966; § 1015, as amended by St.1933, p. 1899).

9. Divorce ⇨295

In husband's suit to vacate an interlocutory decree of divorce, court's power was not limited to relief requested but court was authorized to order that husband pay for support of child pending suit.

10. Equity ⇨39(1)

Where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between parties arising from the action presented.

11. Equity 39(1)

Equity must, when all the parties to a controversy are before it, adjust the rights of all and leave nothing open for further litigation.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Suit by Mark Francis Foy, Jr., against Gladys Anita Foy. From an order requiring complainant to pay for support of a minor child during pendency of suit, complainant appeals.

Affirmed.

Winston Churchill Black, of San Francisco, for appellant.

M. Mitchell Bourquin and Clinton L. Markley, both of San Francisco, for respondent.

GRAY, Justice pro tem.

An examination of the complaint discloses that plaintiff seeks in equity the vacation, for want of jurisdiction and fraud, of those portions of an interlocutory decree of divorce which awarded the custody of the child of the parties to defendant and directed plaintiff to pay to defendant certain sums for the support of herself and child, attorney's fees, and costs. The following facts are alleged in the husband's complaint and not denied in the wife's answer. The parties had intermarried and had as the issue of their marriage one child. The wife had previously filed in the San Francisco superior court a complaint for divorce alleging certain acts of extreme cruelty and seeking the child's custody and an allowance for alimony, the child's maintenance, attorney's fees, and costs. The husband at all times was and is a British subject, domiciled in Sydney, Australia. He had been served by publication and by personal service in Sydney. His default having been entered, the San Francisco superior court had granted the wife an interlocutory decree of divorce in which the custody of the child had been awarded to her and the husband had been ordered to pay her certain sums for alimony, maintenance of the child, attorney's fees, and costs. His complaint further alleged but her answer denied that she had fraudulently, because of certain facts, established a residence in San Francisco for herself and the child and that he, but not

she, was entitled to the custody of the child.

After a trial upon the issues thus raised, the court annulled, for want of personal jurisdiction of the husband, the provisions of the decree granting alimony, maintenance, attorney's fees, and costs but refused to disturb the award of the child's custody to wife. Thereafter, upon the husband's motion, the court granted a new trial upon the issue of the child's custody. Subsequently, on the wife's motion, the court ordered the husband to pay to her \$50 per month for the child's support during the pendency of this action. He appeals from this order, urging the following reasons for reversal. He contends that the divorce decree, by awarding the child's custody to the wife without provision for his support of it, relieved him of such obligation. He denies the court's power to provide for the child's support pendente lite in this action in equity. He objects that the order was based upon a notice of motion which was served not upon him but upon his attorney.

[1] In support of his first point, the husband invokes the rule that a parent who has been deprived of the custody of his child in a divorce action without any provision therein for his support of it cannot be held liable for such support in another action. *Lewis v. Lewis*, 174 Cal. 336, 163 P. 42. In an attempt to apply this rule to the present facts, he argues that, after the annulment in this proceeding of the order in the divorce decree directing him to pay for his child's support, the decree then deprived him of its custody without provision for his support of it. The weakness of this argument lies in the fact that he, forgetting the purpose of this action, erroneously assumes that the provision in the divorce decree as to the custody of the child is a final adjudication. Obviously, since, in this proceeding, he has attacked that very provision and requested an award of the custody to himself, the court in passing on this issue was not bound by the prior determination in the decree. *Caldwell v. Taylor*, 218 Cal. 471, 23 P.(2d) 758, 88 A.L.R. 1194.

[2-7] He next argues that the court lacked authority to make an order for the child's support in this proceeding in equity, since its power to make such an order is derived solely from section 137 of the Civil Code, which by its terms limits the exercise of such power to a pending divorce ac-

tion. This argument lacks appreciation of the broad and flexible power of equity and misconceives the nature of this equitable proceeding and its relation to the divorce action. The custody of the child was an important issue in the divorce action and until that issue was finally determined the divorce action was pending. *Grannis v. Superior Court*, 143 Cal. 630, 77 P. 647. The husband in this action has not only attacked the provision of the interlocutory decree of divorce awarding the child's custody to the wife, but he has also in his complaint tendered the issue as to which parent is entitled to such custody. It was the duty of the court, sitting in equity, to determine this issue and not leave it to further litigation. *Spalding v. Spalding*, 75 Cal.App. 569, 243 P. 445. A court of equity in the exercise of its general chancery powers had inherent jurisdiction, independent of statute, to award and control the custody of children. *Barrett v. Barrett*, 210 Cal. 559, 292 P. 622; 46 C.J. 1249. Incident thereto, a court of equity may provide for the maintenance of a child pending a determination of its custody. *Paxton v. Paxton*, 150 Cal. 667; 89 P. 1083; 46 C.J. 1275. The order also is authorized by section 137 of the Civil Code because, if substance rather than form is considered, this proceeding is really a continuation of the divorce action. An action in equity to vacate an interlocutory decree, since it involves a re-examination of the issues, is analogous to a motion for a new trial. *Carp v. Superior Court*, 76 Cal.App. 481, 245 P. 459. The husband's choice of attack by an independent equitable proceeding rather than by a motion in the divorce action is immaterial and does not destroy the court's power to provide for the child's maintenance under section 137. *Nelson v. Nelson*, 7 Cal.(2d) 449, 60 P.(2d) 982. Although a decree of divorce had been previously granted, still the court under said section could order the husband to support his child. *Dixon v. Dixon*, 216 Cal. 440, 14 P.(2d) 497.

[8-11] The husband questions the order because the notice of motion was served upon his attorney but not upon himself. He appeared in the action when he filed his complaint although it was verified by his attorney. *Lyons v. State*, 67 Cal. 380, 7 P. 763. Section 1010 of the Code of Civil Procedure (as amended by St.1935, p. 1966) permitted service of the notice either upon him or his attorney. Since he resided out of the state, as al-

leged in his complaint, the notice was properly served upon his attorney as authorized by section 1015 of the same Code (as amended by St.1933, p. 1899). He further argues that the court's power was limited to the relief he requested. But a litigant who has appealed to equity may not so restrict its power. Where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the action presented. It is the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation. *Flood v. Templeton*, 152 Cal. 148, 92 P. 78, 13 L.R.A.(N.S.) 579; *Newport v. Hatton*, 195 Cal. 132, 231 P. 987; *Smith v. White*, 215 Cal. 204, 8 P.(2d) 1030; *Walsh v. Majors*, 4 Cal.(2d) 384, 49 P.(2d) 598.

The order is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.



23 Cal.App.2d 367

LANNAN v. GARRETT et al.

Civ. 1686.

District Court of Appeal, Fourth District,
California.

Nov. 6, 1937.

1. Attachment ⇨302

Proceeding by attaching creditor to determine title to property after filing of third party claims is somewhat in nature of a statutory creditor's bill, and is similar in effect to proceeding on third party claim (Code Civ.Proc. § 689, as amended by St. 1935, p. 1958, § 15; § 720, as amended by St. 1933, p. 1892).

2. Fraudulent conveyances ⇨206(1)

A creditor has a right to attack an assignment made by his debtor on ground of fraud.

3. Fraudulent conveyances ⇨292

In proceeding by attaching creditor to determine title to property after filing of third party claims, excluding evidence that claimant knew of pendency of action against debtor at time loan was made and that by

purporting to make loan to debtor claimant had taken part in conspiracy to prevent application of funds to debt due attaching creditor was improper (Code Civ.Proc. § 689, as amended by St.1935, p. 1958, § 15).

4. Trial ⇐49

In proceeding by attaching creditor to determine title to property after filing of third party claims, regardless of question of sufficiency of first offer of proof that claimant knew of pendency of action against debtor at time loan was made, and that by purporting to loan money to debtor claimant had taken part in conspiracy to prevent application of funds to debt due attaching creditor, refusing to permit any further offer of proof constituted error (Code Civ.Proc. § 689, as amended by St. 1935, p. 1958, § 15).

5. Witnesses ⇐275(4)

In proceeding by attaching creditor to determine title to property after filing of third party claims, where fraud is charged, a wide latitude should be allowed in cross-examining the adverse parties (Code Civ. Proc. § 689, as amended by St.1935, p. 1958, § 15).

6. Fraudulent conveyances ⇐291(1)

In proceeding by attaching creditor to determine title to property after filing of third party claims, attaching creditor should be allowed to trace funds claimed to have been borrowed by his debtor from third party claimant and find out what was done with funds, where fraud is charged (Code Civ.Proc. § 689, as amended by St.1935, p. 1958, § 15).

7. Appeal and error ⇐1048(6)

In proceeding by attaching creditor to determine title to property after filing of third party claims, refusing to permit the cross-examination of debtor as to what he had done with money which it was claimed had been loaned him by third party claimant constituted prejudicial error, notwithstanding claimant and debtor had previously testified that no part of the money had been repaid to claimant, since inquiry had important bearing on question of fraud involved (Code Civ.Proc. § 689, as amended by St.1935, p. 1958, § 15).

Proceeding by J. E. Lannan against W. T. Garrett, wherein Lillian Swartout, Guy L. Rick, and Laura Peters, by her agent Cornelius Peters, filed third party claims. From a judgment for the third party claimants, plaintiff appeals.

Reversed.

George I. Devor, of Los Angeles, and Guthrie & Curtis, of San Bernardino, for appellant.

Denair A. Butler, of Los Angeles, and Joseph M. Maltby, of Long Beach, for respondents.

BARNARD, Presiding Justice.

This is a proceeding, under section 689 of the Code of Civil Procedure (as amended by St.1935, p. 1958, § 15), to determine title to property after the filing of third party claims.

The plaintiff brought an action against the defendant Garrett to recover some \$7,000 on certain promissory notes. A writ of attachment was issued as a result of which about \$5,550 came into the hands of the sheriff. Three third party claims were filed totaling an amount equal to the funds in the hands of the sheriff. Each of these parties claimed to hold a note signed by Garrett secured by an assignment of a corresponding part of the fund which had been attached; the respective notes and assignments being all dated before suit was filed and attachment issued. The three claims were consolidated for hearing, and the plaintiff sought to prove that the notes and assignments were given by Garrett to the claimants through a fraudulent conspiracy to cover up or transfer the funds in question, in order to prevent their being applied in satisfaction of any judgment that might be obtained. Judgment in this proceeding was in favor of the third party claimants, and the plaintiff has appealed upon a bill of exceptions, making two assignments of error.

Counsel for appellant asked one of the claimants, on cross-examination, whether or not she knew of the pendency of this action at the time she made the loan to Garrett. An objection was made, whereupon counsel made an offer of proof that the witness knew of the pendency of the action at the time the loan was made, and that by purporting to loan money to Garrett she had taken part in a conspiracy to prevent the application of the funds to the debt due to appellant. The court sustained the objection and refused to per-

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

mit any further offer of proof; this being the ground of the first exception.

With respect to the second exception, while the respondent Garrett was testifying he was asked by counsel for the appellant what he had done with the \$3,000 which it was claimed had been loaned him by Laura Peters. An objection was made on the grounds that the question was incompetent, irrelevant, and immaterial. Counsel for the appellant then stated that the purpose of the question was to ascertain whether or not the witness and the third party claimants had entered into a conspiracy with respect to the funds in question. The court sustained the objection, and refused to permit the appellant to make any further effort to trace the funds which Garrett claimed to have borrowed from the third party claimants.

[1,2] This proceeding is somewhat in the nature of a statutory creditor's bill, and is similar in effect to the proceeding provided for in section 720 of the Code of Civil Procedure (as amended by St. 1933, p. 1892). *Gilbank v. Benton*, 9 Cal. App.(2d) 517, 50 P.(2d) 815. A creditor has a right to attack an assignment made by his debtor on the ground of fraud. *Dore v. Dougherty*, 72 Cal. 232, 13 P. 621, 1 Am.St.Rep. 48; *Kemp v. Lynch* (Cal. Sup.) 65 P.(2d) 1316. In *Fross v. Wotton*, 3 Cal.(2d) 384, 44 P.(2d) 350, 354, the court said: "From the very nature of the action, direct proof of the fraudulent intent of the parties is an impossibility. For this reason and because the real intent of the parties and the facts of the transactions are peculiarly within the knowledge of those sought to be charged with the fraud, proof indicative of fraud must come by inference from the circumstances surrounding the transaction, the relationship and interests of the parties."

[3,4] Obviously, the action was not pending on the purported date of the note. But the loan may not have been actually made until after the action was begun. The appellant was entitled to endeavor to find out the facts through cross-examination, particularly in a proceeding of this kind. Even if the loan was in fact made before the action was started, the witness

may have known of the debt upon which it was based and that an action was about to be brought, and may have made the loan for the purpose of forestalling the results of such an action. Aside from any question as to the sufficiency of the first offer of proof made, it was error to refuse to permit any further offer of proof.

[5-7] The respondents answer the second assignment of error by saying that since Laura Peters and respondent Garrett had theretofore testified that no part of the \$3,000 had been repaid to her the question had been fully answered. The statement that that loan had not been repaid was largely a conclusion, and in a proceeding such as this, where fraud is relied upon, the exact facts are important. The money might have been returned to Laura Peters under the guise of another loan, or in many ways it may have been so handled as to destroy any preference in favor of her assignment against the writ obtained by the appellant. The very purpose of this proceeding is to give an attaching creditor an opportunity to ascertain the true facts and to protect the third party claimants in a similar manner. Where fraud is charged a wide latitude should be allowed in cross-examining the adverse parties. As a minimum, the attaching creditor under such circumstances as these should be allowed to trace the funds claimed to have been borrowed by his debtor from a third party claimant, and find out what was done with those funds. While the trial court permitted the funds to be traced from the third party claimants into the hands of the respondent Garrett the door was then shut and the appellant was not permitted to find out what he did with them. This line of inquiry had an important bearing upon the question of fraud which was involved, and the refusal to permit any such investigation was necessarily prejudicial to the rights of the appellant. A new hearing should be had with a reasonable opportunity given to the appellant to go into the matter of fraud.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

23 Cal.App.2d 556

YONKER v. CITY OF SAN GABRIEL
et al.
Civ. 5925.District Court of Appeal, Third District,
California.

Nov. 22, 1937.

1. Municipal corporations ⇨733(2)

The management, control, construction, and maintenance of public highways is government function and is distinct from a proprietary undertaking or business carried on by city, as regards procedure to be followed in enforcing alleged liability of city resulting from improper construction and maintenance of highway.

2. Municipal corporations ⇨723, 742(1), 744 Statutes ⇨225

Statutes dealing with city's liability for damages and procedure for enforcing liability must be construed together, and liability of city or its agents must be determined therefrom and procedure therein set forth must be followed (Gen.Laws 1931, Act 5618, § 1; Act 5619, § 2; Act 5150, § 1; Act 5149).

3. Municipal corporations ⇨733(2)

Statute rendering municipalities liable for injury to person and property resulting from dangerous or defective condition of public street furnishes basis for an action against municipality, even though the work done by the municipality is denominated as done in its governmental capacity (Gen.Laws 1931, Act 5619, § 2).

4. Appeal and error ⇨1010(1)

Finding of court supported by testimony is binding on Appellate Court.

5. Bridges ⇨23

Where city's agents in alleged negligent manner dumped asphalt-impregnated gravel and other refuse materials on abutments of bridge and injury to plaintiff's land resulted from the loose material being carried from the abutments down to plaintiff's land, plaintiff's failure to file verified claim with proper city authorities precluded maintenance of action for damages, or for an injunction (Gen.Laws 1931, Act 5618, § 1; Act 5619, § 2; Act 5150, § 1; 5149; Const. art. 1, § 14).

Appeal from Superior Court, Los Angeles County; J. T. B. Warner, Judge.

Action by Jacob H. Yonker against the City of San Gabriel, Glenn E. Evans and others, members of the City Council of the City of San Gabriel, William T. Phillips, Superintendent of Streets of the City of San Gabriel, and others. From an adverse judgment, the named defendants appeal.

Reversed.

H. S. Farrell, of Alhambra, and Hill, Morgan & Bledsoe and Kenneth K. Wright, all of Los Angeles, for appellants.

John M. Dvorin and Charles Murstein, both of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action had judgment against the defendants in the sum of \$4,000 for damages alleged to have been caused to his property by reason of the negligent act of the defendants, and also had judgment for an injunction as prayed for in the complaint. From this judgment, and the decree granting an injunction, the defendants appeal.

It appears from the complaint that the plaintiff during all the times mentioned in this action was the owner of a tract of land lying in the outskirts of the city of San Gabriel, county of Los Angeles, comprising about eight acres. In this land it appears that there is a certain wash known as and called San Pasqual wash. The wash is alleged to have contained valuable gravel from which the plaintiff each year extracted material to be used in building operations. This building material was sold to contractors in Southern California, and produced a valuable income to the plaintiff.

Alongside of this wash the city of San Gabriel maintained a public highway known as and called Ramona street. This street extends over the wash just referred to, and the highway is connected on both sides of the wash by what is known as the Ramona street bridge. For the purpose of strengthening and improving the abutments to the bridge just referred to, it is alleged that the defendants dumped a large quantity of material, containing particles of asphalt, oil, and grease impregnated therein to a great extent. It is then alleged that during the rainy season great quantities of water are carried down through said wash alongside of the abutments referred to and onto and over the lands belonging to the plaintiff. That after the dumping of the

asphalt-impregnated gravel and other refuse materials on the abutments of the bridge just referred to, torrential rains caused the rise of the waters in the wash and carried large quantities of the oil-impregnated gravel and sand and other refuse matter out, over, and upon the lands belonging to the plaintiff, and so impregnated the sands on plaintiff's property as to cause the same to become valueless and useless for building purposes. It is alleged in the complaint that the dumping of said oil-impregnated gravel and refuse material was done carelessly and negligently by the servants and employees of the city of San Gabriel. It is further alleged that the plaintiff gave notice to the defendants of the matters complained of herein, but that said defendants took no measures to prevent the injury to plaintiff's premises by reason of the manner in which the oil-impregnated gravel and refuse matter had been dumped upon the abutments aforesaid, and took no measures whatever to prevent the waters of said wash from carrying the same down to, over, and upon the lands belonging to the plaintiff. That said acts of defendants resulted in damage to the plaintiff's property in the sum of \$5,000. Upon this complaint the court awarded judgment, as we have stated, in the sum of \$4,000, and granted the injunction prayed for.

Attached to the complaint marked Exhibit A is a writing entitled "Notice for Payment of Claim." This claim, however, is not verified and does not in any particular conform to the requirements of the acts of the Legislature to which we will hereinafter refer.

Upon this appeal the main argument of the defendants is to the effect that the plaintiff did not file a claim with the proper authorities of the city of San Gabriel, and that the claim which was filed or rather served upon some of the officers of the defendant does not conform to the requirements of the acts of the Legislature relating thereto. Responding to the objection that no verified claim was filed as required by law, it is the contention of the plaintiff that under section 14 of article 1 of the Constitution the filing of a verified claim against the city of San Gabriel was unnecessary. The section of the Constitution referred to provides that private property shall not be taken or damaged for public use without just compensation being made therefor. At the time of the dumping of the material herein referred to by the

agents of the city of San Gabriel upon the abutments of the Ramona street bridge, no property of the plaintiff was either taken or damaged. The damage, if any, was, as the authorities claim, consequential, but whether it correctly be denominated consequential or direct, immediate, the record shows no damage resulted from the mere fact of dumping the refuse material upon the abutments referred to, but that subsequently torrential rains occurred, causing an excessive flow in the wash referred to; the waters thereof carrying down the refuse matter upon the property belonging to the plaintiff.

[1] We think it unquestionable that the work performed by the city was essentially a governmental procedure or rather a governmental act. The management, control, construction, and maintenance of public highways is by all of the authorities which we have examined and to which our attention has been called designated as a governmental function as distinct from any proprietary undertaking or business carried on by a city.

[2] Under the common law, damages such as are referred to in the plaintiff's complaint could not constitute a basis of action against the city. Our statutes, however, have changed the common law in this particular, and have likewise adopted a procedure which must be followed by any one claiming to have been damaged by the acts of a city or its agents. A number of acts have been passed to which we will now refer and which we think must all be read together and so construed, the liability of a city or its agents must be determined and the procedure therein set forth must be followed.

The first act to which we refer is the one approved May 18, 1919. Stats.1919, p. 756; Deering's Gen. Laws of California, Act No. 5618. Section 1 of that act reads: "No officer of any district, town, city, city and county, county, or of the state of California, shall be liable for any damage or injury to any person or property hereafter resulting from the defective or dangerous condition of any public street, highway, bridge, building, work or property, unless it shall first appear" that the injury was the direct result of the dangerous or defective condition, that the officer in charge had notice of the dangerous condition, that he had authority and it was his duty to remedy such condition, that there were funds available for remedying the condition, and

that reasonable steps were not taken to remedy the same.

[3] The second act to which we refer is the one approved June 13, 1923. Stats. 1923, p. 675; Deering's Gen.Laws, Act No. 5619. This act, after limiting the liability of boards with regard to negligence of employees and also requiring notice and knowledge, contains, in section 2 thereof, the provisions making cities, counties, etc., liable under certain conditions, to wit: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition, * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition." This act, as we have just stated, furnishes the basis for an action against the city, even though the work done by the city is denominated as done in its governmental capacity. It is the defective condition that constitutes the gravamen of the charge.

The third act of the Legislature to which we desire to call attention is one approved June 19, 1931. Stats.1931, p. 2476; Deering's Gen.Laws, Act No. 5150. This act (section 1) provides that: "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building," etc., on account of the carelessness of any public officer, "a verified claim for damages shall be presented in writing and filed with such officer and the clerk or secretary of the legislative body of the municipality, county, city and county, * * * within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received," etc.

The fourth act is essentially a duplicate of the third act to which we have called attention. It was approved on June 19, 1931. Stats.1931, p. 2475; Deering's Gen. Laws, Act No. 5149. These two acts as read together, passed at the same time, approved on the same day, and effective

on the same day, both provide for the filing of verified claims stating the matters therein contained of which we have just made mention.

[4] The court having found that the abutments to the Ramona street bridge were in a defective condition, in that gravel and other material impregnated with oil and decomposed asphalt were dumped in a negligent manner upon the abutments of said bridge as alleged in the complaint, we are bound by the finding of the court. Upon this appeal we do not find that it is seriously contended that the finding of the court in this particular is not supported by the testimony. As we have said, the injury to the plaintiff's land resulted from the loose material being carried from the abutments of the bridge down to, over, and upon the plaintiff's land, and that the plaintiff's land was thereby injured does not appear to be seriously questioned.

[5] The chief point made is that the plaintiff has not proceeded in the manner required by the acts to which we have referred in laying the basis for his action and that, not having done so, his claim against the city and the defendants herein as officers of the city has been waived. This position seems to be well taken. In the case of Musto-Keenan Co. v. City of Los Angeles, 139 Cal.App. 506, 34 P.(2d) 506, 508, this court had before it the very question which we are now considering. The damages in that case were based upon the alleged negligent manner in which certain street work was performed. In answering the contention that under section 14 of article 1 of the State Constitution no claim was required to be filed against the city of Los Angeles, the court said: "Appellants admit they did not file claims for damages with the board of public works of the city of Los Angeles or make objections to the hearing provided in the ordinance of intention but they contend that the excavation in Soto street barring them from access to their properties constitutes, not only mere inconvenience to them, but an actual physical damage such as is contemplated by section 14 of article 1 of the state Constitution, which provides that 'private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner.' * * * While it is true the Constitution provides for compensation for the taking or damage of private property for public use, nevertheless that is a con-

stitutional right that a property owner may waive by failing to comply with such procedural step as may be prescribed by the act under which the public improvement was constructed;" citing *Bigelow v. Ballerino*, 111 Cal. 559, 44 P. 307; *Sala v. City of Pasadena*, 162 Cal. 714, 124 P. 539.

The court in that case then proceeded to consider the claim filed by the plaintiffs, and held that it complied with the act under which the improvement made by the city of Los Angeles was carried on. In the case at bar, nothing of that kind appears. That the notices are required in all cases where personal injuries have been received is shown by the following cases: *Phillips v. County of Los Angeles*, 140 Cal.App. 78, 35 P.(2d) 187; *Myers v. Hopland U. E. School District*, 6 Cal.App.(2d) 590, 44 P. (2d) 654, an action in which this court held that even though the injury resulted to a minor the verified claim must be filed as required by the acts of the Legislature to which we have referred. The latest case upon the subject to which our attention has been directed is that of *Cooper v. County of Butte*, 17 Cal.App.(2d) 43, 61 P.(2d) 516, where it was held that an action could not be maintained unless a verified claim were filed as provided by the acts of the Legislature, and it was further held that neither a county nor its officers could waive the provisions of the acts with regard to the filing of verified claims. That case goes on to hold that the provisions of the statutes regarding the filing of claims is mandatory, and that there must be at least a substantial compliance with the provisions of the various acts to which we have referred; citing a long list of cases supporting the rule just stated.

To the same effect, and supporting the rule that no action can be maintained unless the claims provided for in the city charter and in legislative acts have been filed, we may cite the case of *Western Salt Co. v. City of San Diego*, 181 Cal. 696, 186 P. 345. In *Pittam v. City of Riverside*, 128 Cal.App. 57, 16 P.(2d) 768, the court followed the rule which we have stated herein, that it is only where statutes give a right of action that an action can be maintained to recover damages inflicted by a city in the exercise of its governmental functions. That action was based upon

section 2 of the Act approved June 13, 1923.

One of the latest cases upon the subject to which our attention has been called is that of *Norton v. City of Pomona*, 5 Cal.(2d) 54, 53 P.(2d) 952. The opinion in this case is somewhat lengthy, and takes up several questions other than the one which we consider determinative of the issues presented by this appeal, but the court finally holds that whenever any private property is damaged or injured by reason of the defective condition of any public street, etc., there must be filed a claim just as provided for in Act No. 5149 of Deering's General Laws, and that as no such claim was filed the action could not be maintained.

In answer to the authorities which we have just cited, respondents call our attention to the case of *Jackson v. City of Santa Monica*, 13 Cal.App.(2d) 376, 57 P.(2d) 226. This case is not in point for the simple reason that the injury complained of was not caused by any act or negligence of the officers of the city of Santa Monica while acting in a governmental capacity. The case does go on and hold that where acting in a governmental capacity the acts of the legislature to which we have referred apply. It holds, just as we have stated, that the damages for which compensation was prayed occurred when the agents of the city were engaged in a proprietary capacity, to wit, the driving of a bus. While some of the sections to which we have referred use the word "accident," we think it includes the intent of injury. Thus in the case at bar no accident has resulted, but an injury has been found to have resulted from the acts of the agents of the city.

Other objections have been assigned as furnishing causes for reversal, but by reason of the failure of the plaintiff to file a verified claim as provided for by law we find no escape from the conclusion that no basis was laid for the maintenance of this action, and the judgment for damages, including as well the injunctive provisions of the decree, must be, and the same are hereby, reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

23 Cal.App.2d 493

73 P.(2d)

**COOPERATIVE DAIRYMEN'S LEAGUE v.
HANSEN et al.****Civ. 10432.****District Court of Appeal, First District,
Division 1, California.****Nov. 18, 1937.****Rehearing Denied Dec. 18, 1937.****Hearing Denied by Supreme Court
Jan. 17, 1938.****1. Contracts ⇨50**

A promise which by its terms may be performed without detriment to promisor or benefit to promisee is insufficient as a consideration.

2. Agriculture ⇨6

A recital in contract giving dealer option to purchase milk from producers from year to year that there existed an additional consideration for producers' promises to deliver milk to dealer, though not conclusive, was evidence of a fact supporting trial court's conclusion that producers did not become bound as members of co-operative league which knew of contract and procured membership contracts from producers on theory that their identification with league would induce others to join and thus strengthen it (Civ.Code, § 1615).

3. Agriculture ⇨6

In action by co-operative league to recover from milk producers, who had signed membership contract despite existing contract to deliver milk to another dealer and had voluntarily paid to league difference between price of surplus milk and lower price at which it was marketed, an additional sum to equal proportionate deductions from credits given other members, evidence supported conclusion that producers did not become members of league and did not become obligated otherwise than to pay regular dues.

4. Agriculture ⇨6

Milk producers could not be held liable to co-operative league for penalty imposed on members for milk delivered containing an excess bacterial count where there was no evidence that producers promised to pay, and evidence supported finding that producers did not become members of league.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by the Cooperative Dairymen's League against Hans Hansen and Tom Orloff, individually, and as copartners doing business under the name and style of Han-

sen & Orloff. From a judgment for defendants, plaintiff appeals.

Affirmed.

Decoto & St. Sure, of Oakland (Lafayette J. Smallpage, of Stockton, of counsel), for appellant.

Carleton L. Rank, of Oakland, for respondents.

PER CURIAM.

An appeal by the plaintiff from a judgment entered in favor of the defendants.

Plaintiff (which will be hereinafter referred to as the league) is a nonprofit co-operative corporation composed of dairymen producing milk for sale in Alameda county, and the defendants are copartners engaged in the dairy business in that county. The league was incorporated in 1925 its purpose being to market the milk produced by its members, to the end that uniform prices might be obtained and the income proportionately distributed. Following its incorporation, by-laws were adopted and officers and directors were elected. Public meetings were held with the object of inducing dairymen to join the organization. In June, 1926, such a meeting was held in the town of Newark, at which the league's general manager presided and the defendants were present. The defendants were at this time under contract to sell all their product to another dealer, and this contract, at the option of the latter, had several years to run. This fact was discussed; and there was evidence of an understanding that although these defendants would be unable to deliver their milk to the league during the term of the existing contract, they being the largest producers of milk in the locality, their identification with the league would have the effect of inducing others to join and thus strengthen the organization. Defendants' existing contract provided that they should receive the current wholesale price for their milk; and it is admitted that the success of the league would tend to increase or maintain current prices. At the meeting mentioned defendants signed a membership contract; but it was testified that it was verbally agreed that this should not take effect until the expiration of the existing contract. It was agreed, however, that they should pay the regular dues as members of the league. The trial court so found; and although there was evidence of defendants' participation in the management of the league's

affairs thereafter, which tended to show that they became members at the time, nevertheless the conclusion of the trial court is fairly sustained.

In this connection plaintiff contends in effect that defendants, by the provisions of their existing contract, were not obligated to deliver their product from year to year. But one paragraph of this contract was placed in evidence, the material portion of which reads as follows: "As a further consideration for the execution of this agreement by the vendor vendees jointly and severally covenant and agree to and with vendor that vendees and each of them will for and during the period of twenty years from and after the date of this agreement deliver to vendor daily at vendor's option all or such portion as vendor may desire of the milk produced from any dairy or dairies operated by the vendees or any of them. * * * Vendor shall, on or before May 1st of each year, exercise such option as to the amount of milk which he shall purchase from vendees during the twelve months period immediately following June first of such year."

[1,2] It is the rule that a promise which by its terms may be performed without detriment to the promisor or benefit to the promisee is insufficient as a consideration. While under the quoted portion of the paragraph it was optional with the dealer to purchase the milk he might desire from year to year, and this standing alone might be held to be an insufficient consideration, and that therefore the defendants would not be bound, nevertheless the paragraph recites that there existed an additional consideration for defendants' promises. What this was in fact does not appear. However, this statement, while not conclusive, is evidence of a fact which supports the conclusion of the trial court. Williston on Contracts (2d Ed.) § 115b; *Whitney v. Stearns*, 16 Me. 394; *Frank v. Irgins*, 27 Minn. 43, 6 N.W. 380; *Thrall v. Newell*, 19 Vt. 202, 47 Am.Dec. 682; *National Hardware Co. v. Sherwood*, 165 Cal. 1, 130 P. 881; 13 C.J., Contracts, § 183, p. 336; Civ. Code § 1615.

[3] The situation which led to the present litigation arose in 1930. It was then found that more milk was being produced than could be sold as "grade A market milk"—this being the milk sold for human consumption as distinguished from that sold for manufacturing purposes, which brought a lower price. Under its accounting system

the league credited each member for all the milk delivered at the grade A market milk price. It thereafter became necessary to charge against each account the proportion of the difference between this price and that obtained for manufacturing purposes. As defendants' milk was not sold through the league, no charges were entered on its books against them as in the case of other members; but it was testified that after the adoption of this system they voluntarily paid the league $\frac{1}{2}$ cent for each gallon of milk sold by them, the purpose being to help equalize the difference in the amount received by the other members due to the lower price at which their surplus milk was marketed. It is claimed that this payment by the defendants of $\frac{1}{2}$ cent per gallon did not equal the proportionate deductions from the credits given the other members, and the present action was brought to recover this difference.

Several of the league's officers testified that the question of the defendants' relations with the organization was discussed at its meetings during this period, and that it was the opinion of the officers that it would be to the advantage of the league not to claim from the defendants a proportion of the so-called loss as, in that event, they might arrange to ship their product through the league, thus causing a greater surplus of milk, and that the arrangement described should continue.

It is contended that the meeting at which the defendants signed a membership card was not duly called or held, and that consequently nothing which was then agreed to would bind the league. However, a subsequent resolution was adopted by the members ratifying and approving the preceding acts of the directors and officers; and there is sufficient to show throughout the whole transaction, which covered a long period, that the course pursued was approved by the officers of the league. Evidence, which the trial court believed, sufficiently supports the conclusion that defendants never became obligated otherwise than as found by the trial court. The facts are closely analogous to those in the case of *P. A. Smith Co. v. Muller*, 201 Cal. 219, 256 P. 411, and the principles there applied should control. See, also, *Texas Co. v. Berry Garage*, 121 Cal.App. 455, 9 P.(2d) 241.

The further claim is made that plaintiff should have recovered for certain unpaid dues, but the evidence shows that these were paid.

[4] In addition it is urged that the defendants are liable for a penalty imposed upon the members for milk delivered which contained an excess bacterial count. However, there is no evidence that the defendants promised to pay; and in view of the evidence and the finding that defendants did not become members the court's finding against this contention must be sustained.

We are satisfied that no ground for reversal of the judgment has been shown; and the judgment is accordingly affirmed.



statute are not without limitation as to time, but when construed with related sections and provisions of the Code on limitations contemplate that the summons referred to must be issued and returned within the same time that an original summons might have been issued and returned after filing of original complaint, and hence summons issued in a proceeding to satisfy a judgment against a joint debtor, which was sought more than three years after issuance of the original summons, and more than three years after the rendition of the original default judgment, was barred (Code Civ.Proc. § 991; § 406, as amended by St.1933, p. 1844; § 581a, as amended by St.1933, p. 1869; §§ 989, 990, as amended by St.1935, p. 1965).

23 Cal.App.2d 535

CARSON v. LAMPTON, County Clerk.
Civ. 11346.

District Court of Appeal, Second District,
Division 1, California.

Nov. 19, 1937.

1. Common law ☞9

The policy of the law is to put an end to litigation and to aid the vigilant and not those who sleep on their rights.

2. Statutes ☞174

Where a statute is susceptible of two constructions, the one leading inevitably to mischief or absurdity should be rejected and one consistent with justice, sound sense, and wise policy adopted.

3. Statutes ☞224

Statute relating to issuance of summons when judgment is recovered against one or more persons jointly indebted on obligation and statute requiring summons in preceding statute to be issued by the clerk and upon affidavit specified in a subsequent statute must be construed with related sections as well as with provisions of the Code on limitations (Code Civ.Proc. § 991; § 406, as amended by St.1933, p. 1844; § 581a, as amended by St.1933, p. 1869; §§ 989, 990, as amended by St.1935, p. 1965).

4. Judgment ☞855(2)

Statute relating to issuance of summons when a judgment is recovered against one or more persons jointly indebted on obligation and statute requiring summons issued in the preceding statute to be issued by the clerk upon affidavit specified in subsequent

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Petition for a writ of mandate by Mary C. Carson against L. E. Lampton, as County Clerk of the County of Los Angeles. Judgment granted a peremptory writ after demurrer to alternative writ had been overruled and respondent refused to answer, and respondent appeals.

Judgment reversed, and attempted appeal from peremptory writ of mandate dismissed.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for appellant.

Percy M. Bokofsky and David I. Lippert, both of Los Angeles, for respondent.

DORAN, Justice.

An action was commenced in the superior court of Los Angeles county, on June 12, 1933, by one Mary C. Carson on a joint obligation of Consolidated Building Corporation, a corporation, P. T. Barnes and Mrs. P. T. Barnes, husband and wife. All of said parties, joint obligors, were named therein as parties defendant. Summons was issued on June 12, 1933, and service of summons and complaint was had upon all of the defendants except defendant Mrs. P. T. Barnes, who did not appear in the action at any time. On July 17, 1933, a default judgment was rendered in favor of plaintiff and against the defendants who were served in the action.

The judgment, however, was only partially satisfied. Three years, three and one-half months later, to wit, on November 2, 1936, plaintiff Mary C. Carson requested

of L. E. Lampton, county clerk of said county, appellant herein, that a summons in proceedings against a joint debtor (pursuant to section 989 et seq. of the Code of Civil Procedure, as amended) be issued against defendant Mrs. P. T. Barnes who had never been served. The county clerk refused to issue the summons, taking the position that he was without authority to do so more than three years after the issuance of the original summons, and more than three years after the rendition of the original default judgment.

A petition was filed by plaintiff in the superior court, requesting that a writ of mandate issue against said county clerk commanding him to summon Mrs. P. T. Barnes, as requested. An alternative writ was thereupon issued by the court. A demurrer was filed, and the matter came on regularly for hearing. At the conclusion of the hearing the court overruled the demurrer and, respondent having declined to answer, judgment was ordered for petitioner directing that a peremptory writ of mandate issue against said clerk, as prayed. By the terms of the writ said county clerk was required to issue a summons in proceedings against a joint debtor, directing Mrs. P. T. Barnes to appear and show cause why she should not be bound by the judgment rendered July 17, 1933.

The appeal herein is from the judgment directing the issuance of the peremptory writ, and an appeal from the writ of mandate itself is also attempted.

The pertinent sections of the Code of Civil Procedure, involving proceedings against joint debtors, are as follows: "Sec. 989. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, * * * those who were not originally served with the summons, and did not appear in the action, may be summoned to appear before the court in which such judgment is entered to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons." As amended by St.1935, p. 1965. "Sec. 990. The summons specified in section 989 shall be issued by the clerk, * * * upon presentation of the affidavit specified in section 991, and must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner, and returnable within the same time,

as the original summons. It is not necessary to file a new complaint." As amended by St.1935, p. 1965.

Under section 406 of the Code of Civil Procedure (as amended by St.1933, p. 1844), a summons must be issued within one year after the complaint is filed. Section 581a of the Code (as amended by St.1933, p. 1869) provides that no further proceedings shall be had and the action must be dismissed "unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action."

In the instant case, the request for issuance of the subsequent summons was not made until more than three years after the complaint was filed, more than two years after the time within which the original summons could have been issued, and more than four months after the original summons could have been returned.

Appellant contends, in substance, that the provision in section 990, namely, that the summons "shall be issued * * * and returnable within the same time, as the original summons," should be construed as an unequivocal requirement that the summons in question must be issued and returned within the same time as the original summons might have been issued and returned, after the filing of the original complaint.

Respondent contends, however, that said section "does not limit the time within which the summons specified in section 989 shall be issued by the clerk"; that by the use of the word "returnable" in section 990, it is merely "intended that a joint debtor summons must require the defendant to appear within ten days if served within the county where the action is brought, or within thirty days if served elsewhere."

[1-4] Respondent's position is untenable. As hitherto declared, "It is the policy of the law to put an end to litigation, and to aid the vigilant, and not those who sleep upon their rights." *Bingham v. Kearney*, 136 Cal. 175, at page 177, 68 P. 597. Moreover, it is a well-recognized rule of construction that where a statute is susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense, and wise policy, the former should

be rejected and the latter adopted. In *re Mitchell*, 120 Cal. 384, 386, 52 P. 799; *San Joaquin, etc., Irr. Co. v. Stevinson*, 164 Cal. 221, 229, 128 P. 924; *Robbiano v. Bovet*, 218 Cal. 589, 596, 24 P.(2d) 466. It can scarcely be contended with reason that as to one section of the Code, regarding the subject herein referred to, all limitation with respect to time is intended to be disregarded, when, with reference to all others, the element of time receives express, if not emphatic, consideration. Necessarily, sections 989 and 990 are to be construed with related sections and as well with the provisions of the Code on limitations, and so construed, in the light of the foregoing, are not without limitation as to time, but, to the contrary, contemplate that the summons referred to must be issued and returned within the same time that the original summons might have been issued and returned after the filing of the original complaint.

For the foregoing reasons, the judgment is reversed. There being no appeal authorized from a peremptory writ of mandate, the attempted appeal from such writ is dismissed.

I concur: YORK, P. J.



23 Cal.App.2d 550

**FOSTER v. PENSION BOARD OF CITY
OF ALAMEDA et al.**

Civ. 10622.

District Court of Appeal, First District,
Division 2, California.

Nov. 22, 1937.

1. Municipal corporations ⚡176(3)

Under ordinance providing that pensions payable to members of police and fire departments thereunder should not be in addition to any compensation insurance unless compensation payments were less than one-half of member's salary, and providing that in no case should combined compensation and pension exceed one-half of member's salary, injured fire department officer was entitled only to a pension equal to difference between one-half of salary and amount of compensation received for corresponding

month, particularly where to construe ordinance differently would lead to absurd results (St.1917, p. 831, as amended).

2. Municipal corporations ⚡176(3)

Provision in pension ordinance that amount of compensation and amount of pension allowed by board to member of police and fire department should not in any event exceed one-half of member's salary at time of injury was not unconstitutional as a limitation upon amount of monthly compensation payments payable to a disabled member in violation of the Workmen's Compensation Insurance and Safety Act, as provision was solely a basis for computing amount of pension payable under the ordinance (St.1917, p. 831, as amended).

3. Municipal corporations ⚡200

Pension board was entitled to recover amount of overpayments which it had made to pensioner, whether such overpayments were made under a mistake of fact or under a mistake of law.

4. Municipal corporations ⚡200

Pension board's withholding of one-fourth of amount of each pension payment due pensioner for four succeeding months held a proper method of recovering amount of overpayments previously made.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Mandamus proceeding by Frederic Foster against the Pension Board of the City of Alameda and others. Judgment for defendants, and petitioner appeals.

Affirmed.

Philip O. Solon, of Oakland, for appellant.

H. Albert George, City Atty., of Alameda, for respondents.

SPENCE Justice.

Petitioner sought a writ of mandate to compel respondents to make certain payments claimed to be due under a pension ordinance. From a judgment denying the writ, petitioner has appealed.

This controversy arose under a pension ordinance of the city of Alameda. Said ordinance was originally adopted in 1925 and was known as ordinance 276, new series. A pension fund was thereby created together with a pension board to administer the same. Provision was made for

pension payments to members of the police and fire departments who might be retired from active service, voluntarily or involuntarily, after various specified periods of service. In the event of service for 25 years before retirement, the monthly pension was to be paid in an amount equal to one-half the monthly salary. Said ordinance was amended in 1933 by an ordinance known as ordinance 503, new series. The main purpose of the amendment was to deal with pensions in those cases in which members of the police and fire departments might be retired on account of disability. It provided for payment of a monthly pension in such cases in an amount equal to one-half the monthly salary, regardless of the length of service prior to such retirement, but subject to the limitations hereinafter set forth. Section 3 (d) of said ordinance as amended read as follows:

"The monthly pensions payable under this ordinance shall not be additional to any monthly compensation insurance payable to any member of the police or fire department in case of accident resulting in the course of his employment, *unless the compensation payments are less than one-half ($\frac{1}{2}$) of the salary of the member*, provided that when the monthly compensation insurance has been fully paid, the monthly pension will thereupon and thereafter be payable, *except as herein provided*.

"In case the compensation insurance awarded by the Industrial Accident Commission shall be payable in a lump sum, the Pension Board shall not make monthly payments of the pension to any member until the expiration of the period of time covered by the permanent disability rating, provided in the event said member be awarded compensation for life, said amount shall be payable to said member from the Compensation Fund. *The amount of such compensation and the amount of pension allowed by the Board shall not in any event, exceed one-half ($\frac{1}{2}$) of the member's salary at the time of his injury.*"

The italics are ours and the italicized portions are those stressed by the respective parties on this appeal.

Certain issues were made by the petition and the answer thereto but the parties stipulated in the trial court with respect to all of the essential facts. Petitioner was a lieutenant in the fire department, receiving a salary of \$185 per month at the time

he sustained an injury to his knee. He was subsequently retired because of disability resulting from said injury, said retirement being effective as of November 1, 1936. He was paid a pension from said pension fund in the sum of \$92.50 per month for each of the months of November and December, 1936. In January, 1937, the respondents learned for the first time that petitioner had received from the city's insurance carrier on account of said disability the sum of \$53.44 for the month of November, 1936, and the sum of \$55.22 for the month of December, 1936. After notice to petitioner and a hearing held on February 3, 1937, the respondent board passed a resolution reciting the foregoing facts and finding that the total pension to which petitioner was entitled for said two months of November and December, 1936, amounted to \$76.34 instead of the total of \$185 which had been paid and that the difference, amounting to \$108.66, had been paid in error and was owing by petitioner to said pension fund. The resolution then ordered "that beginning with the month of January, 1937, and continuing so long as said Frederick Foster continues to receive compensation under said Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831, as amended) the amount of monthly pension payable to said Frederick Foster shall be a sum equal to the difference between one-half of the monthly salary of a member of the rank of Lieutenant in the fire department and the amount of compensation received by said Frederick Foster during any such month, and that when said compensation payments shall cease the full amount of pension shall thereupon and thereafter be payable." It further ordered that said sum of \$108.66, found owing to the pension fund by petitioner, be deducted in four equal amounts from the monthly pension payments due for the months of January, February, March, and April, 1937.

Petitioner contends that, under said pension ordinance, he was entitled to a monthly pension of \$92.50, being an amount equal to one-half the monthly salary, and that the trial court therefore erred in denying the writ. Respondents, on the other hand, contend that petitioner was entitled only to a monthly pension equal to the difference between one-half of the monthly salary and the amount of compensation received by appellant for the corresponding month. We are of the opinion that peti-

tioner's contention cannot be sustained and that respondent's position is correct under the ordinance in question.

[1] From what has been said, it is apparent that the monthly compensation payments received by petitioner were less than one-half of the monthly salary of \$185 per month. What then was the amount due him by way of pension? It is conceded by the parties that said action 3 (d) of the pension ordinance is loosely drawn, but the last above-quoted sentence thereof seems to be entirely clear and to be determinative of this controversy. It reads, "The amount of such compensation and the amount of pension allowed by the Board shall not *in any event*, exceed one-half of the member's salary at the time of his injury." (Italics ours.) Whether this sentence is read alone or in connection with all of the other provisions of the ordinance, we find no ambiguity in the meaning of the ordinance as applied to the facts before us. But even assuming that there may be said to be some ambiguity in the ordinance in its application to situations such as the present one, the construction placed upon the ordinance by petitioner would lead to absurd consequences and should not be adopted. 23 Cal.Jur. 766. Let us assume that two lieutenants of the fire department are both injured, one being injured more seriously than the other. Let us further assume that both are retired on account of disability; that the more seriously injured member receives monthly compensation payments equal to 55 per cent. of the monthly salary; and that the less seriously injured member receives monthly compensation payments equal to 45 per cent. of the monthly salary. Under petitioner's construction of the ordinance and particularly under his construction of the provisions of the first paragraph of said section 3 (d) above quoted, the less seriously injured member would be entitled to monthly pension payments equal to one-half the monthly salary in addition to his monthly compensation payments of 45 per cent. of his monthly salary, making a total of 95 per cent. of his monthly salary, while the more seriously injured member would be entitled to no pension payments whatever while receiving monthly compensation payments equal to 55 per cent. of the monthly salary. Assuming the existence of ambiguity, we conclude that such absurd results were never intended and that there is nothing in the ordinance to prevent the

more reasonable and more rational construction placed upon the ordinance by respondents.

[2] Petitioner makes the further contention that the last sentence of said section 3 (d) above quoted is unconstitutional and void. In our opinion this contention is without merit. It assumes that said sentence must be construed as a limitation upon the amount of monthly compensation payments payable to a disabled member of the police or fire department and that it is therefore in conflict with the provisions of the Workmen's Compensation Insurance and Safety Act. This construction cannot be justified. A reading of the title of the ordinance and of its various provisions shows that it is strictly a pension ordinance and that the reference to the act in question is made in the ordinance merely as a basis for computing the amount of the pension payable under the ordinance.

[3, 4] Having concluded that petitioner was entitled only to a monthly pension in the amount above indicated and that petitioner had been overpaid in each of the months of November and December, 1936, there is nevertheless a further question raised by petitioner on this appeal. Petitioner apparently contends that, even if he was overpaid in the total sum of \$108.66, the trial court erred in not issuing the writ to compel respondents to pay him the amount of monthly pension to which he was entitled without deduction on account of the overpayments theretofore made as provided in the respondent board's resolution. We find no merit in this contention. It is immaterial whether said overpayments were made by respondent board under a mistake of fact or under a mistake of law. In either event, the respondent board was entitled to recover the amount of said overpayments from petitioner. *People v. Hanson*, 330 Ill. 79, 161 N.E. 145; 20 Cal. Jur. 972; 48 Cor.Jur. 738, § 286; 48 Cor. Jur. 757, § 314. As further pension payments were to become due to petitioner, the method adopted for recovering the overpayments by withholding one-fourth of the amount thereof from each of the pension payments made for the four succeeding months was a reasonable and proper method for effecting such recovery.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

**UNION TRUST CO. OF SAN DIEGO v.
SUPERIOR COURT IN AND FOR
SAN DIEGO COUNTY et al. ***

Civ. 2053.

District Court of Appeal, Fourth District,
California.

Nov. 22, 1937.

Hearing Granted by Supreme Court
Jan. 20, 1938.

1. Discovery ☞97(4)

A person should not be forced to surrender his private records to another who does not claim to have any interest in them except upon convincing proof that such records contain evidence which materially affects the rights in litigation of person demanding them (Code Civ.Proc. § 1000, as amended by St.1933, p. 1897).

2. Discovery ☞97(4)

A person is not entitled to an order for inspection of records merely upon a legal conclusion stated in general terms that such records would be material (Code Civ.Proc. § 1000, as amended by St.1933, p. 1897).

3. Discovery ☞97(4)

An order for inspection of records based on an affidavit or other proof which fails to show that the evidence sought is competent is void (Code Civ.Proc. § 1000, as amended by St.1933, p. 1897).

4. Discovery ☞97(1)

To obtain an order for inspection of records, the precise document containing such evidence must be so described that it may be identified (Code Civ.Proc. § 1000, as amended by St.1933, p. 1897).

5. Discovery ☞97(4)

An order for inspection of records will not be granted on information and belief that records contain evidence material to an issue of the cause, but facts showing that the records actually contain competent and material evidence must be shown (Code Civ. Proc. § 1000, as amended by St.1933, p. 1897).

6. Discovery ☞86(1)

An order for inspection of records may not be obtained to enable a person to go on a "fishing expedition" (Code Civ.Proc. § 1000, as amended by St.1933, p. 1897).

7. Appeal and error ☞837(4)

A pleader's legal conclusion that evidence sought to be discovered by order for inspection of records was competent was required to be disregarded by reviewing

court in considering sufficiency of affidavit to support order (Code Civ.Proc. § 1000, as amended by St.1933, p. 1897).

8. Discovery ☞97(4)

An affidavit for an order for inspection of records was fatally defective where documents to be inspected were not identified by date, name, or any other description, the evidence sought to be discovered was not set forth with any particularity, its competence and materiality averred only by way of a legal conclusion and, under order, moving party could go on a "fishing expedition" (Code Civ.Proc. § 1000, as amended by St. 1933, p. 1897).

9. Discovery ☞99

Trial ☞9(1)

Order for inspection of records which was not supported by any evidence was void, and hence order that case was not to be set for trial until after compliance with order for inspection of records, made when party who was to furnish records for inspection refused to comply with order for inspection, was erroneous, and the cause was required to be set for trial (Code Civ.Proc. § 1000, as amended by St.1933, p. 1897).

Original proceeding by the Union Trust Company of San Diego for a writ of mandate directed to the Superior Court of the State of California in and for San Diego County and the Hon. L. N. Turrentine, a Judge thereof.

Peremptory writ issued as prayed.

Stearns, Luce, Forward & Swing, of San Diego, for petitioner.

C. J. Novotny, of San Diego, for respondents.

MARKS, Justice.

This is an original proceeding seeking a peremptory writ of mandate directing a judge of the respondent court to set for trial an action pending in his department.

On August 14, 1931, judgment was rendered in the superior court of San Diego county in favor of petitioner against C. J. Novotny. About September 17, 1931, a deficiency judgment was entered against Novotny in the sum of \$1,744.27. About June 2, 1936, an action on the deficiency judgment was commenced by petitioner against Novotny. The case was finally brought to issue. Among the pleadings of Mr. Novotny is a cross-complaint wherein,

*For subsequent opinion see 81 P.2d 150.

among other things, he seeks damages against petitioner in the sum of \$106,000. The case being at issue, it was set for trial.

On May 19, 1937, C. J. Novotny filed a notice of motion for inspection of documents in possession of petitioner and of its books. This was supported by the affidavit of Novotny. On May 21, 1937, the trial judge made the following order:

"Order for Inspection and Copies

"The defendant's motion for such purposes coming on regularly to be heard this 21st day of May, 1937, Stearns, Luce, Forward & Swing appearing for plaintiff and C. J. Novotny appearing for defendant, the matter having been fully presented by respective counsel and the court being fully advised it is hereby

"Ordered that plaintiff give to defendant forthwith an inspection and copy or permission to take a copy of the entries of accounts and of the documents and papers mentioned in the affidavit of C. J. Novotny sworn to on May 19, 1937, and upon which said motion is in part based and made. The inspection and copies to be made in the office of plaintiff and in the presence of plaintiff's attorney or agent, said inspection to commence May 21, 1937, and continue during business hours on May 21 and May 22, 1937.

"Dated: May 21, 1937."

On May 24th this order was amended as follows:

"The matter of the plaintiff's motion to set aside the Order for inspection and copies, of certain books and records, made by this Court on the 21st day of May, 1937, came on for hearing on this 24th day of May, 1937, Stearns, Luce, Forward & Swing appearing for plaintiff and Curtis Hillyer, Geo. A. Westover and C. J. Novotny appearing for defendant, and the matter having been presented by counsel and the Court being fully advised:

"It is hereby ordered that the plaintiff give to the defendants forthwith an inspection and copy or permission to take a copy of the entries of account and of the documents and papers mentioned in the affidavit of C. J. Novotny sworn to on May 19, 1937, excepting those certain documents and records mentioned in said affidavit as follows: 'All entries in full and all of said books relating to and showing the purchase and sale of stock in plaintiff corporation and in the Union Title Insurance Company and all en-

tries in stock journals, stock ledgers, books of certificates of stock, stock sales and transfer books relating to or containing entries relating to the capital stock of plaintiff corporation and the Union Title Insurance Company and the issue, sale, cancellation and transfer of such capital stock in both of said corporations from the year 1919 to the present,' which said mentioned records need not be produced for inspection and/or copy. That all other books, papers and records mentioned in said affidavit be produced pursuant to this order.

"That the inspection and copies to be made in the office of the plaintiff corporation and in the presence of the plaintiff's attorneys or agents, said inspection to commence at the hour of 8:30 o'clock A M on the 25th day of May, 1937, and continue during business hours until the same shall have been completed.

"And it is further ordered that the plaintiff shall make available for such examination, inspection and/or copy of all of said records of said plaintiff corporation:

"Dated: May 24th, 1937."

Petitioner moved to vacate the foregoing orders. The motion was denied. Petitioner refused to comply with the orders on the ground that they were void. Thereupon the following order was signed and filed:

"It appearing to the Court that the Union Trust Company of San Diego, a corporation, has refused to comply with the order of May 20, 1937, and the order of May 21, 1937, for an inspection by defendant of certain documents in the custody of plaintiff;

"It is hereby ordered, adjudged and decreed that the above case be not set for trial except after a reasonable lapse of time after a compliance by plaintiff with the orders above referred to.

"It is further ordered, adjudged and decreed that this said order be made nunc pro tunc as of June 14th, 1937."

[1-5] The proceeding for inspection of the books and records of petitioner was brought under the provisions of section 1000 of the Code of Civil Procedure (as amended by St.1933, p. 1897). The facts which must be established before an order for inspection can lawfully issue is thus clearly stated in *Shell Oil Co. v. Superior Court*, 109 Cal.App. 75, 292 P. 531, 532:

"The question presented involves the constitutional right of the people to 'be secure

in their * * * papers and effects against unreasonable seizures and searches.' Const., art. 1, § 19.

"As was said in *Kullman, Salz & Co. v. Superior Court*, 15 Cal.App. 276, at page 285, 114 P. 589, 593: 'The right of the people to be secure against unreasonable or unnecessary seizure of their private papers and documents is justly regarded as a highly sacred one—so much so, in fact, that the people themselves have taken the pains in express written terms to guarantee and safeguard its perfect enjoyment. Const., art. 1, § 19. In no case, therefore, should a person be forced to surrender his private books and papers to another who does not claim to own or have any interest in them except upon convincing proof that such books or papers contain evidence which materially affects the rights in litigation of the person demanding them.' Citing and quoting from *Ex parte Clarke*, 126 Cal. 235, 238, 58 P. 546, 46 L.R.A. 835, 77 Am.St.Rep. 176.

"As a condition precedent to support such an order of inspection there must be shown, by clear and unequivocal proof, two essential facts:

"(1) That the precise book, paper, or document containing the evidence material to the issue be described or designated so that it may be readily recognized; and

"(2) That such book, paper, or document contains evidence material to the issue to be tried by the court. Such evidence must be competent evidence, not hearsay.

"Again quoting from *Kullman, Salz & Co. v. Superior Court*, 15 Cal.App. 276, at page 286, 114 P. 589, 593, it is said: 'Nor is it enough, as is said by the court in *Morrison v. Sturges*, 26 How.Prac.(N.Y.) [177] 179, "that the party believes or is advised that the paper contains material evidence. Facts must be shown to support it."' The *Kullman Case* was approved in *Funkenstein v. Superior Court*, 23 Cal.App. 663, and at page 667, 139 P. 101, 103, we find this significant language:

"'If any of such books, papers or documents so made, issued, or taken would be admissible upon any theory of the case, it was the duty of the affiant to set forth the facts and reasons showing wherein their materiality and admissibility consist; and it was not sufficient in his affidavit to merely rely upon the legal conclusion stated in general terms that such books, papers, and documents would be material.

"'Finally, the entire failure of the affiant to identify with any particularity of description any specific book or paper or document constitutes, in our opinion, a fatal objection to the jurisdiction of the trial court to make the order in question.'"

An order based on an affidavit or other proof which fails to show that the evidence sought is competent is void and unenforceable. *Commercial Bank v. Superior Court*, 192 Cal. 395, 220 P. 422. The "precise book, paper, or document, containing such evidence" must be "so designated or described that it may be identified." *Pyper v. Jennings*, 47 Cal.App. 623, 191 P. 565, 566. It is not sufficient that the moving party be informed, or believe, that the book, paper, or other document contains evidence material to an issue of the cause. He must disclose facts showing that it actually contains competent and material evidence. *Kullman, Salz & Co. v. Superior Court*, supra; *Ex parte Clarke*, 126 Cal. 235, 58 P. 546, 46 L.R.A. 835, 77 Am.St.Rep. 176.

[6-8] When we measure the sufficiency of the affidavit of Novotny in support of his motion we find it fatally defective and insufficient to support the order of inspection. For illustration we quote two paragraphs of the affidavit:

"All entries in said books, all documents and papers relating to, held or received by plaintiff in connection with said trust and agreement; all entries in said books and all agreements, contracts, documents and papers relating to or connected with the judgments mentioned in the complaint herein and the transactions out of which said judgments arose: "All entries in said books and all documents and papers relating to the matters and transactions covered by and alleged in defendant's counterclaim and cross complaint herein."

No effort is made to identify any of the books, papers, or documents to be inspected, by date, name, or any description whereby any of them might be identified with any degree of certainty. It is clear that under the order of the trial judge Novotny could go on a "fishing expedition" through many of the records of petitioner which are none of his concern. This cannot be permitted. *Shell Oil Co. v. Superior Court*, supra. The evidence sought to be discovered is not set forth with any particularity. Its competence and materiality are only averred by way of the legal conclusion of the affiant. This legal conclusion must be disregarded,

leaving the affidavit barren of any attempt to show that the evidence sought is either material or competent to any issue made by the pleadings in the case.

[9] As the orders for inspection are not supported by any sufficient affidavit or other evidence, they are void. It follows that there was no ground for the nunc pro tunc order of June 14, 1937, and that the cause should be set for trial.

Let the peremptory writ of mandate issue as prayed for.

We concur: BARNARD, P. J.; JENNINGS, J.



23 Cal.App.2d 420

SHIVELY et al. v. KOCHMAN et al.
Civ. 10300.

District Court of Appeal, First District,
Division 1, California.
Nov. 12, 1937.

1. Appeal and error ⚡957(1)
Judgment ⚡139

The granting of relief from a default is a matter of discretion with trial court which will not be interfered with on appeal, unless such discretion has been abused.

2. Judgment ⚡143(12)

The setting aside of a default judgment entered after defendants failed to answer supplemental complaint was not an abuse of discretion, where defendants made timely application for relief and, according to his affidavit, defendants' attorney, through inadvertence, had failed to note expiration of time to answer the new pleading.

3. Judgment ⚡160

Deficiencies of affidavit of merits in support of motion to set aside default judgment would be remedied by verified answer denying material allegations of supplemental complaint.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Action by J. H. Shively and another against I. M. Kochman and others, where-

in a default judgment was entered against the defendants upon their failure to answer a supplemental complaint. From an order vacating the default and setting aside the judgment entered thereon, the plaintiffs appeal.

Affirmed.

S. Laz Lansburgh, of San Francisco (S. Joseph Theisen, of San Francisco, of counsel), for appellants.

Matthew J. Dooley, of San Francisco (E. Coke Hill, of San Francisco, of counsel), for respondents.

PER CURIAM.

An appeal from an order vacating a default and setting aside a judgment entered thereon.

The action was brought to recover installments of rent and damages for the loss of and injuries to certain personal property. Subsequently, the plaintiffs by leave of the court served and filed a pleading, designated a supplemental and amended complaint, and defendants were allowed ten days to answer the same. They having failed to answer, their default was taken and a judgment was entered against them. This they moved to vacate, and their motion was granted.

In support of the motion they served and filed an affidavit by their attorney and a verified answer to the supplemental and amended complaint. Plaintiffs contend that these were not sufficient to support the order appealed from.

While the previous pleadings in the case are not contained in the record, it is undisputed that the defendants had answered the original complaint; and it appears from the affidavit in support of the motion that a few days before the filing of the amended and supplemental complaint the case had been set for trial by the plaintiffs. It appears that in the supplemental portion of the complaint plaintiffs alleged that installments of rent had accrued since the commencement of the action, and recovery of these sums was sought by the new pleading. According to the affidavit mentioned, defendants' attorney noted in his register of actions the date fixed for the trial, but through inadvertence failed to note the expiration of the time within which his clients were required to answer the new pleading.

[1, 2] It is well settled that the granting of relief from a default is a matter of dis-

cretion with the trial court, which will not be interfered with on appeal unless such discretion has been abused. Here the defendants made timely application for relief, and the facts bring the case fairly within the rule stated in the following decisions: *O'Brien v. Leach*, 139 Cal. 220, 72 P. 1004, 96 Am.St.Rep. 105; *Downing v. Klondike Min. Co.*, 165 Cal. 786, 134 P. 970; *Berri v. Rogero*, 168 Cal. 736, 145 P. 95; *Hagenkamp v. Equitable Life Assurance Society*, 29 Cal.App. 713, 156 P. 520; *Hayes v. Pierce* (Cal.App.) 64 P.(2d) 728; *Brasher v. White*, 53 Cal.App. 545, 200 P. 657.

[3] An affidavit of merits was filed by the defendants' attorney, and complaint is made that this also was insufficient. However, one of the defendants verified the answer mentioned, which denied the material allegations of the amended pleading. The answer supplied any deficiencies in the affidavit, and such has been held to be sufficient. *Waybright v. Anderson*, 200 Cal. 374, 253 P. 148.

No abuse of discretion has been shown, and the order appealed from is accordingly affirmed.



23 Cal.App.2d 441

BIGELOW v. PLUMMER et al.

Civ. 11563.

District Court of Appeal, Second District,
Division 2, California.

Nov. 15, 1937.

Rehearing Denied Dec. 8, 1937.

Hearing Denied by Supreme Court

Jan. 13, 1938.

1. Sales ⇨53(1)

The question whether parties occupy relation of principal and agent or seller and buyer is ordinarily question of fact to be determined by fact finder, and only where evidence is clear and undisputed is it a question of law for court to decide.

2. Executors and administrators ⇨221(5)

Evidence sustained finding that transaction was one wherein broker purchased stock and owned it and entered into installment contract of sale so that relationship was that of seller and buyer rather than agent and principal, as regards sufficiency of claim against buyer's estate (Probate Code, § 706; Civ.Code, § 1624a).

3. Appeal and error ⇨1010(1)

Appellate Court may not upset findings of trial court supported by substantial evidence.

4. Executors and administrators ⇨227(2)

Where claim against deceased's estate was based on sale of stock, claim was fatally defective where it did not have annexed thereto contract or memorandum thereof on which claim was founded, and claim could not be enforced by action thereon (Probate Code, § 706; Civ.Code, § 1624a).

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Harry A. Bigelow, as trustee in bankruptcy of Insull Son & Co., Inc., a bankrupt, against Edna Covert Plummer and another, as executrices of the estate of Serge Mdivani, sometimes known as Serge Z. Mdivani, deceased. From an adverse judgment, plaintiff appeals.

Affirmed.

Latham, Watkins & Bouchard, by George Bouchard, all of Los Angeles for appellant.

Robert J. Sullivan, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of defendants in an action brought on a claim presented against the estate of decedent and rejected. It was tried on a stipulated set of facts.

We find that the defendant's decedent, Serge Mdivani, cabled Insull Son & Co., Limited, London, on June 2, 1931, that he was interested in buying shares of Insull Utility common on the installment plan and for them to wire terms. On June 18, 1931, the London company wrote Mdivani that as soon as it received instructions to do so it would purchase the shares in the open market, and send him a formal undertaking in writing to the effect that it had purchased the shares for his account, "These shares would not become your property until fully paid for. We would work out that they should be paid for over a period of ten monthly installments, and that you would receive no interest whatsoever or benefit by the dividends * * * until the shares are fully paid for. * * *

We do not make a general practice of doing

this type of business." On July 2, 1931, Mdivani cabled the London company to buy 1,500 Insull common on the terms outlined above, and on July 3, 1931, the London company wrote Mdivani that they had secured for his account 1,500 shares at \$32¾ per share, or a total of \$49,125, and that the arrangement is, "that you shall pay for these shares in ten equal monthly installments * * * and on completion of these payments the shares will be registered as instructed by you. * * * It is understood that any dividends paid on these shares before you have completed payment will not accrue to you."

On November 10, 1931, the London company wrote Mdivani setting forth a résumé of the above facts, and that they had received no response from him. In reply to this, Mdivani wrote a letter setting forth that his affairs were in bad shape and that he could not make any payments at the present time. Not long thereafter Insull Son & Co. went into the hands of a liquidator, and then into bankruptcy. The stock became of no value. None of the stock was ever delivered to Mdivani, and none of the purchase price was paid. A claim was filed against his estate for the full amount of the purchase price, with interest, but no instrument upon which the claim was founded was attached to the claim. It was rejected by the defendants. The trial court held that the relation between the London company and Mdivani was not that of principal and agent, but was that of vendor and vendee, and that the claim filed by the plaintiffs with the defendants did not comply with section 706 of the Probate Code, in that it did not have annexed thereto the necessary contract or copy thereof upon which said claim was purported to be founded, and therefore entered judgment in favor of the defendants. It is from this judgment the appeal is taken.

The plaintiffs contend that the London company and Mdivani occupied the usual relation of broker and customer, i. e., principal and agent, and that, therefore, the claim was not founded upon a written instrument. It is manifest, however, that if the London company was selling the stock to Mdivani on the installment plan and the relation of vendor and vendee ap-

plied to the transaction, that to render the claim as set forth herein as valid under the statute of frauds, section 1624a of the Civil Code, no deliveries having been made of the personal property sold nor anything ever given or paid to bind the contract, there must have existed some note or memorandum in writing of the contract of sale signed by the decedent. Such a writing would be the equivalent of the written instrument mentioned in section 706 of the Probate Code, as amended.

[1] The question whether the parties occupied the relation (1) of principal and agent or (2) vendor and vendee is ordinarily a question of fact to be determined by the fact finder. Only where the evidence on the issue is clear and undisputed is it a question of law for the court to decide. 55 C.J. 43. "Where, as in this case, the facts and circumstances in evidence may reasonably authorize either one of two opposite inferences and the trial court has adopted one and rejected the other, its decision is binding upon the appellate court, the case being in substance the same as where the trial court decides upon the weight of contradictory evidence." *Boland v. Gosser*, 5 Cal.App.(2d) 700, 43 P.(2d) 559, 560, and cases cited.

[2-4] In the instant case, there is substantial evidence from which the inference may reasonably be drawn that the transaction was an unusual one wherein the London company purchased the stock and owned it and had entered into an installment contract of sale with Mdivani, and this court, under the circumstances, may not upset the findings of the trial court. Under such facts the duty to annex the note or memorandum to the claim was mandatory (*Estate of Steuer*, 77 Cal.App. 584, 585, 247 P. 211; *State of Montana ex rel. Paramount Publix Corp. v. District Court*, 90 Mont. 281, 1 P.(2d) 335, 76 A.L.R. 1371, at page 1373), and it follows that the claim, being fatally defective, cannot be enforced by action thereon. *Bank of Sonoma County v. Charles*, 86 Cal. 322, 24 P. 1019; *Stockton Savings Bank v. McCown*, 170 Cal. 600, 150 P. 985.

Judgment affirmed.

I concur: McCOMB, J.

I dissent: WOOD, J.

23 Cal.App.2d 325

**GILMORE v. STATE COMPENSATION
INSURANCE FUND et al.****Civ. 5912.****District Court of Appeal, Third District,
California.****Oct. 29, 1937.****Hearing Denied by Supreme Court
Dec. 27, 1937.****1. Workmen's compensation ⇨13**

The constitutional provision authorizing Legislature to create and enforce a complete system of workmen's compensation, and Workmen's Compensation Act were intended to provide only for compensation by employers for their own servants and their dependents, and legislation which purports to exceed that authorization is beyond power conferred by Constitution and therefore void (Const. art. 20, § 21).

2. Workmen's compensation ⇨1049

The discretion conferred on State Compensation Insurance Fund to declare dividends from excessive premiums which have been charged for insurance may not be arbitrarily exercised, since law contemplates that portion of premiums collected in excess of compensation paid and costs of maintaining fund is to be refunded in dividends or credited on renewal of subsequent premiums (St.1935, pp. 723-725, 728, §§ 11732-11740, 11770, 11775-11778, 11781, 11820, 11822; Const. art. 20, § 21).

3. Workmen's compensation ⇨1048

The State Compensation Insurance Fund is an agency of the state (St.1935, pp. 723-725, 728, §§ 11732-11740, 11770, 11775-11778, 11781, 11820, 11822; Const. art. 20, § 21).

4. Evidence ⇨83(1)

On petition for mandamus to require refunding of that portion of premium paid by employer to State Compensation Insurance Fund which was not expended during life of policy in payment of compensation for injuries and disabilities sustained by insured's employees, in absence of allegation to the contrary, court would assume that Compensation Fund and state treasurer complied with all provisions of law with respect to premium rate of insurance involved, payment of compensation, and distribution of dividends (St.1935, pp. 723-725, 728, §§ 11732-11740, 11770, 11775-11778, 11781, 11820, 11822; Const. art. 20, § 21).

5. Mandamus ⇨154(4)

A petition for mandamus to require refunding of that portion of premium paid

by employer to State Compensation Insurance Fund which was not expended during life of policy in payment of compensation for injuries and disabilities sustained by insured's employees was demurrable, where petitioner merely showed that out of premium, fund and state treasurer retained \$738.25, and that in 20 years fund accumulated \$14,000,000, but did not allege that statutory provisions with respect to premium rate of insurance, payment of compensation, and distribution of dividends had not been complied with (St.1935, pp. 723-725, 728, §§ 11732-11740, 11770, 11775-11778, 11781, 11820, 11822; Const. art. 20, § 21).

Mandamus proceeding by Charles L. Gilmore against the State Compensation Insurance Fund of the State of California and another, wherein respondents filed demurrers.

Demurrers sustained.

Charles L. Gilmore, of Sacramento, in pro. per.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and Carroll S. Bucher, and Frank J. Filippi, both of San Francisco, for respondents.

PER CURIAM.

This is a petition for a writ of mandamus to require the refunding of that portion of an annual premium paid by the Templar Mining Company to the State Compensation Insurance Fund of California, which was not expended during the life of the insurance policy in payment of compensation for injuries and disabilities sustained by the employees of the insured company. Separate demurrers were filed by the respondents on the ground that the petition fails to state facts sufficient to warrant the issuance of the writ. A verified answer to the writ was also filed by the respondents.

Incident to the enforcement of the statutory system for payment of compensation to workmen for injuries or disabilities sustained by them in the course of their employment, the California State Compensation Insurance Fund was created by statutes enacted pursuant to the provisions of article 20, section 21, of the Constitution of California. That section provides: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce

a complete system of workmen's compensation, by appropriate legislation * * * [including] full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund."

The petition merely alleges that the Templar Mining Company was duly incorporated and engaged in the enterprise of mining in the state of California; that on April 22, 1935, the State Compensation Insurance Fund of California issued its policy and insured the employees of that company against injuries or disabilities incurred by them in the course of their employment, until March 18, 1936, for which policy the mining company paid the respondent Insurance Fund the sum of \$1,420.07 as an annual premium therefor; that during that period the insurer expended of that sum only the sum of \$199 to compensate for injuries sustained by the mining company's employees; that on January 14, 1937, the Insurance Fund repaid to the mining corporation the sum of \$482.82, as dividends to which the insured was entitled; that the unconsumed portion of the annual premium paid by the insured amounted to the sum of \$738.25, which sum belongs to the insured and which the insurer refuses to pay; that the Insurance Fund has accumulated by wrongfully withholding overpaid premiums on policies during the past twenty years approximately the aggregate sum of \$14,000,000 which is deposited to its credit with the state treasurer and in various banks in California; that said claim for a refund amounting to \$738.25 was assigned to this petitioner, who thereupon demanded payment thereof from the respondents, which was refused. This petition for a writ of mandamus was then instituted.

The petitioner contends that the constitutional provision from which we have quoted limits the amount which the State Compensation Insurance Fund may collect as premiums on insurance policies to such sums as will compensate the employees of the insured industries for the injuries, disabilities, and deaths incurred by the employees in the course of their employment, together with the cost of administering the fund for that purpose, and that the accumulation in that fund of \$14,000,000 in the past twenty years is proof of the fact that

excess premiums have been collected and retained by the Compensation Insurance Fund. It is contended that portion of the premium collected from the Templar Mining Company, which has not been expended for the purposes specified, belonged to it. That claim was assigned to this petitioner. In support of the foregoing assertion, section 11775 of the Insurance Code (Stats.1935, pp. 496, 724, Deering's Supp. for 1935, p. 1069, Act 3748) is cited. That section provides: "The fund shall, after a reasonable time during which it may establish a business, be fairly competitive with other insurers, and it is the intent of the Legislature that the fund shall ultimately become neither more nor less than self-supporting. For that purpose loss experience and expense shall be ascertained and dividends or credits may be made as provided in this article."

We are of the opinion the demurrers to the petition should be sustained. The petition fails to state facts sufficient to authorize the issuing of a writ of mandamus to compel the treasurer to pay to the petitioner any part of the reserve fund claimed in the sum of \$738.25.

[1] It has been determined that by the adoption of article 20, section 21, of the Constitution, and the Workmen's Compensation Act, it was intended to provide only for compensation by employers for their own servants and their dependents, and that legislation which purports to exceed that authorization is beyond the power conferred by the Constitution, and therefore void. *Commercial Cas. Ins. Co. v. Ind. Acc. Comm.*, 211 Cal. 210, 216, 295 P. 11; *Pac. Gas & Elec. Co. v. Inc. Acc. Comm.*, 180 Cal. 497, 503, 181 P. 788; *People v. Yosemite Lumber Co.*, 191 Cal. 267, 216 P. 39; *People v. Standard Oil Co. of Calif.*, 132 Cal.App. 563, 23 P.(2d) 86.

A discretion is conferred on the commission with respect to the proportion of premiums which shall be allowed and distributed in cash dividends to employers who are insured therein. Section 11777 of the Insurance Code (St.1935, p. 725) provides that: "Such cash dividend or credit is to be an amount which the commission in its discretion considers to be the employer's proportion of divisible surplus."

[2] It is true that the discretion which is conferred on the commission to declare dividends from excessive premiums which have been charged for insurance may not be

arbitrarily exercised. It is evident that the law contemplates that since the fund is to become only "self-supporting," any portion of the premiums which are collected from insured employers in excess of compensation necessarily paid, and the cost of creating and maintaining the fund, is to be refunded in dividends or credited on the renewal of subsequent premiums paid by the insured. It is difficult to determine just what proportion of premiums is necessary to meet all of the obligations incurred incident to the payment of compensation and the maintenance of the fund. Certainly the petition in the present proceeding fails to allege facts from which we may determine what proportion of the unexpended premium, if any, is unnecessary for those purposes.

[3] Under the police powers of the state, for the purpose of securing employees and their dependents of payment of compensation for injuries sustained, the Constitution authorized the creation and maintenance of the State Compensation Insurance Fund to make "full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund." Pursuant thereto, appropriate legislation was enacted authorizing the State Industrial Accident Commission to engage in compensation insurance business "to the same extent as any other insurer." Sections 11770 and 11778, Insurance Code (St.1935, pp. 724, 725). The State Compensation Insurance Fund is an agency of the state. *Rauschan v. State Comp. Ins. Fund*, 80 Cal.App. 754, 760, 253 P. 173. The commission is authorized to establish and maintain an insurance business "competitive with other insurers." Section 11775, Ins. Code (St.1935, p. 724). To that end the commission is vested with full power, authority, and jurisdiction over the fund. "It may perform all acts necessary or convenient in the exercise of any power, authority or jurisdiction over the fund, either in the administration thereof or in connection with the insurance business to be carried on by it * * * as fully and completely as the governing body of a private insurance carrier." Section 11781, Ins. Code (St.1935, p. 725). All insurance carriers within the state, including the State Compensation Insurance Fund, must

file with the State Insurance Commissioner classifications of their respective risks and premium rates, together with their systems of schedule rating. The State Insurance Commissioner must then hold hearings and determine upon uniform classifications of risks and premium rates and adopt a uniform system of schedule rating applicable to all insurance carriers, subject only to further changes thereof by the commissioner after a subsequent hearing. All insurance carriers are prohibited from renewing or issuing policies for employers for workmen's compensation at premium rates less than those which are fixed and approved by the Insurance Commissioner. Sections 11732-11740, Insurance Code (St.1935, pp. 723, 724).

The premium rates are to be fixed pursuant to section 11820 of the Insurance Code (St.1935, p. 728) as nearly as practicable, to ascertain:

"(a) Bodily risk or safety, or other hazard of the plant, premises or work of each insured employer.

"(b) The manner in which the work is conducted.

"(c) A reasonable regard for the accident experience and history of each such insured.

"(d) A reasonable regard for the insured's means and methods of caring for injured persons," § 11821 St.1935, p. 728. § 11821.

The basis for the fixing of such premium rates is provided by section 11822 of the same Code (St.1935, p. 728) as follows:

"The rates fixed by the commission shall be that percentage of the payroll of any employer which, in the long run and on the average, will produce a sufficient sum, when invested at three and one-half per cent interest:

"(a) To carry all claims to maturity. The rates shall be based upon the 'reserve' and not upon the 'assessment' plan.

"(b) To meet the reasonable expenses of conducting the business of the fund.

"(c) To produce a reasonable surplus to cover the catastrophe hazard."

Pursuant to law, the State Compensation Insurance Fund of California was organized January 1, 1914. Since that time it has issued half a million insurance policies. It now has approximately \$35,000 policies in force. It maintains twelve offices in the state with some 500 employees. It

is authorized to, and because of the uncertainty of its current and future expenses and unknown obligations of necessity it must, maintain a surplus reserve fund. Not only must the fund pay all lawful claims for injuries and disabilities incurred by employees covered by the insurance together with future liabilities growing out of their ailments incurred in the course of employment, such as occupational diseases against which the statute of limitations has not run, but it must also pay all current expenses incident to the maintenance of the business, such as soliciting and writing insurance, investigating and adjusting claims, defending suits, enforcing contracts, employing officers and attorneys, and providing against possible unusual catastrophes.

Dividends may be declared only as required by section 11776 of the Insurance Code (St.1935, p. 725), which reads: "The actual loss experience and expense of the fund shall be ascertained on or about the first of January in each year for the year preceding. If it is then shown that there exists an excess of assets over liabilities, necessary reserves, and a reasonable surplus for the catastrophe hazard, then a cash dividend may be declared to, or a credit allowed on the renewal premium of, each employer who has been insured with the fund."

Before declaring a dividend to any insured employer, the fund must make full provision for meeting all past and future obligations incurred under the policy, together with contingent expenses of the fund chargeable thereto. The proportionate share chargeable to the policy must be placed in the surplus fund reserved for the payment of all obligations. This fund consists of two major reserves: (1) The present value of the future installments of compensation payable on account of past accidents, whether known or unknown, generally called the "loss reserve." (2) Provision for losses and expenses to arise during the remainder of the unexpired term of current policies, usually called the "unearned premium reserve."

[4] In the absence of allegations in the petition to the contrary, we must assume that the respondents in this proceeding have complied with all of the provisions of law with respect to the premium rate of insurance involved, the payment of compensation and the determining and distribution of dividends, and that the result shows that no

part of the claimed residue amounting to the sum of \$738.25 is due the petitioner.

[5] For the reason that the petition fails to allege facts indicating that any portion of the alleged claim is due the petitioner, the demurrers should be sustained. It is so ordered.



23 Cal.App.2d 475

In re SONNICKSEN'S ESTATE.

Civ. 10456.

District Court of Appeal, First District,
Division 2, California.

Nov. 17, 1937.

1. Husband and wife ⇨3

One of the implied conditions of the marriage contract is that the wife shall give husband companionship and the society of home life without compensation.

2. Husband and wife ⇨38

Under woman's agreement to give companionship and society of home life in return for property on death of decedent, which was made before but not in contemplation of marriage, woman subsequently marrying decedent was not entitled to conveyance of property on decedent's death, since contract of marriage contemplated such services would be given without compensation and, being inconsistent with original agreement, had the effect of terminating that agreement (Probate Code, § 850).

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding in the matter of the estate of Andrew O. Sonnicksen, deceased, by Martha Sonnicksen, petitioner, opposed by Karsten Sonnicksen and others, contestants. From an order denying petition for an order directing conveyance of real estate pursuant to contract with decedent, Martha Sonnicksen appeals.

Affirmed.

Paul A. McCarthy, of San Francisco, and Lakin & Leve, of Palo Alto, for appellant.

Kenneth R. McDougall, of Palo Alto, for respondents.

SPENCE, Justice.

This is an appeal by Martha Sonnicksen, the widow of the deceased, from an order of the probate court denying her "Petition of executrix for an order directing conveyance of real estate pursuant to contract of decedent."

The deceased was formerly married to Else Sonnicksen, who died on December 31, 1930. Respondents are the issue of said former marriage. Shortly after January 1, 1931, deceased and appellant, who was then Martha Sullivan, signed a written agreement which bore said date. The agreement contained many unusual provisions. It is difficult to briefly set forth its terms and we therefore set it forth in full.

"This Agreement, made at Palo Alto, Santa Clara County, California, this first day of January, 1931 between Andrew O. Sonnicksen, widower, of said County and State, party of the first part, and Martha Sullivan, of the same place, party of the second part, Witnesseth:

"Whereas, the parties hereto now reside and have since about the month of January, 1931, resided together in order that the first party shall have human companionship and the care and nursing that may be required by him by reason of his age and prospect of infirmity; and

"Whereas, the second party is a trained nurse by profession and practiced her profession actively until requested to refrain therefrom by the first party for the purpose of affording first party more companionship and the society of home life, and pursuant thereto the second party has refrained and continues to refrain from engaging in professional nursing work at the request of the first party; and

"Whereas, the expenses of the home where the parties hereto and the daughter of the second party reside are maintained equally by the first and second parties; and

"Whereas, the first party is desirous of making provision for the second party, in addition to the first party's contribution to the expenses of the maintenance of the parties' common home;

"Now, Therefore, in consideration of the premises and of the mutual covenants herein contained, the parties hereto hereby agree with each other as follows:

"1. The second party agrees to continue during the life of the first party to render to him such companionship, care and nursing as may be required by him, and during such

period to refrain from engaging in her nursing profession for the purpose of providing for the first party the greater companionship and society desired by the first party.

"2. During such time as the parties hereto maintain a common home each of the parties shall bear one-half of the cost thereof, and the daughter of the second party may continue to reside in such home as long as agreeable to the parties hereto. Nothing herein contained shall require a continuance of said common home longer than shall be mutually agreeable, and either of the parties shall be, and hereby is, permitted to terminate such arrangement at any time, subject to the other provisions of this agreement.

"3. In addition to the payment equally by the first party and second party of the expenses of the maintenance of such common home for the parties hereto, first party agrees to pay to the second party, during such time as the first party chooses so to do, an additional sum of \$100.00 per month for the care and companionship to be provided for the first party by the second party. The second party agrees to repay to the first party such sum of \$100.00 on account of the purchase price of the real and personal property hereinafter described.

"4. The first party agrees that if the provisions hereinabove contained respecting the maintenance of a common home for the parties hereto and the care and companionship of the first party by the second party shall continue during the life of the first party, the first party will grant, bargain, sell, assign, transfer and convey to the second party, at the moment immediately before the death of the first party, the real and personal property hereinafter described as compensation to the second party for such companionship and care.

"The property herein referred to consists of that certain real property situated in the County of San Mateo, State of California, particularly described as follows: [Describing certain real property and a certain automobile.]

"5. If the parties hereto shall mutually agree to terminate this agreement during the life of the first party, or if the first party, with or without cause, shall terminate this agreement during his lifetime, either by notice in writing to the second party of such termination or by making his abode elsewhere than with the second party, or by any other convenient means of termination of this agreement, the second party shall have absolutely no right, title, interest or claim to

the property herein described, or any part thereof, or against the first party or his estate in case of his death, excepting as hereinafter provided, and the first party shall not by any such termination of this agreement be deemed to have breached or broken this agreement or any promise or covenant on his part.

"6. The second party is hereby given the option, during the continuance of this agreement, of paying to the first party any sum or sums in addition to the sums hereinabove provided to be paid to the first party by the second party upon the purchase price of the real and personal property hereinabove described. If this agreement is terminated by mutual consent or by the first party without the consent of the second party, either for cause or without cause, first party shall, upon any such termination, be obligated to repay to the second party within thirty (30) days after such termination of this agreement any and all sums that may be paid by the second party to the first party pursuant to the provisions of this paragraph, it being understood that the payments provided for in this paragraph are to be made, if made at all, by the second party from moneys received from other sources than from the first party hereto.

"7. During the lifetime of the first party and until the moment immediately preceding his death the second party shall have no right, title or interest in or claim to the real or personal property hereinabove described, or any part thereof.

"In Witness Whereof, the parties hereto have hereunto set their hands the day and year first hereinabove written. Executed in duplicate.

"A. Sonnicksen,
"Martha Sullivan."

We deem it unnecessary to pass upon the validity of said agreement or the effect of the various provisions thereof. It should be stated, however, that the so-called additional sum of \$100 per month, the payment of which was made optional with the deceased under paragraph 3, was never paid at any time and, of course, said sum was never repaid by appellant to deceased on account of the undisclosed "purchase price" of the property. It should be further stated that no additional sums were paid on the

undisclosed "purchase price" by appellant to deceased from other sources under the optional provisions of paragraph 6. We may therefore treat said agreement, as it is treated by appellant, as one for the performance of services by appellant for a compensation as provided by the terms and provisions of said agreement.

About a year and a half after said agreement was executed and on June 23, 1932, deceased and appellant married and thereafter lived together as man and wife until the death of the deceased on May 6, 1935. Appellant was appointed the executrix of the last will and testament of the deceased and filed her petition, presumably under section 850 of the Probate Code, seeking an order directing the conveyance of the real property mentioned in said agreement to her daughter as her nominee. She appeals from the order denying said petition.

We find no error in the ruling of the court below. Respondents urge several points in support of said ruling but it is only necessary to discuss one of them. It is respondents' contention that the contract of marriage and the marriage of the parties pursuant thereto terminated the agreement of January 1, 1931, and in our opinion this contention must be sustained.

[1, 2] Said written agreement was made by the parties while unmarried and it is conceded that it was not made in contemplation of marriage. When the parties subsequently entered into a contract of marriage and became husband and wife, one of the implied terms of the contract of marriage was that appellant would perform without compensation the services covered by said written agreement. 30 C.J. 520. The terms of the two contracts were inconsistent and the necessary legal effect of the marriage contract was to terminate the obligations of the parties under said written agreement. *In re Callister's Estate*, 153 N.Y. 294, 47 N.E. 268, 60 Am.St.Rep. 620; see also, 30 C.J. 676, § 255; 13 C.J. 603, § 628. We therefore conclude that appellant was not entitled to an order directing the conveyance of said real property.

The order denying the petition is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

23 Cal.App.2d 480

SONNICKSEN v. SONNICKSEN'S ESTATE.

Civ. 10379.

District Court of Appeal, First District,
Division 2, California.

Nov. 17, 1937.

Hearing Denied by Supreme Court

Jan. 13, 1938.

Limitation of actions § 49(2)

Where contract made in January, 1931, to furnish companionship and society of home life in return for decedent's property on death, was terminated in 1932 by marriage to decedent who died in 1935, claim upon an alleged promise implied by law to pay reasonable value of services from 1931 to 1932 accrued at the time of the termination of the written agreement in 1932, and was barred by the statute of limitations, as against contention that cause of action did not accrue until the death of deceased (Code Civ.Proc. § 339).

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Martha Sonnicksen against the estate of Andrew O. Sonnicksen, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

Paul A. McCarthy, of San Francisco, and Lakin & Leve, of Palo Alto, for appellant.

Kenneth R. McDougall, of Palo Alto, and J. W. Coleberd, of South San Francisco, for respondent.

SPENCE, Justice.

This is a companion case to *In re Estate of Sonnicksen*, 73 P.(2d) 643, the opinion in which has been this day filed. After the probate court had denied plaintiff's petition for an order directing the conveyance of certain real estate, plaintiff filed a claim against the estate attaching thereto the written agreement set forth in the last-mentioned opinion. Said claim was rejected by the probate court and plaintiff filed this action upon the rejected claim. The cause was tried by the court sitting without a jury and, from a judgment denying plaintiff any relief, plaintiff has appealed.

The complaint was in two counts. The first count was based upon said written agreement and sought damages in the amount of the alleged value of the real

property at the time of the death of said deceased. The second count was based upon a quantum meruit in which it was alleged that the reasonable value of plaintiff's services to the deceased from January 1, 1931, to May 6, 1935, was the sum of \$150 per month. The prayer of the complaint was for judgment allowing plaintiff's claim for the sum of \$5,000, said sum being the alleged value of the real property, or, in the event said claim was not granted, then for the sum of \$2,700, said sum being the alleged reasonable value of said services. The trial court found and concluded that the said written agreement had been terminated by the contract of marriage and the marriage of the parties pursuant thereto on June 23, 1932, and further found and concluded that the alleged cause of action upon a quantum meruit was barred by the provisions of section 339 of the Code of Civil Procedure. The judgment against plaintiff was entered accordingly.

Appellant contends that the trial court erred in finding and concluding that said written agreement between appellant and the deceased was terminated by their marriage. We find no merit in this contention. It was made in the companion case, was there decided adversely to appellant's contention, and therefore requires no further discussion here.

The second contention of appellant is that the trial court erred in finding and concluding that appellant's claim upon a quantum meruit was barred by the statute of limitations. We are of the opinion that this contention is likewise without merit. In her brief, appellant "concedes that from the date of the marriage of Sonnicksen and herself her services as his wife were referable entirely to the marital status and contract, and that her right to compensation is confined to services in the period between January 1, 1931, and their marriage on June 23, 1932." Her claim was therefore based upon an alleged promise implied by law to pay the alleged reasonable value of her services up to June 23, 1932, and was not based upon the written agreement which provided for compensation in a different manner and which had been terminated on June 23, 1932. Her alleged cause of action, if any, upon a quantum meruit accrued not later than the time of the termination of the written agreement on June 23, 1932, and, as the deceased died on May 6, 1935, and the claim was thereafter pre-

sented, the trial court properly held that the alleged cause of action was barred by the provisions of said section 339. Appellant cites several authorities in support of the claim that her cause of action did not accrue until the death of the deceased. Said authorities do not support said claim, as none involved a situation where the express agreement of the parties had been terminated as in the present case.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



23 Cal.App.2d 444

PEOPLE v. YAMADA et al.

Cr. 508.

District Court of Appeal, Fourth District,
California.

Nov. 15, 1937.

Criminal law ⚡1182

Where clerk's and reporter's transcripts were filed on October 11, 1937, and case was placed on calendar of November 9, 1937, for argument, but no brief was filed and no appearance made for defendants, judgment against defendants was affirmed (Pen.Code, § 1253).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding by the People against Hanji Yamada and Sabas Felesures. From an adverse judgment, defendants appeal.

Affirmed.

A. A. George, of Fresno, for appellants.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

MARKS, Justice.

This is a motion to affirm the judgment pronounced on defendants under the provisions of section 1253 of the Penal Code. The clerk's and the reporter's transcripts were filed on October 11, 1937, and the case was placed on the calendar of No-

vember 9, 1937, for argument. No brief was filed, and no appearance made for defendants.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



23 Cal.App.2d 547

PEOPLE v. CONTRERAS.

Cr. 1581.

District Court of Appeal, Third District,
California.

Nov. 22, 1937.

Polsons ⚡9

Evidence of sale of marihuana sustained conviction for violation of act regulating sale, possession, and distribution of habit-forming narcotics (St.1929, p. 380, as amended).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Migual Contreras was convicted of violating an act to regulate the sale, possession, and distribution of habit-forming narcotics, and he appeals.

Affirmed.

Daniel E. Weyand and Elvin F. Sheehy, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The appellant was convicted upon an information filed by the district attorney charging violation of an act to regulate the sale, possession, distribution, etc., of habit-forming narcotics, etc. St.1929, p. 380, as amended. From the judgment of conviction the defendant appeals, and upon this appeal alleges that the testimony is insufficient to support the conviction, in that there is no testimony showing that the defendant had in his possession any of the narcotic drug described as "Marihuana" or "Indian Hemp," on his person

or in his possession, or under his dominion and control.

The record shows the following: That the appellant, on June 28, 1937, rented room No. 22 in the Alaska Hotel, in the city of Sacramento. Between 10 and 11 o'clock of the same evening the appellant was approached by one Howard Guy, a colored man, who asked him if he could get him (Howard Guy), a marihuana cigaret. The appellant replied that he could, and Guy gave the appellant 25 cents. The appellant took the money and went to the Alaska Hotel. He was followed into the hotel by an officer by the name of Kenealy, a member of the Sacramento police department. The officer waited at the head of the stairs in the hotel, and in a few minutes observed appellant coming out of room No. 22, stopped him, turned him around, and proceeded with him back to the room. Upon it being opened from the inside by a codefendant of the appellant, the officer observed as he entered the room that there was a paper of marihuana lying open on the bed. The officer stood the appellant at the foot of the bed, noticing as he did so that there was nothing on the floor around him. Carpeno, the codefendant of the appellant, was the only other person in the room; he was sitting at the head of the bed in the far corner. The room was four or five feet longer than the bed and three or four feet wider. After standing the appellant at the foot of the bed, the officer turned to a window and called to an officer by the name of Palmer, who was waiting on the street in front of the window, and he turned back in the room and noticed a crumpled cigaret on the floor immediately back of appellant. This cigaret contained marihuana in unlawful amounts; the cigaret was lying within two feet of the appellant. The testimony of the officer, as shown by the respondent's brief which we have verified by an examination of the record, is as follows:

"Now, while you were calling out of the window, it is your theory that this cigaret was placed or thrown on the floor at that time, is that correct? A. Yes.

"Q. Do you know by whom? A. I suspect by this man Contreras.

"Q. You suspect. Do you know? A. I didn't see it.

"Q. You didn't see it? A. No.

"Q. It might have been placed there by Mr. Carpeno, might it not? A. It couldn't possibly have been. I hardly thought possible. It was right at the foot of the bed. It is pretty hard to throw a cigaret that far in the condition the cigaret was rolled up. It was my contention that Contreras tried to throw it under the bed.

"Q. That is merely your deduction. It might have been possible that Mr. Carpeno might have put it there? A. Well, I wouldn't say so. I don't think so.

"Q. You don't think so? A. I don't think so."

After appellant was arrested he stated that he was staying in Sacramento because he had three pounds of marihuana which he wanted to dispose of. The appellant took the stand in his own defense and denied possession of the cigaret found at his feet. He admitted renting the room under a fictitious name. He stated that he passed the room on to Mr. Carpeno as he himself was leaving town to go to a ranch, and explained that he returned to the room in order to locate a baggage check which he thought he might have left in the room. He further stated that he did not find the check until the officer took him back into the room. When the officer entered the room with him it was lying on the bed within three or four inches of the package of marihuana.

Upon this testimony, if believed by the jury, the defendant was properly convicted. The jury had a right to conclude that the appellant, at the time the officer who had him in charge turned to call a brother officer, attempted to dispose of the cigaret, and that up to that moment it was in his possession and under his control. The jury had a right also to disbelieve the appellant's story about the renting of the room for other purposes than to use it in making sale and distribution of the unlawfully possessed cigarets.

Finding no merit in the appeal, the order denying the appellant's motion for new trial and the judgment of conviction are hereby affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

23 Cal.App.2d 510

McCULLOUGH v. LANGER et al.

Civ. 5660.

District Court of Appeal, Third District,
California.

Nov. 18, 1937.

Rehearing Denied Dec. 18, 1937.

Hearing Denied by Supreme Court

Jan. 17, 1938.

1. Physicians and surgeons ⇨18(8)

Evidence that physician supervising treatment of crushed thigh permitted rays from infrared lamp 21 inches from thigh to be applied for four hours to keep compress warm, resulting in third degree burn, and that such practice was not in accordance with practice of competent physicians in the vicinity, authorized recovery from physician for malpractice.

2. Master and servant ⇨333

In suit by patient against physician and nurse for burn from infrared rays in physician's hospital, evidence that physician supervised nurse by visiting room of patient and instructing nurse as to length of time rays should be applied, authorized recovery from physician, notwithstanding verdict denying recovery from nurse.

3. Master and servant ⇨333

The rule that a verdict exonerating servant for injuries to third party also exonerates master is applicable only where master is liable under doctrine of respondeat superior, and is inapplicable where servant acts under direction of master, and master is liable as joint participant in acts complained of.

4. Physicians and surgeons ⇨18(1C)

In suit against physician for burning of crushed thigh by infrared rays used to keep compress warm while patient was under influence of opiates, which prevented him from knowing cause of burn, instructions as to doctrine of res ipsa loquitur were proper.

5. Appeal and error ⇨1060(1)

In suit against physician for burn from infrared rays, offering in evidence letter written by physician to adjuster of his indemnity insurer, which contradicted physician's testimony that burn was not caused by application of rays, was not prejudicial misconduct.

6. Evidence ⇨215(3)

In suit against physician for burn from infrared rays, letter written by physician to adjuster of his indemnity insurer, which

contradicted physician's testimony that burn was not caused by application of rays, was admissible.

7. Trial ⇨127

As respects suit against physician for malpractice, evidence which is competent because addressed to a valid issue is admissible, though it may incidentally disclose that an insurer is interested in outcome of litigation.

8. Appeal and error ⇨1048(6)

In suit against physician for malpractice, cross-examination of another physician, testifying for defendant, as to whether he owned stock in certain insurance company previously shown to be defendant's indemnity insurer was not prejudicial, where no objection was made, and court directed jury to disregard cross-examination.

9. Appeal and error ⇨1060(1)

In suit against physician for burn from infrared rays, plaintiff's argument, referring to physician's letter to adjuster of his indemnity insurer, which contradicted physician's testimony that burn did not result from application of rays, as letter written to insurer stating "that it was a burn," was not prejudicial misconduct.

10. Appeal and error ⇨1058(2)

A defendant was not prejudiced by exclusion of his testimony as to conversation wherein he allegedly admitted liability and solicited false testimony, where he had previously been permitted to testify fully as to such conversation.

11. Physicians and surgeons ⇨18(7)

In suit against physician for burning of crushed thigh by infrared rays, evidence was inadmissible that physician had applied rays to knee and elbow of another patient without injury for periods as long as period during which rays were applied to plaintiff's thigh, where it was not shown that such other patient's flesh was devitalized.

12. Evidence ⇨553(2)

A hypothetical question, asked of an expert, which failed to include many essential factors of the issues involved in the case, was improper.

13. Trial ⇨98

A court may assign his reason for a ruling on an objection to testimony if it is not prejudicial in its nature.

14. Trial $\hookrightarrow$ 133(6)

Argument of plaintiff's counsel, consisting of extravagant constructions of evidence, attack on credibility of witnesses, appeals to sympathy or prejudice of jurors, requests that jurors "place yourself as nearly as possible in position of plaintiff," and statement that jurors could ignore all testimony, was not prejudicial, where court gave instructions to disregard, and fully instructed jury as to proper consideration of law and evidence.

15. Appeal and error $\hookrightarrow$ 930(2)

The Court of Appeal must assume that jurors understood and followed admonitions of trial court to disregard statements of counsel unsupported by evidence and to determine facts for themselves.

16. Trial $\hookrightarrow$ 121(2)

Counsel may draw any inference with respect to facts or credibility of witnesses of which evidence is reasonably susceptible, but trial court must prevent unwarranted and deliberate attacks on credibility or motives of witnesses, exaggerated statements of evidence, or appeals to sympathy or prejudices of jurors.

17. Trial $\hookrightarrow$ 131(1)

Objections to argument of counsel were waived by failure to request instruction to disregard.

18. Trial $\hookrightarrow$ 108

Ordinarily, both parties to an action tried before a jury have the right to have the facts of their case argued to the jury.

19. Trial $\hookrightarrow$ 25(2)

The party on whom the burden of proof rests has the right to open and close the arguments, subject to reasonable discretion of trial court to regulate time and manner of presenting arguments (Civ.Code Proc. § 607, subd. 4).

20. Trial $\hookrightarrow$ 108

Ordinarily, where party entitled to open argument waives such privilege, he may not be permitted to close argument when his adversary also waives argument.

21. Trial $\hookrightarrow$ 108

Ordinarily, where counsel for respondent declines to reply to a fair opening argument, party on whom burden rests may not then be permitted to continue his argument further.

22. Trial $\hookrightarrow$ 108

Where it is previously understood from specific order of court that each side is allotted fixed period for arguments, and one of attorneys on whom burden of affirmative rests makes full and fair presentation of issues on which he relies for judgment, it is within sound discretion of trial court to require opposing counsel to make his reply, or, on his refusal to do so, he may be precluded from following closing argument of his adversary.

23. Trial $\hookrightarrow$ 108

Where it was understood that certain time should be allotted for arguments, plaintiff, in opening argument, made fair presentation of issues on which he relied, court warned defendant that he would then be required to make his argument, and defendant refused to make any argument at such time, permitting plaintiff to make closing argument within time allotted, and denying defendant right to reply, was discretionary.

24. Appeal and error $\hookrightarrow$ 1004(1)

The Court of Appeal is bound by competent evidence supporting award of damages, notwithstanding opinion of court as to proper damages.

25. Appeal and error $\hookrightarrow$ 1004(1)

As respects damages, it is sole province of jurors to judge credibility of witnesses and weight and sufficiency of evidence, and Court of Appeal may not interfere with this province unless verdict is so grossly excessive as to shock one's conscience, or circumstances make it evident that verdict resulted from passion and prejudice.

26. Physicians and surgeons $\hookrightarrow$ 18(11)

\$25,000 as reduced from \$50,000 was not excessive for burning of crushed thigh from infrared rays, under evidence that injury was permanent, involved great pain, impaired plaintiff's earning ability, and required repeated graftings of skin.

27. New trial $\hookrightarrow$ 162(3)

In suit against physician for malpractice, trial court, as condition on which new trial would be denied, could reduce jury's award of \$50,000 to \$25,000, as the amount which court believed was fairly supported by evidence.

28. Appeal and error $\hookrightarrow$ 1004(3)

In suit against physician for malpractice, wherein evidence of physician's indem-

nity insurance was admitted, that it was necessary to reduce jury's award from \$50,000 to \$25,000 did not establish that verdict resulted from passion and prejudice.

Appeal from Superior Court, Siskiyou County; A. F. Ross, Judge.

Suit by Lloyd McCullough against Joseph Langer and others, which was dismissed as against one Dr. Hoag. From an adverse judgment, defendant Joseph Langer appeals.

Affirmed.

Hearing denied by Supreme Court; CURTIS, EDMONDS, and HOUSER, JJ., dissenting.

Horace W. B. Smith and George A. Work, both of San Francisco, and Joseph P. McNamara, of Yreka, for appellant.

Vincent W. Hallinan, of San Francisco, and Carter Barrett, Finley & Carlton, of Redding, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant, Dr. Joseph Langer, has appealed from a judgment which was rendered against him in a suit for malpractice of the medical profession consisting of alleged improper use of an infrared incandescent lamp which caused permanent injury to plaintiff's leg in the nature of a third degree burn, as a result thereof. A jury returned a verdict in favor of the codefendant, Mae Roberts, who, as appellant's nurse, had charge of the patient at the time of the injury. The cause was dismissed as to the other codefendant, Dr. Hoag. The jury returned a verdict of \$50,000, which, upon motion for a new trial, was reduced to \$25,000.

The appellant is a regularly licensed physician who resides in Siskiyou county, Cal. He was employed as local physician for the Fruit Growers Supply Company, which was engaged in a logging business in the vicinity of Hilt in that county. He owned and operated a hospital at Hilt. The codefendant, Mae Roberts, was employed by him as a nurse in that hospital, and had personal charge of the patient under the supervision of the appellant. The plaintiff was employed by the Fruit Growers Supply Company, and was engaged in operating a platform crane at the time of the accident. He was caught between the stationary platform and a revolving portion of the crane, and his leg was drawn into a 4½-inch aperture seriously crushing and bruising

the flesh of his left thigh. There was no abrasion of the skin. He was taken to the appellant's hospital for treatment. X-ray pictures disclosed the fact that no bones were broken. He was placed in bed about 1:30 o'clock that afternoon. Opiates were administered to relieve his suffering. The chief injury which he received was on the anterior of the left thigh. Hot compresses were applied to the injured part, consisting of towels saturated with a hot saline solution and covered with a rubber sheet over which a dry towel was placed. A 500-watt incandescent infrared lamp was then applied to the injured part through the compress. The lower rim of this lamp was suspended at a distance of 21 inches from the thigh of the patient. At 2:30 p. m. codein was administered to relieve his pain. The plaintiff testified that he thereafter became unconscious until he awoke at 5:30 p. m. Neither the compress nor the lamp was changed or removed from 1:30 until 5:30 p. m. The nurse did occasionally place her hand under the compress and ascertained that "it was still warm," and that the skin was moist. It appears that Dr. Langer, whose office was just across the hall from the room in the hospital which was occupied by the patient, visited him occasionally during that period of time. It does not appear that he participated personally in arranging the compress or lamp; that he interfered with the treatment administered by the nurse; that he instructed her regarding the time or the manner of using the lamp, or that he directed her to watch the result of the treatment of the injury. About 4:30 o'clock the nurse asked the appellant whether the lamp or compress should be changed. He advised her to leave them as they were until after the patient's evening meal. At 5:30 o'clock that evening the plaintiff awakened in great pain and rang for the nurse, who then removed the lamp and compress and found that the skin over the wound was blistered. This blister covered a space 8 by 10 inches in area. The evidence supports the implied finding that the plaintiff suffered a third degree burn on account of this negligence in treating his injured thigh. For a period of about two years he suffered great pain; his ability to work was seriously impaired; and certain medical experts testified that the result of the burn was permanent in its nature. Repeated graftings of skin over the burned area were necessary. The grafted skin cracked and the wound bled frequently. It failed

to heal, and the plaintiff endures pain, discomfort, and inconvenience which impairs his earning ability.

It is contended the evidence fails to support the judgment; that the exoneration of the nurse from negligence exempts the appellant from liability; that the court erroneously charged the jury with respect to the doctrine of *res ipsa loquitur*; that the court erred in rejecting evidence and in refusing to permit the attorney for the defendants to argue their case to the jury; that the plaintiff's attorneys were guilty of prejudicial misconduct particularly in adducing evidence that the appellant carried indemnity insurance; and that the damages which were awarded are excessive.

[1] We are of the opinion the judgment is adequately supported by the evidence showing that the appellant was guilty of malpractice in the treatment of the plaintiff's injured thigh. The mere use of an incandescent infrared lamp to keep the compress warm over the injured portion of the limb did not constitute malpractice. But the manner in which the lamp was used and the period of time during which the devitalized flesh of the injured limb was submitted to excessive heat therefrom, in our judgment, constitutes negligence which amounts to malpractice. The evidence is undisputed that tender, devitalized flesh is much more susceptible to burning from excessive heat than is normal flesh. In response to a request from Dr. Rea to specify what he considered wrong with the treatment of plaintiff's injury by the appellant and which was not in accordance with good medical practice in that vicinity, he testified: "It is not what he did; it is what he didn't do. He should have watched his light, * * * watched his bandage and watched his skin." Two qualified physicians testified that the third degree burn which was suffered by the plaintiff was the result of submitting the tender, devitalized flesh of the bruised thigh to excessive heat from the infrared light for too great a length of time. It appears the compress was left undisturbed over the wound with the heat of the lamp applied thereto for more than four hours, without adequate effort to ascertain the result of such treatment. There is evidence this lamp would generate 140 degrees of heat in one hour, and that the maximum heat which should be applied to that wound under the circumstances was not to exceed 110 degrees Fahrenheit. These physicians

testified that the treatment of this injury which was administered by the appellant was not in accordance with approved medical practice of competent physicians in that vicinity. This furnishes sufficient evidence to support the judgment.

[2,3] The exoneration of the nurse from negligence as a result of the rendering of a verdict by the jury in her favor does not necessarily relieve the appellant from liability. In support of his contention that he is relieved of responsibility by the rendering of a verdict in favor of his codefendant, the appellant relies on the case of *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171. In the case of *McInerney v. United Railroads of San Francisco*, 50 Cal.App. 538, 549, 195 P. 958, in which a hearing was denied by the Supreme Court, a similar contention was disposed of in the following language: "This brings us to the final contention urged by the appellant, which is that, since the jury by its verdict in favor of the appellant's codefendant Fitch exonerated the latter from liability for the injuries of which the plaintiff complains, it must necessarily be held to have also exonerated the appellant as the employer of Fitch from liability for his acts as its employee. In making this contention the appellant relies upon the cases of *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171, and *Thompson v. Southern Pacific Co.*, 31 Cal.App. 567, 161 P. 21, and also upon certain cases cited from other jurisdictions. These cases are, however, distinguishable and are in fact distinguished from the case at bar under the authority of *Benson v. Southern Pacific Co.*, 177 Cal. 777, 171 P. 948, wherein it is stated that, where the act of the employee was one for which the employer was liable only under the application of the rule of respondeat superior, the doctrine laid down in *Bradley v. Rosenthal* and the other above-cited cases might be applied; but that the principle invoked in those cases was not to be given application to a case where the employee was acting under the direction of his employer, who was therefore liable not merely under the rule of respondeat superior, but rather as a joint participant in the acts complained of."

Under the circumstances of this case, the nurse was presumed to attend the patient under the supervision and direction of her employer, Dr. Langer. As the Mc-

Inerney Case, *supra*, states, the employer "was therefore liable not merely under the rule of respondeat superior, but rather as a joint participant in the acts complained of." *Armstrong v. Wallace*, 8 Cal.App. (2d) 429, 439, 47 P.(2d) 740, 745. In the case last cited, this court said: "The surgeon had the power and therefore the duty to direct the nurse to count the sponges as a part of his work in the opening and closing of plaintiff's abdomen and the putting in and taking out of sponges, and it was his responsibility to see that such work was done."

In the present case, it was the duty of the doctor in his treatment of the patient to see that the compress and lamp were used in such a manner as to prevent the application of excessive heat and a consequent burning of the flesh. The supervision of the doctor is shown by his personal visits to the room of the patient and by the inquiry of the nurse addressed to him an hour before the burn was discovered as to whether she should not then change the compress and lamp, to which he replied, "leave them until after his evening meal." The appellant was therefore not relieved of liability because of the verdict favorable to his codefendant.

[4] The court properly instructed the jury at the request of the plaintiff respecting the doctrine of *res ipsa loquitur*. The appellant contends that: "The lamp and the compress having been used in the course of the treatment as distinguished from their use in making the diagnosis, the giving of these instructions was error." We are unable to reasonably draw a distinction between the taking of X-ray pictures to ascertain the nature of an ailment and the actual treatment of a case by the physician, in their application to the doctrine of *res ipsa loquitur*. It seems reasonable to conclude that ordinarily the diagnosing of the ailment of a patient is a necessary prerequisite to and part of the proper professional treatment of the case. It is necessary for a physician to first determine the nature of an ailment before he may intelligently treat the disorder. It has been repeatedly held in this jurisdiction that the doctrine of *res ipsa loquitur* applies to cases involving the negligence of a physician in the use of X-ray pictures taken for the purpose of diagnosing an ailment, and also in the manner of actually treating the disorder. *Moore v. Steen*, 102 Cal.App. 723, 283 P. 833; *Meyer*

v. McNutt Hospital, 173 Cal. 156, 159 P. 436; *McBride v. Clara Barton Hospital*, 75 Cal.App. 161, 241 P. 941; *Timbrell v. Suburban Hospital, Inc.*, 4 Cal.(2d) 68, 47 P.(2d) 737. In the present case, the plaintiff was burned in some way unknown to him, as a result of the treatment of his injury by the appellant. It occurred while he was under the influence of opiates which prevented him from knowing just what caused the burn. The appellant contended that the blister occurred as a result of the plaintiff's crushed thigh, and not from the application of the compress or excessive heat from the lamp. In the *Meyer* Case, the *McBride* Case, and the *Timbrell* Case, above cited, the respective plaintiffs were burned similarly to the plaintiff in this case, by the application of excessive heat from hot-water bottles. We see no distinction between similar injuries received from excessive heat from a hot-water bottle and those resulting from an incandescent lamp. We therefore conclude that the doctrine of *res ipsa loquitur* was applicable to the facts of this case, and that the court properly instructed the jury in that regard.

[5-9] It was not prejudicial misconduct for plaintiff's attorneys to offer in evidence a letter written by the defendant and addressed to "W. H. Harriman, Adjuster, U. S. Fidelity and Guaranty Co., Room 528, 369 Pine St., San Francisco, Cal.," although the letter tended to prove that the insurance company may have been interested in the outcome of the litigation. This letter was competent evidence to show that the appellant had previously made a statement in writing, which was in conflict with his testimony at the trial, to the effect that the plaintiff was not burned as a result of the application of the compress and excessive heat from the incandescent lamp. This letter, over the signature of the doctor, describes the injury received by the plaintiff in the accident at the platform crane, and the treatment administered by the appellant, and then says: "The burn was due to the initial application of a compress over devitalized tissue." It is the established rule of law that when evidence is competent because it is addressed to a valid issue in the case, it is admissible even though it may incidentally disclose the fact that an insurance company is interested in the outcome of the litigation. *Fleming v. Flick*, 140 Cal.App. 14, 32, 35 P.(2d) 210; *Cozad v. Raisch Imp. Co.*, 175 Cal. 619, 166 P. 1000; 10 Cal.Jur.Supp. 666, §§ 29e and

29f. Nor do we think it amounted to prejudicial misconduct for plaintiff's attorney to ask Dr. Newton, a witness for the defendants, on cross-examination whether he owned stock in that insurance company. No objection to this question was made, but defendants' attorney assigned it as prejudicial misconduct. The court of its own motion directed the jury to disregard it and the statement of counsel with respect thereto. We cannot say this question was asked by counsel in bad faith. The inference that the defendant was insured already appeared in evidence from the proper introduction of the letter referred to. The challenged question therefore merely called for cumulative evidence of the same fact. Under proper circumstances it is competent to show the bias of a witness, even though the evidence thereof incidentally discloses the fact that an insurance company is interested in the outcome of the case. 10 Cal.Jur. Supp. 668, § 29g; *Cozad v. Raisch Imp. Co.*, supra. We do not think it constituted prejudicial misconduct for plaintiff's attorney, in the course of his argument to the jury, to have referred to the letter "written to the United States Fidelity & Guaranty Company," in which letter the attorney stated that the appellant said "that it was a burn." The reference to the insurance company was properly made to identify the letter. This was valid argument from competent evidence in the record to refute the defendants' contention that plaintiff was not burned as a result of his treatment. The use of such argument under circumstances similar to those presented in this case was held not to constitute prejudicial misconduct. *Fleming v. Flick*, supra.

An attorney should be careful not to unnecessarily disclose to a jury the interest of an insurance company in the outcome of litigation to which it is not a party. The utmost good faith should be exercised in that regard lest it may create a prejudice in the minds of jurors which will result in an unjust verdict. In a careful reading of the record in this case with respect to this issue, we are unable to say there is evidence of bad faith on the part of counsel, and we are therefore of the opinion the challenged evidence does not constitute prejudicial misconduct.

[10] The appellant contends that the court erred in sustaining objections to several questions propounded to him for the purpose of impeaching the testimony of Dr. Rea who testified that Dr. Langer acknowl-

edged to him in a conversation which previously occurred that his treatment of the plaintiff resulted in a serious burn; that he then "confessed judgment" (meaning that he admitted his negligence), and that he asked Dr. Rea to appear at the trial as a witness in his behalf and testify falsely regarding the nature of the burn. In a lengthy examination of Dr. Langer, objections were sustained to the following questions, and to other similar ones: "I will ask you what the conversation was between you and Dr. Rea * * * ?" "Did you ask Dr. Rea to come and give false testimony for you in connection with this case?" "What was the conversation which took place between you and Dr. Rea at that time * * * ?" "What did you say to Dr. Rea at that time and place about anything connected with this trial?"

The sustaining of objections to these questions was harmless. They called for evidence which was merely cumulative. The subject-matter was fully covered and the contradiction of the testimony of Dr. Rea in that regard was clearly elicited from the appellant in other questions which were answered without objections, as follows:

"Mr. Work:

"Q. Doctor Langer, at the time you called upon Doctor Rea in Yreka here the first time, did you ask Doctor Rea to come here and give false testimony in your behalf?

A. No, I did not.

"Q. Did you have any conversation with Doctor Rea at that time affecting this case?

A. No, I did not."

[11] There is no merit in the foregoing assignments of error.

It was not error for the court to sustain an objection to appellant's offer to prove by a witness named Burton R. King that he was afflicted with osteomyelitis of the right knee and the left elbow, and that Dr. Langer had treated him for those ailments for five years, frequently applying to the respective limbs hot compresses and "the infra-red ray lamp" for periods as long as four hours without burning or blistering the skin. The objection was properly sustained. It is the established rule of law that evidence of experiments or experiences of this nature, which are not connected in any manner with the transaction involved in the case at bar, is not competent unless the conditions are similar. *Baker v. Hancock*, 29 Ind.App. 456, 63 N.E. 323, 64 N.E. 38; *Rayburn v. Day*, 126 Or. 135,

268 P. 1002, 59 A.L.R. 1062. The evidence in the present case is clear that the plaintiff was burned because excessive heat was applied to flesh which was devitalized, and therefore more susceptible to heat on account of the bruised and crushed condition of the thigh. In the proffered testimony of King, it appears that he was suffering from no such ailment. His flesh was not devitalized. It was normal in its condition. He was afflicted with osteomyelitis, which is defined as inflammation of the marrow of the bone. There was no offer to show that his flesh over which the compress and lamp were placed was not in a perfectly healthy, normal condition. The condition of his flesh was not the same as that of the plaintiff. The objection was, therefore, properly sustained.

[12] For the reason last assigned, objections to the questions propounded to Doctors Vidricksen and Dickinson were also properly sustained. There was no offer to show that the condition of the patients who were involved in those questions was similar to that of the plaintiff. With respect to the challenged ruling upon the question asked of Dr. Dickinson it was purely hypothetical in its character. It failed to include many essential factors of the issues involved in the case at bar. As a hypothetical question it was clearly defective. An answer to that question would throw no light on the issues in the present case.

[13] Nor was the court guilty of prejudicial misconduct in illustrating his reason for ruling on the objection. His statement was harmless. A court has a right to assign his reason for a ruling upon an objection to testimony, provided it is not prejudicial in its nature.

[14] The appellant has cited as prejudicial misconduct numerous statements made by one of the attorneys for plaintiff in his argument to the jury. These statements consist of extravagant constructions of evidence, an attack upon the credibility of witnesses, appeals to the sympathy or prejudice of jurors, a request for the jurors to "place yourself as nearly as possible in the position of this plaintiff," and a misstatement of the law in asserting to the jury that "You can ignore the testimony of all the witnesses if you desire." We are convinced that none of these statements constitutes reversible error under the circumstances of this case. Only two of them

were assigned as error. One of these assignments was with respect to the above-quoted misstatement of law. The court then said: "Well, as I before warned the jury, I will instruct on the law before the case goes to the jury. You are to take the instructions on the law from me."

The jury were subsequently fully instructed that they must determine the case upon the evidence adduced at the trial, and that they were the exclusive judges of the weight and sufficiency of the evidence and of the credibility of witnesses. In regard to the alleged misstatement of facts or the distorting of evidence, the court said: "In all these assignments of misconduct, the jury are again admonished it is up to you to judge for yourselves what the evidence shows."

The jury were again told that they must disregard statements of counsel which were not supported by the evidence.

[15-17] We must assume that the jurors understood and followed these admonitions of the court. We do not approve of exaggerated statements of the evidence or appeals to the sympathy or prejudices of jurors, which are too frequently resorted to by counsel in their arguments to juries. Unwarranted and deliberate attacks upon the credibility or motives of witnesses are unjustifiable. It is the province of trial judges to prevent such abuses. But of course it is the privilege of an attorney to draw any inference with respect to the facts or the credibility of witnesses of which the evidence is reasonably susceptible. *Baker v. Market St. Ry. Co.*, 123 Cal. App. 688, 694, 11 P.(2d) 912. We must assume that the common sense of most jurors will aid them in distinguishing reasonable deductions of evidence from fanciful distorted constructions thereof. The errors of these challenged statements, if any such exist, were waived by failing to request the court to direct the jury to disregard them. *Olsen v. Standard Oil Co.*, 188 Cal. 20, 26, 204 P. 393; 1 Cal.Jur.Supp. 330, § 90; *North v. Vinton*, 17 Cal.App. (2d) 214, 61 P.(2d) 950; 2 Cal.Jur. 281, § 90. Moreover, the court of its own motion did in general terms instruct the jury to disregard them. We are of the opinion they were not prejudicial, and certainly they do not constitute reversible error under the circumstances of this case.

The court did not abuse its discretion in refusing to permit defendants' counsel to

reply to the plaintiff's closing argument to the jury. Defendants' attorney expressly waived his right to argue the cause to the jury. At the close of the testimony the court limited the time for presenting arguments to one and a half hours for each side. This seems to have been approved and well understood. Mr. Carter, one of the attorneys for plaintiff, stated that they anticipated their opening argument would consume not to exceed thirty minutes. The clear statement was that he would consume the balance of their allotted time in closing the argument. He said in that regard: "We think an hour and a half for each side is ample to present the case. Of course we have the opening and closing and it was our plan that Mr. Finley would take half an hour for the opening and I would take an hour for closing."

In reply to that suggestion, the court said: "In that case I think we had better have the opening this afternoon." Thereupon, Mr. Finley opened the argument in behalf of the plaintiff, consuming about twelve minutes' time. The reporting of his argument consumed six typewritten pages. It seems to be a fairly comprehensive statement of the issues upon which the plaintiff relied for a judgment. It is brief and concise. The issues were not avoided. We may not say this argument was not presented in good faith as a fair opening argument. At the close of Mr. Finley's argument, Mr. Work, one of the attorneys for the defendants, said: "We ask now that the jury be instructed. We don't desire to argue at this time. The opening argument has been introduced by the plaintiff and we do not desire to answer it."

Mr. Carter then insisted on closing the argument for the plaintiff according to the previous understanding and order of the court. Before permitting Mr. Carter to proceed with his closing argument, the court warned counsel for the defendants that he must argue his case then or he would be precluded from doing so later. The court said: "If he (Mr. Carter) wishes to argue, I will permit it, but I will not do so without giving you (Mr. Work) an opportunity to argue first. * * * If you want to make your argument, I will have to insist that you do it now, and if you want to waive it, you can waive it."

With the statement that "We assume that Mr. Finley hasn't made an argument that requires any answer," Mr. Work declined to reply at that time, claiming the right to

follow the argument of Mr. Carter. Mr. Carter consumed the balance of the time allotted to the plaintiff, in his closing argument. Mr. Work then asked permission to answer that argument, which was refused.

[18] Both parties to an action which is tried before a jury ordinarily have the right to have the facts of their case argued to the jury. *Shippy v. Peninsula Rapid Transit Co.*, 197 Cal. 290, 240 P. 785; 3 Bancroft's Code Practice, p. 1860, § 1388; 64 C.J., p. 244, § 259. According to the last-cited authorities, that right may be waived expressly or by fair inference from the conduct of counsel.

[19-21] It is the custom and the prevailing rule of procedure that the party upon whom the burden of proof rests has the right to open and close the arguments subject to a reasonable discretion on the part of the court to regulate the time and manner of presenting the arguments. Section 607, subd. 4, Code Civ.Proc. It is ordinarily true that when the party who is entitled to open the argument waives that privilege he may not be permitted to close the argument when his adversary also waives argument. It is usually true that when counsel for the respondent declines to reply to a fair opening argument, the one upon whom the burden rests may not then be permitted to further continue his argument. 2 Bancroft's Code Practice, p. 1860, § 1389; *St. Louis, etc., R. Co. v. Vanzego*, 71 Kan. 427, 80 P. 944, 945.

[22] In the interest of justice, there is and should be an exception to this last-mentioned rule. When it is previously understood from a specific order of court that each side is allotted a fixed period of time for arguments to be divided between two or more attorneys for respective sides, and one of the attorneys upon whom the burden of the affirmative rests makes a full and a fair presentation of the issues upon which he relies for judgment, it is within the sound discretion of the trial judge to require the opposing counsel to then make his reply, or, upon his refusal to do so, he may be precluded from following the closing argument of his adversary. This is based on the established custom of granting to the affirmative side of a controversy the opening and closing of the arguments. It sometimes occurs that after the time for arguments has been fixed by the court, the attorney having the affirmative seeks to reserve his theory of the case for

his final argument by waiving his right to the opening. He then runs the risk of losing his opportunity of making the closing argument if his opponent sees fit to submit the cause without argument. Since there is then no argument to answer, it has been held the court will not abuse its discretion by refusing to permit the plaintiff to make a closing argument, for such strategy would have the effect of depriving the defendant of the opportunity to answer his opponent's argument, and might result in possible injustice. Regarding the waiving of an opening argument, it is said in the *Vanzego Case*, *supra*: "It is a constant temptation, sometimes yielded to by able and reputable practitioners engaged for the plaintiff, to have a mere nominal opening argument made in order that in the closing arguments they may, without repetition, present their case and the evidence to support it in its most favorable light, and thus debar the opponent from disclosing any flaws or fallacies which, with great cunning and skill, they may weave into the texture of the final address and thus conceal them. It is a wholesome practice to have it understood that the party having the burden of the issue must make a full and fair presentation of his case in the opening, or take the chances of entirely losing the opportunity so to do."

Under circumstances comports with the text last quoted, it was held in *Ewing v. Union Pac. R. Co.*, 117 Kan. 200, 231 P. 334, that where counsel for the defendant waived his argument at the conclusion of oral argument for the plaintiff, it was not error to refuse to permit the attorney for the plaintiff to make further argument.

When the court has previously allowed a specified period of time for arguments to be divided between adverse counsel and an attorney representing the affirmative of the controversy has made a reasonably fair opening argument, it is not an abuse of discretion to allow him or an associate to complete the argument within the allotted time, even though adverse counsel may waive his argument at the close of the opening presentation. *Bisinger v. Sacramento Lodge No. 6*, etc., 187 Cal. 578, 586, 203 P. 768, 771. In the case last cited, under circumstances similar to those presented in the present case, it is said: "If, after stipulating that each side should have an hour for argument before the jury, the defendant, without previous notice to the plaintiff, waives argument, and thus takes

the plaintiff by surprise, the court, in the exercise of a sound discretion, should allow the plaintiff whatever argument to the jury is necessary in order to overcome the effect of the surprise. And, similarly, should allow the defendant whatever argument was necessary in order to prevent any prejudicial result flowing from the fact that it waived argument before it knew that the court would permit further argument by plaintiff. This was done in this case. The ruling of the court was not erroneous, but proper."

[23] In the present case, we think the court did not abuse its discretion in refusing to permit an attorney for the defendants to argue the case after the closing argument for the plaintiff was completed, for the reason that we are unable to say plaintiff's opening argument was not a fair presentation of the issues upon which he relied, and because the allotment of time was previously made and defendants' counsel were warned of the ruling in ample time to afford them an opportunity to present their arguments in the designated time and manner authorized.

[24-28] Finally, the appellant insists that the judgment of \$25,000, which was rendered against him, is still excessive. This seems to be the most serious problem in the case. Whatever we may think regarding the permanency of plaintiff's injury or the impairment of his ability to perform his accustomed labor, we are bound by competent evidence which supports the judgment in that regard. The record contains the evidence of two medical experts which adequately supports the judgment. Moreover, it was the sole province of the jurors to judge of the credibility of witnesses, and of the weight and sufficiency of their evidence. With this province we may not interfere unless the verdict is so grossly excessive as to shock one's conscience, or the circumstances of the case make it evident that the verdict of the jury was the result of passion and prejudice. We are convinced that the verdict of \$50,000 was excessive, and that the trial court was justified in reducing it. The appellant argues that the circumstances of this case, including the evidence of his indemnity insurance and the plaintiff's aggressive use of that fact before the jury, together with the excessive award of a \$50,000 verdict, show that the jurors were prompted by passion and

prejudice, and that the trial court recognized that fact by reducing the judgment to \$25,000. We are of the opinion this does not necessarily follow. The trial court had a right to reduce the award of damages to an amount which it believed was fairly supported by the evidence, as a condition upon which a new trial would be denied. The court has a right to require the judgment to conform to the evidence, even though it may not believe it was procured as the result of passion and prejudice of the jury. Having thus reduced the judgment, we are now confronted with the question as to whether it is still so grossly excessive as to require this court to set it aside. We are convinced the plaintiff was seriously burned as a result of the negligence of the appellant in his treatment of the injury, which amounted to malpractice. The evidence that the injury is permanent in its nature, and proof of the extent to which plaintiff may be impaired in the use of his limb on account of appellant's treatment, are not entirely satisfactory. But there is substantial testimony to support the evidence that his injury resulting from appellant's treatment is permanent, and that his earning ability has been impaired, and that he will continue to suffer pain and inconvenience.

We are therefore of the opinion we should not further disturb the award of damages.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



23 Cal.App.2d 539

PEOPLE v. LUCKETT.

Cr. 425.

District Court of Appeal, Fourth District,
California.

Nov. 19, 1937.

1. Abortion ☞1

Legally, there is no difference between an "abortion" and a "miscarriage produced by unlawful means" (Pen.Code, § 274).

[Ed. Note.—For other definitions of "Abortion" and "Miscarriage," see Words & Phrases.]

2. Abortion ☞11

Evidence that pregnant woman went to office of defendant before fourth month of her pregnancy and submitted to a curettement performed by him with surgical instruments for the purpose of procuring a miscarriage, that a miscarriage occurred during the operation, and that the curettement was not necessary to preserve her life, was sufficient to sustain conviction for committing an abortion (Pen.Code, § 274).

3. Abortion ☞11

In prosecution for committing an abortion, corroboration of woman's testimony as an accomplice supplied by the testimony of two physicians who treated her before commission of criminal act, by man responsible for her condition who was present during the operation, by three physicians who examined her within three or four hours after operation, by a pathologist, and by the evidence of several lay witnesses, was legally sufficient (Pen.Code, § 274).

4. Criminal law ☞829(1)

Refusal to give instructions which were either legally incorrect or covered in subject-matter by other given instructions was not error.

5. Criminal law ☞822(1)

Court of Appeal was required to take all instructions given and consider each as a part of the whole in passing upon alleged error in giving certain instruction in criminal prosecution.

6. Criminal law ☞822(6)

In prosecution for committing an abortion, giving of instruction that legally there was no difference between a miscarriage and an abortion was not prejudicial error, where it appeared, upon taking all of the instructions given and considering each as a part of the whole, that the court was speaking of miscarriage caused by illegal means as described in statute (Pen.Code, § 274).

7. Criminal law ☞520(2)

Admission of statements made by defendant after arrest pointing strongly to knowledge by defendant of his guilt was not error, notwithstanding defendant was allegedly induced to make such statements by deputy sheriff telling him that it would be better for him if he told truth.

8. Criminal law ☞1159(3)

Resolution of conflict in evidence respecting alleged inducement of statements

made by defendant after arrest against defendant in trial court was controlling in Court of Appeal.

9. Criminal law §1119(4)

Where record did not show that defendant's counsel used all of their allotted time for argument or that they asked for additional time or that any prejudice resulted from limitation on time, such limitation presented no ground for reversal.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

T. O. Luckett was convicted of committing an abortion, and he appeals.
Affirmed.

Lee Nuffer, of El Centro, and Herbert L. Isigii, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Paul D. McCormick, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., of El Centro, and D. H. Wolford, Deputy Dist. Atty., of Brawley, for the People.

MARKS, Justice.

This is an appeal from a judgment pronounced on defendant, and from an order denying his motion for new trial. Defendant was charged with committing an abortion on a young woman of the age of seventeen years.

Several of defendant's specifications of error may be consolidated and considered under the contention that the evidence is insufficient to support the verdict and judgment. In support of this argument he cites medical works wherein it is stated that a miscarriage can only occur after the third month of pregnancy. The evidence shows that the illegal operation was performed by defendant prior to that time.

[1] It has been held that in law there is no difference between an abortion and a miscarriage produced by unlawful means. *State v. Harris*, 90 Kan. 807, 136 P. 264, 49 L.R.A.(N.S.) 580; *People v. Heisler*, 300 Ill. 98, 132 N.E. 802; *State v. Grissom*, 35 N.M. 323, 298 P. 666. See, also, *People v. Coltrin*, 5 Cal.(2d) 649, 55 P.(2d) 1161. We must adopt the legal and not the medical definition here. The crime denounced by section 274 of the Penal Code is that committed by a person who uses instruments or other unlawful agents on a preg-

nant woman at any time after conception to interrupt its development and expel the product before it has acquired the power of sustaining independent life where such act is not necessary to preserve the life of the woman.

[2] The evidence in the instant case shows beyond question that the young woman involved, when pregnant, went to the office of defendant before the fourth month of her pregnancy and submitted to a curettement performed by him with surgical instruments for the purpose of procuring a miscarriage; that a miscarriage occurred during the operation; that the curettement was not necessary to preserve her life. This is sufficient under the law to sustain the verdict and judgment.

[3] Defendant urges that the young woman was an accomplice and that the corroboration of her testimony was not legally sufficient. This contention is without merit. Her evidence is supported by the testimony of two physicians who treated her before the commission of the criminal act, by the man responsible for her condition who was present during the operation, by three physicians who examined her within three or four hours after the operation, by a pathologist, and by the evidence of several lay witnesses. The corroboration here is unusually complete.

[4] Defendant complains of the refusal of the trial judge to give four instructions. The record does not disclose which party proposed any instruction, either given or refused. If we assume that the four instructions in question were proposed by defendant there was no error in refusing to give them. They were either legally incorrect or other instructions given covered the same subject-matter.

[5,6] Complaint is made of the following instruction given by the trial judge: "You are instructed that it is the law of California that in contemplation of law there is no difference between a miscarriage and an abortion." As an abstract statement the instruction is not correct, for a miscarriage can result innocently from accident, illness, disease, or other causes. We must, however, take all the instructions given and consider each as a part of the whole. When we do this, it is obvious that in the quoted instruction the trial court was speaking of miscarriage caused by the illegal means described in the Penal Code.

There was no prejudicial error in giving this instruction.

[7,8] Complaint is made because the trial judge admitted in evidence, over defendant's objections, statements made by him after arrest which pointed strongly to knowledge of his guilt. He claims inducement for the statements which he made because a deputy sheriff testified defendant was told that it would be better for him if he told the truth. If we assume, without holding, that this was an inducement, still there was no error in admitting the statements in evidence. The officer charged with holding out the purported inducement denied doing so. This conflict in the evidence was resolved, against defendant in the trial court which is controlling here.

[9] The trial judge allotted to counsel on each side one hour and fifteen minutes for arguments. The district attorney gave defendant fifteen minutes of his time. The record does not show that defendant's counsel used all of their allotted time. Neither does it show that they asked for additional time. No prejudice is shown to have resulted from the limitation on the time given for arguments. *People v. Rice*, 90 Cal.App. 590, 266 P. 295.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



In re WALLACE'S ESTATE.*

O'MARA et al. v. FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES et al.
Civ. 11655.

District Court of Appeal, Second District,
Division 2, California.
Nov. 22, 1937.

Hearing Granted by Supreme Court
Jan. 20, 1938.

1. Executors and administrators §315(5)

In determining parties' rights under will after final distribution decree, court must look to such decree which supersedes will and prevails over provisions therein.

2. Wills §634(1)

To create vested remainder by will there must be present conveyance of future estate to beneficiary.

3. Executors and administrators §315(5)

A distribution decree providing for testamentary trustee's payment of stated sum monthly to testator's widow during her life and balance of net income from trust estate to his two daughters, and for termination of trust and distribution of balance in fund to such daughters equally on widow's death as directed by will, created no vested estate in remainder but a contingent remainder in daughters, and, on death of one of them before widow's death, deceased daughter's remainder lapsed and her interest descended to testator's heirs at law.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

In the matter of the estate of William W. Wallace, deceased. From a decree construing deceased's will in favor of the Farmers & Merchants National Bank of Los Angeles, as trustee thereunder, and others, Ellen Ruth O'Mara and others, objectors, appeal.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for appellants.

Chenoweth & Whitehead, of Los Angeles, for respondent Farmers & Merchants Nat. Bank.

Eckman & Lindstrom, of Los Angeles, for respondents Hubert A. Boisvert and Phoebe A. Boisvert.

Richard L. Gray, of Los Angeles, for respondent Jessie W. Buchanan.

WOOD, Justice.

By the will of William W. Wallace a trust was created consisting of the residue of the estate, the Farmers & Merchants National Bank being named trustee. The trustee was directed to pay to Harriet M. Wallace, wife of the testator, the sum of \$50 per month during her lifetime, and to two daughters, Jessie W. Buchanan and Margaret W. O'Mara, the balance of the net income. The will provided: "Upon the death or remarriage of my said wife, the said trustee shall turn over and deliver the balance remaining in said trust fund to my said two daughters above named, in equal

*For subsequent opinion see 79 P.2d 1094.

proportions, share and share alike, that is to say: one-half to each." Upon the death of Mr. Wallace the will was admitted to probate, the administration of the estate was completed, and the final decree of distribution entered on December 7, 1926. The decree followed the directions contained in the will concerning the creation of the trust, provided for the payment by the trustee of \$50 per month to Mrs. Wallace during her lifetime, and the balance of the net income to the two daughters, and further provided: "Upon the death or remarriage of said widow, the said trust shall terminate and said trustee shall distribute the balance remaining in said trust fund to the two above-named daughters of decedent, in equal proportions, share and share alike." One of the daughters, Margaret W. O'Mara, died on July 31, 1932, and Harriet M. Wallace died on September 24, 1936. The trial court held that the estates left to the two daughters were contingent remainders and did not vest until the termination of the life estate in Harriet M. Wallace; that by reason of the death of Margaret W. O'Mara prior to the death of Harriet M. Wallace the remainder in favor of Margaret W. O'Mara lapsed and that this interest should descend to the heirs at law of William W. Wallace. The appeal is prosecuted by the heirs of Margaret W. O'Mara and the administrator of her estate.

[1] We must look to the decree of distribution to determine the rights of the respective parties. The decree supersedes the will and prevails over the provisions in the will. *Keating v. Smith*, 154 Cal. 186, 97 P. 300; *Goad v. Montgomery*, 119 Cal. 552, 51 P. 681, 63 Am.St.Rep. 145. The decree of distribution entered by the court provides that upon the death of the widow the trustee "shall distribute the balance remaining. * * *" A number of decisions have been made by the reviewing courts of California in which a fine distinction is drawn between those testamentary provisions which create vested remainders and those which create contingent remainders. In *Re Estate of Fair*, 132 Cal. 523, 60 P. 442, 456, 64 P. 1000, 84 Am.St.Rep. 70, the testator devised certain property to trustees to hold during the lives of the testator's children "and upon the death of such survivor to transfer and convey" the property to certain persons named. In holding that the words used in the will did not create a vested estate in the beneficiaries, the court said that "the whole estate

was to go to the trustees, to be by them conveyed, and there are no operative words to create an estate in remainder." The court further pointed out that, if the testator "had made a direct devise in remainder to the persons of the classes named in the will, those of the latter who were alive at the testator's death would have immediately taken vested estates." In *Re Estate of Hamon*, 136 Cal.App. 517, 29 P.(2d) 326, the testator devised certain property to a trustee: "To invest * * * and pay the income * * * to my daughter, Edith I. Brown. At the end of twenty (20) years from the date of this will * * * said Trustee shall deliver said trust fund to my said daughter, Edith I. Brown, to be her sole and separate property." Within the period of twenty years Edith I. Brown died and her husband, as executor of her will, petitioned the court to terminate the trust and distribute the trust estate to him as executor. The reviewing court pointed out that "nowhere in the trust clause nor elsewhere in the will is any language used indicating an intention on the part of the testatrix to vest present title to the trust property in Edith I. Brown." The court quoted from *Re Estate of Troy*, 214 Cal. 53, 3 P.(2d) 930: "It may be taken as settled by the decisions in this state that the beneficiary of a trust takes no estate in the property itself, and that title vests in the trustee with the right in the beneficiary to enforce performance of the trust." A similar ruling was made in *Re Estate of Willson*, 171 Cal. 449, 153 P. 927, 928, wherein the testamentary clause in dispute provided: "Upon the death of both the said Fred Kuhnle and Mary E. Kuhnle, his wife, said trustee shall convey and transfer said property absolutely to Mary S. Hayward."

[2,3] To create a vested remainder it is necessary that there be a present conveyance of a future estate to the beneficiary. The present title was vested in the trustee with the requirement that independent action on the part of the trustee be taken before title passed to the beneficiaries. No language is used giving to the daughter a present vested interest in the corpus of the estate. The words used in the decree providing that upon the death or remarriage of the widow the trustee "shall distribute the balance remaining" to the daughters are similar in import to the words used in *Re Estate of Hamon*, supra, "shall deliver," and to the words used in *Re Estate of Fair*, supra, in which upon the

happening of a certain event the trustee was directed "to transfer and convey." As said in *Re Estate of Fair*, there are no operative words to create a vested estate in remainder.

The decree is affirmed.

We concur: CRAWL, P. J.; McCOMB, J.



23 Cal.App.2d 436

BELL v. RIO GRANDE OIL CO.

Civ. 11578.

District Court of Appeal, Second District,
Division 2, California.

Nov. 15, 1937.

Hearing Denied by Supreme Court
Jan. 13, 1938.

1. Principal and agent ⇨23(1)

Evidence did not establish that holder of legal title to land acted as known and disclosed agent of claimant to mineral leasehold, in negotiating lease to third party and prior written agreement under which lessee agreed to pay certain sum out of oil produced, so as to enable such claimant to recover from lessee for breach of such agreement.

2. Mines and minerals ⇨73

A mineral lease, and a prior written agreement providing that lessee should pay certain sum out of oil produced, and that lease should be in certain standard form terminating all rights and obligations on surrender of lease at lessee's option, would be construed as one agreement.

3. Contracts ⇨166

A written agreement may, by reference expressly made thereto, incorporate other written agreements, and, where such incorporation is made, original agreement and those referred to must be considered and construed as one.

4. Mines and minerals ⇨79(1)

Under mineral lease, and under prior written agreement providing that lessee should pay certain sum out of oil produced, and that lease should be in certain standard form giving lessee option to suspend drilling or cleaning operations and surrender lease, which would terminate all rights and obligations, lessee was not liable for

specified sum, where lessee surrendered lease without having produced any oil (Civ.Code, §§ 1434, 1436, 1438).

Appeal from Superior Court, Los Angeles County; Allan B. Campbell, Judge.

Action by H. H. Bell against Rio Grande Oil Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Walter H. Hewicker, of Los Angeles, for appellant.

H. L. Dunnigan and Gordon A. Goodwin, both of Los Angeles, for respondent.

CRAWL, Presiding Justice.

This appeal is taken from a judgment in favor of the defendant in an action for breach of contract.

Plaintiff became the owner of an oil and gas lease upon a certain 80 acres of land. The legal title to the land was held by R. H. Anderson who, some time prior to the commencement of this action, conveyed said land to R. H. Anderson, Inc., a corporation. In July, 1930, plaintiff, through an agent named Young, offered to sell his leasehold estate to defendant. Negotiations for the sale continued until some time in August, when defendant refused to deal further with plaintiff or his agent because of the fact that the leasehold estate was incumbered and possibly in default. Thereafter, on August 25, 1930, defendant commenced negotiations with R. H. Anderson, as president of R. H. Anderson, Inc., to lease said 80 acres from the corporation, the owner of the fee title. On September 24, 1930, defendant addressed a letter not to the plaintiff, but to R. H. Anderson, in which it offered to lease the said land. Inasmuch as plaintiff contends this letter constitutes the agreement for the breach of which this action was brought, we set forth its provisions: "Regarding your property on Gould Hills, [legal description]. Subject to approval of title by our Legal Department, we agree to lease from you the property on the following terms and conditions: 1. \$6,000 in cash and \$6,000 to be paid out of 10% of the oil produced and saved. 2. $\frac{1}{8}$ royalty. 3. We agree to start operations on the property by way of cleaning out the present wells within 60 days after title is approved. 4. If we fail in making a commercial producer, we will pay \$2 per acre, per month, to defer the

drilling of a new well for a period not to exceed five years. 5. We agree to pay the actual expenses of a suit to quiet title to a maximum amount of \$400. 6. Your lease to us is to be Oil Age form 86, with modification to conform with this letter. Kindly signify your acceptance of this in the space allotted below." In accordance with some understanding with plaintiff, the details of which do not appear to have been disclosed either to the court or to the defendant, Anderson forwarded this letter to plaintiff, and the latter signified his acceptance or approval by signing his name in the space provided for acceptance. Thereafter, Anderson, by agreement with plaintiff, caused a quiet title action to be commenced in the name of R. H. Anderson, Inc., against plaintiff and others claiming any interest, and a decree was duly entered, quieting title against plaintiff and others. The expense of this action in the amount of \$400 was paid by defendant.

Shortly thereafter a lease was entered into between R. H. Anderson, Inc., lessor, and defendant as lessee in accordance with the above agreement, with the exception that the provision concerning cleaning operations was changed with the consent of the lessor, i. e., it was provided that the lessee might, at its option, during the first five years, suspend required drilling or cleaning operations without being in default, provided lessee paid to lessor \$2 per acre per month for each acre covered by the lease. The lease further provided that lessee might at any time quitclaim all or any part of the leased premises, and that, if lessee chose to quitclaim all the leasehold, by paying the sum of \$10 to lessor as liquidated damages, all rights and obligations of the parties would terminate. Such a surrender clause is a standard provision found in all "Oil Age form 86" leases. At the time of entering into the lease, defendant delivered to R. H. Anderson a check for \$6,000, which, pursuant to some undisclosed understanding, was indorsed by Anderson to plaintiff. Contemporaneously, plaintiff's agent, Young, demanded that the check be made payable to plaintiff, but was informed by defendant's representative that the instructions were to deal with Anderson alone, and not with plaintiff. Defendant paid the rental of \$2 per acre, per month, so long as it held the property, and this rental was accepted by the lessor in lieu of the drilling and well-cleaning provisions of the lease. In November of 1932,

defendant quitclaimed and surrendered the leasehold estate to R. H. Anderson, Inc., and the latter accepted such surrender. Plaintiff commenced the present action upon the theory that the surrender of the lease constituted a breach of the agreement (letter) of September 24, 1930, and sought to recover \$6,000 damages for defendant's failure to pay that sum out of oil produced.

Briefly, plaintiff's contentions are that, in the transactions leading up to the execution of the lease, Anderson was acting as plaintiff's agent; that even though defendant might surrender the lease, thus terminating its obligations to the lessor, such surrender did not relieve defendant of its obligation toward plaintiff to clean out existing wells within 60 days and to pay \$6,000 out of oil produced, as set forth in the agreement of September 24, 1930, under his claim this latter agreement was separate and distinct from the lease.

Plaintiff advances the contention that certain specified findings of the trial court were contrary to the uncontradicted evidence. The gist of these findings, in so far as they bear upon this appeal, is as follows: That defendant did not enter into any agreement with plaintiff respecting the lease in question and the resultant corollary; that R. H. Anderson did not act as plaintiff's agent in these transactions and; that, in general, none of the provisions contained in the letter of September 24, 1930, constituted obligations of the defendant to the plaintiff. We are of the view that there is substantial evidence in the record to sustain the findings of the trial court.

[1-3] The evidence concerning any known and disclosed agency relationship between plaintiff and Anderson is nebulous and insubstantial. However, assuming that Anderson was acting as agent for plaintiff, we are of the opinion that the agreement of September 24, 1930, and the lease must be read as one complete agreement and not, as contended by plaintiff, as two separate agreements, in which the obligations of one run solely in favor of plaintiff and the other, solely in favor of R. H. Anderson, Inc. A written agreement may, by reference expressly made thereto, incorporate other written agreements; and in the event such incorporation is made, the original agreement and those referred to must be considered and construed as one. *Beedy v. San Mateo Hotel Co.*, 27 Cal.App. 653, 150 P. 810; *Roberts v. Security Trust & Savings Bank*, 196 Cal. 557, 238 P. 673.

The agreement of September 24th expressly states, "Your lease to us is to be Oil Age form 86, with modification to conform with this letter." Oil Age form 86 is a standard form of printed lease, containing the provision that the lessee might, at his option, surrender the lease, and, upon doing so, all rights and obligations of the parties would terminate.

[4] Thus, reading the agreement of September 24th and the lease as one contract, it appears that defendant agreed to pay \$6,000 out of 10 per cent. of the oil produced and saved, unless, before producing any oil, defendant should surrender the lease, in which event, there would be no further obligation on the part of the defendant. The obligation to pay the sum of \$6,000 is subject to a condition precedent, i. e., it does not accrue until such time as oil may be produced and saved. Civ.Code, § 1436. Since the obligation depends upon an uncertain event, the possible production of oil, it is conditional (Civ.Code, § 1434) and is further subject to being extinguished by the occurrence of a condition subsequent, viz., the surrender of the lease by the defendant. Civ.Code, § 1438. We conclude, as regards this contention, that the obligation never became fixed because the defendant surrendered the premises without having produced any oil.

Judgment affirmed.

I concur: McCOMB, J.

WOOD, J., being disqualified, took no part in the decision of the above case.



23 Cal.App.2d 563

In re FULTON'S ESTATE.

FULTON v. FULTON.

Civ. 5921.

District Court of Appeal, Third District,
California.

Nov. 23, 1937.

1. Executors and administrators ⚡111(6)

In administration of an estate, allowance of attorney's fees requires consideration of value of estate, work performed by

attorney in routine administration, and amount to which the attorney would be legally entitled under the statute, and, if the sum allowed by law appears to be a reasonable compensation, even though the attorney may have performed some extraordinary services, the court may in its sound discretion disallow a claim for extra compensation (Probate Code, § 902).

2. Executors and administrators ⚡510(10)

Unless the trial court has abused its discretion in the matter of allowance of an attorney's fee for services rendered in administration of an estate, an appellate court may not disturb the allowance.

3. Executors and administrators ⚡111(6)

\$717 as attorney's fees, which included \$532 as the legal fee calculated upon appraised value of estate, and \$185 as extra compensation, was reasonable under the evidence, where extra compensation sought was for services performed in the matter of executor's contest of widow's petition for family allowance, a probate homestead, and to have certain exempt property set aside (Probate Code, § 902).

4. Executors and administrators ⚡111(6)

Court was authorized to consider the motives which actuated father as executor of deceased son's estate in resisting claims of widow for a family allowance, a probate homestead, and to have exempt property set aside, in refusing to allow extra compensation for the executor's attorney (Probate Code, § 902).

5. Executors and administrators ⚡111(6)

If representative of estate participates individually or as a partisan in resisting certain claims, his attorney is not entitled to extra compensation as for services performed for the benefit of the estate or in aid of administration.

6. Executors and administrators ⚡195

Order providing for payment of family allowance to testator's widow until a designated date, from which no appeal was taken, precluded executor from objecting to decree of settlement of final account and distribution on ground that family allowance should have been terminated on an earlier date.

7. Descent and distribution ⚡63

Surviving wife was entitled to inherit one-half of the estate from deceased husband as his "widow," notwithstanding that inter-

locutory divorce decree had been granted prior to his death, since an interlocutory divorce decree does not dissolve the marital status.

8. Descent and distribution $\Rightarrow$ 63

Widow was not barred by reason of alleged acceptance of property awarded to her under an interlocutory decree of divorce from inheriting as deceased's widow, where she did not take possession of such property until some months after decedent's death.

Appeal from Superior Court, Stanislaus County; L. J. Maddux and B. C. Hawkins, Judges.

Proceeding in the matter of the estate of William Forest Fulton by S. G. Fulton against Louisa J. Fulton. From a decision determining heirship and from a decree of settlement of final account and distribution, S. G. Fulton appeals.

Affirmed.

W. Coburn Cook, of Turlock, for appellant.

R. V. Wilcox, of Turlock, and Dennett & Zion, of Modesto, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This matter is before us upon two appeals, one from a decision of the court determining heirship, and the other from an order and decree of settlement of final account and distribution. Both appeals are presented upon one transcript and one set of briefs.

The appeal by S. G. Fulton presents for our consideration the disallowance by the trial court of a certain sum claimed as counsel fees for extra services; also the sum of \$75.76 for printing a brief used upon an appeal hereafter referred to; also, that it was error to terminate the family allowance as of February 1, 1937, instead of on May 16, 1934; and also, that it was error to order one-half of the estate distributed to Louisa J. Fulton.

The will of William Forest Fulton reads as follows: "In the Name of God, Amen. I, William Forest Fulton, being of sound mind and memory, but knowing the uncertainty of human life, do make, and publish this my last will and testament, that is to say, I give, devise and bequeath to S. G. Fulton, my father, to be divided among my heirs equally, that he be appointed administrator, without bond. In Witness

Whereof, I have hereunto set my hand and seal this 18th day of November, 1912." (Signed by William Forest Fulton and attested by two witnesses.)

It will be observed that the testator failed to make any mention of his estate. The court, however, apparently construed the will as reading: I give, devise and bequeath to S. G. Fulton, my father, all my estate, etc., or words to that effect.

William Forest Fulton died on the 21st day of December, 1933. The will just mentioned was admitted to probate, and the appellant, S. G. Fulton was appointed executor thereof. Prior to the death of William Forest Fulton on December 21, 1933, the respondent, Louisa J. Fulton, was his wife, and, upon the death of said William Forest Fulton, under the will became his surviving widow. The appellant, however, claims that certain court proceedings had prior to, and subsequent to the death of William Forest Fulton deprived the respondent of her rights as a surviving widow of the deceased. The proceedings just referred to are as follows:

On June 7, 1932, William Forest Fulton was granted an interlocutory decree of divorce, on the ground of desertion, from Louisa J. Fulton, by the superior court of Stanislaus county. The interlocutory decree disposed of certain property belonging to the respective parties. Louisa J. Fulton appealed from the decree just referred to. On May 9, 1934, the Supreme Court rendered its decision affirming the interlocutory decree. On December 7, 1934 (almost one year after the death of William Forest Fulton), final decree was entered in said action.

After the death of William Forest Fulton the respondent, Louisa J. Fulton, was granted a family allowance in the sum of \$50 per month. Upon appeal to this court, the order of the superior court making the allowance referred to was affirmed. Louisa J. Fulton thereafter filed a petition asking to have set aside to her a probate homestead and certain exempt property. This petition was denied by the probate court and the order of the court was affirmed upon appeal to this court.

The proceedings just referred to were all contested by the appellant, S. G. Fulton, and for the services therein an allowance of \$325 as extraordinary services for the attorney for the executor was prayed for, and also the sum of \$75.76 for printing of

brief in the matter of the application for homestead and the setting aside of exempt property.

The record shows that the court did allow extra compensation on account of services of the attorney, in the sum of \$185. The legal fee, calculated upon the appraised value of the estate, amounted to \$532, which, with the extra allowance, aggregated the fee for the attorney in the sum of \$717, apparently considered by the court as a sufficient allowance for the services of the attorney.

So far as the record shows, it appears that S. G. Fulton was not simply acting as executor of the last will of said deceased, in the preservation of the funds of the estate for the benefit of creditors, but was acting in behalf of his own interests in preventing the respondent, Louisa J. Fulton, from either receiving a family allowance or a homestead, or having set aside to her the exempt property of the estate.

The court, in its order refusing the extra allowance both to the attorney and to the executor, used the following language: "That said W. Coburn Cook performed further services of the reasonable value of \$325.00, as alleged in the petition herein, but said fees are not allowed for the reason that S. G. Fulton was not obliged, as such executor, to resist the petitions of Louisa J. Fulton for family allowance and probate homestead and exempt personal property. That for the same reason the sum of \$75.-76 paid for printing brief on appeal in said homestead matter is not allowed the executor as a charge against the estate."

Section 902 of the Probate Code specifies that "further allowances may be made as the court may deem just and reasonable for any extraordinary services, such as sales or mortgages of real or personal property, contested or litigated claims against the estate," etc. The court did allow extra compensation for certain extraordinary services, such as negotiating mortgages, etc., but disallowed, as stated, extra compensation for the litigation referred to.

[1-3] Section 902, *supra*, leaves the matter within the sound discretion of the trial court, and does not make it mandatory upon the court to grant extra allowance of fees on account of services. In making such allowance or disallowing a claim therefor, the trial court necessarily takes into consideration the value of the estate, the

work performed by the attorney in the routine administration thereof, and the amount to which the attorney would legally be entitled, calculated according to the provisions of the Probate Code, and, if the sum allowed by law appears to be a reasonable compensation, even though the attorney may have performed some extraordinary services, it is within the sound discretion of the trial court to disallow claims for extra compensation, and, unless it appears that there has been an abuse of discretion, an appellate court is not at liberty to disturb the conclusion of the trial court. As we have said, the court did allow \$185 additional fee, which brought the full compensation of the attorney up to the sum of \$717, which appears to be a reasonably fair compensation for the services shown by the record to have been performed by the attorney for the executor in the administration of the estate.

[4, 5] Again, the court had a right to take into consideration the motives which actuated the appellant in resisting the claims of the widow, Louisa J. Fulton. In sections 1052 and 1053 of 11b, California Jurisprudence, the rule, supported by a number of authorities, is stated as follows: "If the representative participated individually, or as a partisan, the attorneys' services are not for the benefit of the estate or in aid of administration." The authorities supporting the rule just stated are there cited and need not be listed here.

[6] The exception to the date when the family allowance was terminated does not appear to us to be well taken. The order settling the second annual account of the executor, dated June 22, 1936, specifically provided for the continuance of the payment of the family allowance to the widow at the rate of \$50 per month. No appeal was taken from this order. It has become final and binding upon the court and was properly taken into consideration by the court in settling the final account and ordering distribution. So long as the order remained in force, which was up to February 1, 1937, the order settling the final account was conclusive. Citing *In re Nelson's Estate*, 167 Cal. 321, 139 P. 692. Other cases might be cited, but the rule stated in the Nelson Case has not been modified.

[7] It is further urged that the court erred in finding that Louisa J. Fulton, the respondent, was entitled to share equally

with S. G. Fulton in the administration of the estate of William Forest Fulton, deceased.

In *Re Estate of Fulton*, 15 Cal.App.(2d) 202, 59 P.(2d) 508, 509, the following language was used by the court in its opinion, to wit: "It is well settled law that an interlocutory decree of divorce does not dissolve the marital status, and therefore, upon the death of William Forest Fulton, Louisa J. Fulton became his widow." The court in that case, while recognizing that Louisa J. Fulton became the widow of William Forest Fulton upon the latter's decease, held that Louisa J. Fulton was not entitled to have set aside to her a homestead, for the reason that, for some time prior to the decease of William Forest Fulton, and at the time of his decease, she was not living with him as his wife, and was therefore not a part of his family. The court did not hold that the interlocutory decree terminated the rights of the respondent as the surviving widow of William Forest Fulton, deceased.

In *Re Estate of Gould*, 181 Cal. 11, 183 P. 146, 147, the Supreme Court held as follows: "At the time of the death of the decedent, Nettie Gould was his wife. She is now entitled to such rights as the law confers upon her, under the circumstances, as his widow, including the right to a family allowance unless the property of the community awarded to the decedent was allotted to him free and clear of all claim by her, including the claim to a family allowance." The court in that case held that the language of the agreement between the parties and the interlocutory decree did not abridge the rights of Nettie Gould as the surviving widow of the deceased.

In *Re Estate of Fulton*, 8 Cal.App.(2d) 423, 48 P.(2d) 120, 121, this court had occasion to construe the language used in the interlocutory decree as affecting the rights of the respective parties thereto, it was there said: "The second ground for reversal urged by the appellant is based upon the language of the decree which we have quoted, awarding certain property to William Forest Fulton. The decree itself does not purport to dispose of all of the property which might have been the community property of William Forest Fulton and Louisa J. Fulton, but if it be assumed that no other property was owned by William Forest Fulton, the decree does not in terms deprive Louisa J. Fulton of her marital

rights as against the estate of William Forest Fulton, deceased. The language in the instant case is no different in substance and effect from that found in the interlocutory decree mentioned in *Re Estate of Gould*, 181 Cal. 11, 183 P. 146, to wit: 'All other property of said community, real, personal, or mixed, and of every description, is hereby assigned and allotted to the plaintiff, Frank H. Gould, free and clear of all claim of the defendant.' The words 'free and clear of all claim of the defendant,' just quoted, are no less comprehensive than the words 'free from any claim of any nature whatsoever of Louisa Fulton.'"

Following the authorities cited in the opinion in the case just referred to, it was held, as we have stated, that the rights of the respondent as the widow of William Forest Fulton, deceased, were not abridged, and that she stood in the position of a widow of said deceased at the time of his death, which, of course, included the right of inheritance.

A petition to have the foregoing cause heard by the Supreme Court was denied on September 19, 1935.

In support of what we have said, we may cite the recent case of *In re Estate of Minier*, 215 Cal. 31, 8 P.(2d) 123, 81 A. L.R. 689. The law of this case having been settled by the decisions to which we have referred, establishing the status of Louisa J. Fulton as the wife of the deceased just prior to his death, and as his surviving widow thereafter, it necessarily follows that the decree of the court awarding her one-half of the estate of William Forest Fulton was and is correct.

[8] The further point is made by the appellant that the widow was barred by reason of having accepted the property awarded to her under the interlocutory decree. This contention, however, does not seem to us meritorious, as it is shown that the widow did not take possession of such property until some months after the death of William Forest Fulton.

Finding no reversible errors, the decree establishing heirship, making distribution, and the order settling the final account of the executor are, and each of them is, hereby affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

23 Cal.App.2d 498

**HALL v. DOUGLAS AIRCRAFT CO., Inc.,
et al.**

Civ. 11559.

District Court of Appeal, Second District,
Division 2, California.

Nov. 18, 1937.

Rehearing Denied Dec. 13, 1937.

Hearing Denied by Supreme Court
Jan. 17, 1938.**1. Principal and agent** Ⓒ17, 88

Where agent of airplane manufacturer appointed a subagent to further interests of manufacturer in negotiating sale of manufacturer's products to National Government of China, manufacturer ratified the appointment, notified the National Government thereof, and directed subagent concerning the negotiations, the manufacturer constituted subagent its own agent and became liable for his compensation when a sale was effected.

2. Work and labor Ⓒ4(3)

Generally, a request by one party to another to render services gives rise to a liability to compensate for the services when rendered.

3. Principal and agent Ⓒ81(4)

If a seller who has an agreement with its agent, whereby agent is to receive the difference between a fixed amount payable to seller and amount paid by buyer, changes fixed price so that agreement can no longer operate, the seller is obligated to pay the reasonable value of services rendered by agent in furthering sale.

4. Principal and agent Ⓒ88

Even if compensation of subagent, who had rendered valuable services in effectuating a sale of airplanes to National Government of China, was to have been the difference between a fixed price payable to manufacturer and price paid by National Government, subagent would not be deprived of compensation for his services by fact that the price was lowered so as to eliminate the "differential," but subagent would be entitled to the reasonable value of his services.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by W. B. Hall against the Douglas Aircraft Company, Inc., and others.

Judgment for the defendants and the plaintiff appeals.

Reversed.

Raymond L. Haight, and Arthur L. Syvertson (of Haight, Trippett & Syvertson), all of Los Angeles (John S. Haven, of Los Angeles, of counsel), for appellant.

H. W. Elliott, of Los Angeles, and Edward P. Fogg, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff appeals from a judgment in defendant's favor in an action in which he seeks judgment for the reasonable value of services performed for defendant at its special instance and request in the matter of the sale of twenty airplanes to the Nationalist Government of China.

In the summer of 1930, Captain W. B. Hall, the plaintiff, and Captain F. N. Shumaker were located in the neighborhood of Shanghai. Both were experienced aviators, and both were in touch with certain officials of the Chinese government. Shumaker was in the brokerage business, and acted as the representative of defendant in a number of transactions in the Orient both within and outside China. Before the consummation of the transaction which is the subject of this litigation, the Douglas Company had effected two sales to the Chinese government. In one of these transactions ten airplanes were sold by defendant through the instrumentality of Captain Shumaker, and in this transaction Captain Hall took no part. The ten airplanes were sold for \$255,000; Shumaker receiving a commission in the sum of \$25,000.

The trial court found that "the compensation agreed upon to be paid to Shumaker for sales of airplanes was the 'differential'—so-called—between the price the seller stated to him it would accept and any greater amount for which the sale was actually made." On the transaction involving the ten airplanes, the required net price to the factory was \$23,500 for each plane; the difference between the factory price and the sales price being \$2,000 per plane. It is apparent that in this transaction Shumaker received more than the "differential."

The other prior transaction involved the sale of airplane parts, and concerning this matter the trial court found: "During the same period and about July, 1930, Shumaker negotiated a sale of airplane parts

for defendant to the Chinese government, and during such negotiation, Shumaker engaged the services of plaintiff, W. B. Hall, to assist in effecting such a sale, promising to pay him fifteen per cent. of whatever the sale price would be. Such sale was effected for a price of \$60,000, and after some delays the fifteen per cent. commission, or \$9,000.00 was paid by defendant direct to plaintiff on Shumaker's direction and charged on the books of defendant as commission paid to W. B. Hall, he, Shumaker, receiving as a balance on such commission, the sum of \$8,500.00, and on said sale of airplane parts for \$60,000, a total commission of \$17,500.00 was paid by defendant."

Concerning the sale of the twenty airplanes, which is the subject of the litigation, the trial court made findings in unusual detail, and quotations from these findings may be advantageously made:

"The Court further finds that while still occupying the status of a merchandise broker, with compensation to be measured by the 'differential' method and coincident with the consummation of the sale of airplane parts above referred to, defendant directed Shumaker to negotiate a sale of twenty or more airplane bombers to the Chinese government at the price of \$24,000 per unit on certain terms as to method and time of payment, the compensation in case of sale to be determined by the 'differential' resulting. Thereupon, Shumaker appointed plaintiff as his assistant in this transaction and cabled to defendant information of that fact on September 4th, 1930, and requested defendant to cable direct to the Chief of the Bureau of Aviation of the Chinese government that plaintiff was authorized to negotiate with the Chief of the Bureau of Aviation for direct telegraphic contract between the Bureau and the factory for twenty airplanes with specifications the same as the last ten that had been sold to the Chinese government. This the defendant did by cable of the same date. Shumaker gave plaintiff oral and specific written instructions to the effect that he was to hold this proposition in line, not to appear as agent or broker, but to advocate and exert every effort to persuade the officials of the Aviation Bureau to recommend to the Government and especially to the Minister of Finance, who furnished the money, the purchase of Douglas airplanes. This arrangement all resulted from a situation which had arisen in China, whereby

Shumaker had become persona non grata with certain Chinese aviation officials, while plaintiff was in their confidence and possessed considerable influence personally over these officials who would have most to do with recommending what aviation products should be purchased. Also, to satisfy the Minister of Finance there would be no improper division of commissions, it was recommended by Shumaker to the defendant Company that the sale should be a direct sale between the buyer, the Chinese government, and the defendant, as seller, with no apparent agents or intermediaries. Shumaker again employed the plaintiff to assist him, and at the inception of this employment of the plaintiff, nothing was agreed upon as to the compensation of the plaintiff, but Shumaker stated that plaintiff, would be protected by the company 'one hundred per cent.' At the same time, defendant cabled plaintiff 'to do everything possible assist technically any direct transactions between Bureau and ourselves.'

"The Court further finds that under these arrangements, plaintiff immediately, early in September, 1930, began a sales campaign on behalf of Douglas planes and products, centering his efforts on aviation officials of the Chinese government, while Shumaker left China and returned to the United States and to the factory of defendant at Santa Monica, California. Shumaker sailed from China on or about September 6th, 1930, and returned to China about the first day of November, 1930, leaving shortly thereafter for northern points and Manchuria, and did not return to Shanghai until April 1, 1931. While in Shanghai on his return in November, 1930, Shumaker dissolved his China company and informed plaintiff that he personally had authority from defendant to sell airplanes and parts on terms as to compensation the same as before and that if a sale could be consummated he would allow plaintiff three-fourths of the 'differential', which was to be his (plaintiff's) share of compensation, as stated by Shumaker to plaintiff in his letter of September 6, 1930. During Shumaker's absence, he kept in touch with plaintiff by letter and by wire and plaintiff and defendant also were in constant cable and letter communication.

"The Court further finds that during this period, plaintiff owned and operated a garage in Nanking, the seat of government then in China, and within a short distance of the aviation field and headquarters. He left

a superintendent in charge of his garage and devoted the greater part of his time from September 6, 1930, to May 23, 1931, in efforts to persuade the aviation officials to surely recommend to the Finance Minister the purchase of Douglas planes, and when the Finance Minister would agree to supply money for a purchase of planes.

"The Court further finds that it was recognized and known by all concerned that the Government would not buy bombers unless and until a necessity arose by reason of an anticipated rebellion in Canton. Such a rebellion became imminent in the first week of May, 1931. Shumaker had again, in April, sailed for the United States, arriving at his home in Denver about May 1, 1931, having left plaintiff in China to press upon the Chinese officials the proposition of buying only Douglas planes, and plaintiff did so continue to press such proposition up to May 19, 1931.

"The Court finds that on May 8, 1931, the Finance Minister cabled to defendant asking for bedrock price on twenty bomber planes. Defendant on the same day cabled the price of \$24,000.00 per unit. The Finance Minister cabled back an offer of \$20,000.00 per unit on May 9. In reply, on the same day, defendant cabled its refusal to reduce its price. On May 12, defendant, after a telephone conversation with Shumaker who was in Denver, cabled to plaintiff asking if he was 'now in position to secure the business now pending'. On May 13 the Chief of the Aviation Bureau cabled to defendant stating that the Government would offer \$22,000 per unit, and strongly recommended its acceptance. On May 14, not having received a reply from plaintiff to its cable of May 12th, defendant cabled plaintiff canceling 'all arrangements to represent us.' In the meantime, defendant communicated by telephone with Shumaker in Denver on May 12, informing him of the offer of \$22,000 and inquiring if he had word from plaintiff. Shumaker then cabled to plaintiff, but received no reply until May 21st. In the conversation with Shumaker the price reduction from \$24,000.00, asked, to \$20,000.00, offered, was discussed and also its effect on Shumaker's commission or 'differential,' and Shumaker recommended that defendant effect the sale at all costs and disregard his commissions down to one per cent. of the sales price.

"The Court finds that at this same time, a certain eastern company, owning an interest in defendant company, had sent a

Captain Westervelt to China as its representative, chiefly to effect the erection of an airplane plant in China, which would cost approximately \$200,000 and would be built and owned jointly by the Curtis Aviation Company, the Douglas Aircraft Company and the Inter-Continent Aviation Company. On May 14th defendant received from New York, a telegram from the president of this eastern company suggesting that in view of the pending transaction for twenty Douglas bombers, defendant should appoint Captain Westervelt as its agent in China to represent defendant in the proposed sale. On May 15th, defendant received a cable from plaintiff announcing, among other things, that the order for the planes would 'be executed sooner than expected.' The Court finds that there was some confusion of words in this cable upon decoding, and defendant cabled on the same day to plaintiff, asking him to repeat in clearer language.

"There was no answer from plaintiff until May 19, when he answered the cable of May 14, canceling his authority, advising defendant not to discontinue his services. On May 18, defendant cabled to the Finance Minister of China, announcing that Captain Westervelt was the only person authorized to represent the defendant and to negotiate the sale with him. On the 19th, defendant cabled to plaintiff, refusing to alter its decision of cancellation and advised plaintiff of the appointment of Captain Westervelt as its representative in China. On the same day defendant cabled to the Chief of the Aviation Bureau its refusal of the \$22,000.00 offer, informing him that Captain Westervelt was defendant's representative in China and offering to sell twenty bombers equipped with Wright cyclone engines instead of Hornet engines, for \$23,000.00 per unit. On May 20, Shumaker wired to defendant from Denver, suggesting advice to Captain Westervelt to propose the sale of the bombers for \$22,000.00 with some alterations as to bomb racks, and that this would 'allow us to come out on a commission arrangement five hundred without injuring business in any way.' On the same day, defendant received a wire from the president of the eastern company reporting that Captain Westervelt had cabled that the Minister of Finance would positively not pay more than \$22,000.00 and would probably accept cyclone engines, and asking 'shall we accept for Douglas Aircraft Corporation.' On the same day, defendant cabled acceptance and

wired to Shumaker, stating that it had offered to sell for \$22,000.00 per airplane, and that 'you are protected as per telephone conversation for total commission on twenty airplanes of five thousand dollars.'

"On May 21st, plaintiff cabled to defendant explaining the reason for delay in answering previous cables, and stated therein: 'Your agreement with me binding until court decides otherwise.' On May 23, 1931 the Bureau of Aeronautics of the Ministry of War of the National government of the Republic of China, as buyer, and defendant company as seller, signed a contract of purchase and sale of twenty Douglas airplanes at a price of \$22,000.00 per unit or \$440,000.00 in all, Captain Westervelt signing for the defendant company and the Chief of the Bureau of Aeronautics for the buyer. The \$440,000.00 was paid and the transaction was consummated; the airplanes were sold and delivered by the defendant to the National government of China. Thereafter the defendant paid to Shumaker \$5,000.00.

* * *

"The Court finds that the services performed by plaintiff in the campaign to sell Douglas airplanes to the National government of China as hereinabove found were valuable and were performed at the request of Shumaker and with the knowledge and consent of defendant, as hereinabove found. No specific finding as to the value of said services is herein made because of the conclusion of the court that defendant is under no obligation to pay the value thereof."

The trial court further found that a rebellion became imminent in the southern part of China in April and May of 1931, and that certain officials of the Nationalist government withdrew and went to Canton. Plaintiff had urged these officials to purchase the Douglas airplanes. In June, 1931, plaintiff left Shanghai and went to Canton where he accepted employment with the Cantonese government.

In its cablegram to the Bureau of Aviation of China under date of September 4, 1930, defendant stated: "Bert Hall authorized to negotiate with you for direct telegraphic contract between you Bureau and ourselves twenty airplanes same as last." Three days later defendant sent to plaintiff the cablegram mentioned in the findings asking him to do everything possible to assist in the sale. Thereafter, many communications passed between the parties. Early in May, 1931, a letter was written

by defendant to plaintiff as follows: "Dear Bert: Your letter of April 6th came during my absence from Santa Monica, hence the delay in answering it more promptly. Upon my return, Thursday, we received a cable from T. V. Soong requesting a firm offer on 20 O-2MC observers. It sounded like real business and we cabled a price of \$24,000.00 each, gold, for prompt acceptance. We promised deliveries to start June 20th and to complete the order July 20th. Today Soong wired offering us \$20,000 each, with deliveries to start first week in June. Of course both terms are out of order, and we regretfully so advised him. We are anxious for the business, and will do all possible to get it, except accept it at a loss to us. The price of \$24,000.00 included your commission of \$2,000.00 each. We are giving you this information for what it is worth. Am hoping that Soong will realize that our ships are built to a quality standard and not to a price standard, and that the order will come along before this letter reaches you. Your cable of May 1st relative to spares was received. We are awaiting the arrival of your list of requirements, and as soon as we have this in hand, we will quote prices. * * * Please keep us advised as to your activities. Rest assured that we are anxious to get a big share of the Chinese business, and will meet them more than half-way. On the other hand, remember that it is not our policy to sacrifice quality for price—and eventually acquire a rotten reputation. With best wishes for your continued success." This letter was not received by plaintiff until after the cancellation of his appointment.

It will be noted that plaintiff's duty was to urge upon the officials of the Bureau of Aviation that they recommend to the minister of finance the purchase of the Douglas planes, but he was not to directly contact the Minister of Finance. It will also be noted that Shumaker was absent from China during most of the period covered by the transaction, and that even if in China he could not do effective work, since he was not in the good graces of the officials of the Bureau of Aviation.

[1,2] Plaintiff contends that the trial court erred in ruling that defendant did not incur liability to compensate plaintiff for the services rendered. This contention must be upheld. Since Shumaker was not in position to deal personally with the officials of the Bureau of Aviation and was

also about to leave China, it was, as Shumaker cabled to Douglas on September 4, necessary to designate some one else to handle the matter before the Bureau. Shumaker accordingly appointed plaintiff to further the interests of defendant, and promptly notified defendant of the appointment. Defendant in turn ratified the appointment, notified the Chinese government of it, and gave instructions directly to plaintiff to proceed. All of this took place before the services were performed. The correspondence between plaintiff and defendant continued until after a definite offer had been received from the Minister of Finance, at which time defendant wrote to plaintiff of the offer and asked him to "keep us advised as to your activities." In one communication defendant informed plaintiff that Shumaker "sails Saturday on several missions for us and will only assist confidentially your propositions." On May 2, 1931, Shumaker wrote to an official of defendant company: "My advice to you in the matter is to leave it to Bert: he is in continuous touch with the right people." By its ratification of the appointment and its subsequent conduct in directing plaintiff concerning the conduct of the negotiations defendant constituted plaintiff its own agent and became liable for his compensation. It is a general rule that in the absence of an agreement to the contrary a request by one party to another to render services gives rise to a liability to compensate for the services when rendered.

The view that defendant became liable to compensate plaintiff for the services rendered finds support in a number of cases. In *Fisher v. Berwind-White Coal Mining Co.*, 64 W.Va. 304, 61 S.E. 910, 911, 131 Am. St.Rep. 898, one Rease, the agent of Berwind, employed Fisher to secure coal lands or options and Rease told Fisher that he would get a commission if the lands were actually bought. In allowing Fisher to recover from Berwind, the court said: "It is noted that but little reliance is placed on the contention that Fisher did not become the agent of Berwind in the transactions had in pursuance of said contract, and rightly so, for it appears clearly that such relationship existed. Berwind became the owner of the 860 acres of coal through the subagency of Fisher. This fact is manifestly shown, and also that Berwind's manager in Philadelphia was in touch with the work which was being carried on by Fisher, and was advising with him in the premises, per-

sonally, as well as through Rease. Fisher's employment was thus impliedly authorized and ratified by Berwind, and the latter is liable for his compensation." In *American Oil & Refining Co. v. Clements*, 99 Okl. 204, 225 P. 349, 354, the defendant authorized the Oklahoma Oil Securities Company to sell its stocks. The latter company employed the plaintiff on commission basis of 10 cents per share sold. The plaintiff procured a purchaser for 38,000 shares, and sued both companies for commissions for securing this order. The court, in sustaining the plaintiff's contention, said: "There is no question, in our opinion, that the smaller company, as broker, had full authority to employ agents for the sale of the stock of the larger company, and, under the peculiar circumstances of this case, that the larger company authorized the smaller company to employ subagents and had full knowledge of the employment of this plaintiff, and that it acquiesced in and ratified the employment of plaintiff, and, this being our conclusion, all authorities agree that the larger company was responsible to the plaintiff for the payment of this commission." See, also, *Large v. Frick Co.*, 215 Mo.App. 232, 256 S.W. 90; *Hornbeck v. Gilmer*, 110 La. 500, 34 So. 651; *Story on Agency* (9th Ed.) § 387; *Mechem on Agency* (2d Ed.) § 332.

[3,4] The parties present a sharp conflict on the subject of the basis for the compensation for the sale of the airplanes; defendant contending that it was agreed that the "differential" method should be applied and that, in view of the price at which the airplanes were sold, there was no "differential." To this contention plaintiff replies that as to him there is no evidence in regard to the "differential" method which can operate to deprive him of his right to compensation, and that even as to Shumaker no net price to the factory is shown by the record, and that the fixing of the price remained in the control of the defendant. It is unnecessary for us to decide between these contentions for in any event, under the undisputed facts as shown by the record, plaintiff is entitled to compensation for the reasonable value of the services rendered. For a period of eight or nine months plaintiff devoted the greater part of his time in furtherance of the sale of defendant's airplanes. At the time the sale was about to be consummated his authority was canceled. At that time defendant had received an offer from the Minis-

ter of Finance and negotiations were shortly thereafter completed to effectuate the sale. It was not a part of plaintiff's duties to conduct negotiations with the Finance Ministry but rather it was his sole duty to contact the Bureau of Aviation. Captain Westervelt, who was appointed by defendant as its representative in closing the deal with the Minister of Finance, was engaged to perform services of a nature different from those plaintiff was called upon to perform. It appears from the findings that alterations were made in the specifications of the airplanes originally offered by plaintiff and defendant, with the result that defendant was enabled to sell at a reduced price. It is significant to note that Shumaker received the full amount he expected to receive on the transaction while plaintiff is left without any remuneration for the services rendered by him covering a period of many months. Defendant stresses the point that plaintiff's influence was with those officials who joined the Cantonese movement. There is no finding by the court that plaintiff's services were ineffective, but the court did find that plaintiff did in fact render valuable services.

If defendant is correct in its views that the record discloses plaintiff's compensation was to be upon the "differential" basis, nevertheless plaintiff is entitled to compensation for the reasonable value of his services. Defendant lowered the price of its airplanes and contends that thereby the "differential" was eliminated, and that with the "differential" went also plaintiff's compensation. It would be harsh and unjust to uphold this contention. The more just and reasonable rule is that, if the seller changes the fixed price so that the agreement can no longer operate, the seller is obligated to pay the reasonable value of the services rendered by the agent in furthering the consummation of the sale. A seller may not ratify the appointment of an agent to be compensated upon a "differential" basis, receive the benefit of his services, and at the moment of final negotiation make sure to itself the consummation of the transaction and full enjoyment of its profits, by the expedient of lowering the price of the commodity and eliminating the compensation of the agent. In such a situation the agent is entitled to the reasonable value of his services. In *Wetzell v. Waggoner*, 41 Mo.App. 509, the owner offered to pay \$200 commission if a farm should be sold for \$8,000. The broker introduced to

the owner a prospective customer to whom the farm was afterwards sold at a lower price. In holding that the broker was entitled to compensation, the court said: "It would indeed be a singular hardship on the plaintiffs if after their successful efforts in bringing about this sale they should receive no compensation, solely because the defendant agreed himself with the purchaser to take a less sum than he had offered, through the plaintiffs, his agents, to take in the first instance. It would be quite difficult to conceive of a principle that would give sanction to such rank injustice." See, also, *Steinfeld v. Storm*, 31 Misc. 167, 63 N.Y. S. 966; *Raeder v. Butler*, 19 Pa.Super. 604; *In re Breon Lumber Company (D. C.)* 181 F. 909.

The judgment is reversed.

I concur: CRAIN, P. J.

I dissent: McCOMB, J.



PEOPLE v. McKENNA.*

Cr. 3028.

District Court of Appeal, Second District,
Division 2, California.

Nov. 16, 1937.

Rehearing Denied Nov. 29, 1937.

Hearing Granted by Supreme Court
Dec. 16, 1937.

1. Criminal law ☞ 1144(13)

On appeal from a conviction, the evidence will be viewed most favorably to the prosecution.

2. Forgery ☞ 4

The false preparation, with intent to defraud, of an assignment of notes and mortgages which were the subject of dispute in two actions instituted by defendant in her daughter's name, to enjoin the sale of property at foreclosure and to quiet title to the property described in the mortgages, authorized conviction of defendant for "forgery" as of one who with intent to defraud either falsely makes or alters an assignment of real or personal property (Pen.Code, § 470).

[Ed. Note.—For other definitions of "Forgery," see Words & Phrases.]

3. Forgery ⚭10

False insertion of words in document which, as added, conveyed an interest in notes and mortgages which were in issue in actions instituted by defendant in her daughter's name for purpose of enjoining foreclosure and to quiet title, with intent to defraud, authorized conviction for "forgery" (Pen.Code, § 470).

4. Criminal law ⚭1159(2)

Alleged insufficiency of evidence to sustain conviction did not warrant reversal where there was substantial evidence considered in connection with such inferences as jury may have reasonably drawn to sustain the facts upon which jury necessarily predicated its verdict.

5. Forgery ⚭12(4)

Defendant who attempted to use forged documents which if genuine would have established title to mortgaged premises in daughter, in action instituted by defendant in daughter's name to enjoin foreclosure of mortgaged premises and to quiet title thereto, was not entitled to rely upon alleged immateriality of documents as defense to prosecution for forgery (Pen.Code, § 470).

6. Judgment ⚭648

Judgment establishing allegedly defrauded person's right to foreclose mortgages against defendant precluded defendant from alleging lack of title in such person as defense to prosecution for having forged documents which were used by defendant in actions instituted by her in daughter's name to enjoin foreclosure and to quiet title to the mortgaged premises (Pen.Code, § 470).

7. Criminal law ⚭388

An experiment must have been made under substantially the same conditions as existed at time of transaction which experiment is attempting to prove or disprove in order to be admissible.

8. Criminal law ⚭388

In forgery prosecution, an exemplar consisting of a picture of paper pasted on other paper to illustrate the appearance of paper so placed when photographed, the people having offered an exhibit of such nature, was properly rejected where the paper used as the basis of the offered exemplar was not the same as the paper in the picture introduced by the people (Pen.Code, § 470).

9. Witnesses ⚭274(2)

A character witness may be cross-exam-

ined as to whether he has ever heard of the person whose reputation is under investigation having been accused of committing acts inconsistent with the character attributed to him.

10. Witnesses ⚭274(1)

Cross-examination of defendant's character witnesses as to whether their opinion concerning her would be changed if they had been told that defendant had failed to comply with an agreement to continue a case, or if they were told that defendant had alleged that she was the owner of certain property involved in litigation, whereas it was owned by another, was authorized.

11. Criminal law ⚭1036(1)

An objection to introduction of evidence cannot be heard for first time on appeal.

12. Criminal law ⚭829(1)

Where jury was fully, fairly, and accurately instructed on the principles of law necessary for it to consider in deciding the case, alleged prejudicial error in refusal to instruct the jury, giving instructions as modified, and refusing to give requested instructions, was not ground for reversal.

13. Criminal law ⚭1171(1), 1173(2)

Where it did not appear that certain newspaper articles which were published during the course of trial had been brought to the attention of the jury or any individual member thereof, alleged misconduct of district attorney in releasing the information covered by the articles to the press, and court's refusal to instruct that the articles had no reference to defendant or to her case, was not prejudicial error.

WOOD, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Catherine A. McKenna was convicted of perjury, of offering false evidence, of preparing false evidence, and of forgery, and she appeals.

Affirmed.

Catherine A. McKenna and Charles Ostrom, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury on:

- (a) One count of perjury.
- (b) Two counts of offering false evidence in violation of the provisions of section 132 of the Penal Code.
- (c) Two counts of preparing false evidence in violation of the provisions of section 134 of the Penal Code.
- (d) Two counts of forgery.

Defendant prior to the trial had filed a demurrer to all counts in the indictment, which was overruled.

From the judgments and orders denying her motions for a new trial defendant appeals.

[1] Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

May 28, 1915, George M. and Rena W. Pierson executed and delivered two notes secured by two mortgages on certain real property, in which Edward Russek was named as mortgagee. Thereafter defendant acquired the mortgagor's interest in the mortgaged property and Louie S. Dexter acquired the mortgagee's interest in the above-mentioned notes and mortgages.

In 1926 an action was commenced by Louie S. Dexter to foreclose these mortgages, which ultimately resulted in a decree of foreclosure in favor of H. B. Busing as administrator of the estate of Louie S. Dexter, who had died after the commencement of the action and prior to the decree's becoming final. Busing v. Pierson et al., 1 Cal.(2d) 495, 36 P.(2d) 116.

July 16, 1936, defendant transferred her interest in the mortgaged property to her daughter W. P. Nichols and subsequently as attorney for W. P. Nichols commenced in her daughter's name (1) an action to enjoin the sale of the property pursuant to the decree of foreclosure referred to above and (2) a suit to quiet title to the real property described in the above-mentioned mortgages and decree of foreclosure. During the hearing of these two cases, which had been ordered consolidated for trial and which will hereafter in this opinion be referred to as the "consolidated cases," defendant as an attorney at law

for the plaintiff in the "consolidated cases" offered and there was received in evidence the following documents:

A

"Heirs Research and Recovery Bureau
"Stephen B. Dexter
"President and Manager
"316 Homer Laughlin Building
"Los Angeles, California
"Phone MAdison 6354
"Member of
Los Angeles Chamber of Commerce
"Licensed and Bonded by
State of California
"July 16, 1936

"Mrs. Catherine McKenna,
"Wilcox Building
"Los Angeles, Cal.
"Dear Mrs. McKenna:

"In keeping with the proposition made to you on yesterday touching upon certain quitclaim deeds to be issued to you covering the certain properties contained in two mortgages for \$800 each, given a number of years ago by one George Pierson, said properties being located in the Ela View Tract, this City and County, I am enclosing said deeds, *which are intended to and do convey all interest in and to said mortgages and notes, to grantee.*

"In further keeping with our understanding on this matter, I have notified the Administrator of the Estate of Louie S. Dexter, deceased, of my course of action in this matter, as above stated, and have stated to him that any and all equity that Louie S. Dexter might have in this property as evidenced by that certain suit of Louie S. Dexter vs. George M. Pierson, et al, No. 200705, Superior Court, Los Angeles, California, should be identified and considered by him as having been passed over to yourself, *as all of Louie S. Dexter's interest was passed to Golden State Holding Co. prior to her death.* This statement is given under Notary Seal at your request.

"Very truly yours,

"[Signed] Stephen B. Dexter
Stephen B. Dexter

"State of California, }
"County of Los Angeles. }ss

"On this 16th day of July 1936, before me, J. E. Light, a Notary Public in and for said County, personally appeared Stephen B. Dexter known to me to be the person whose name is subscribed to the

foregoing instrument and acknowledged that he executed the same.

"Witness my hand and official seal.

"[Seal] [Signed] J. E. Light

"Notary Public in and for said County and State"

The foregoing letter will be hereafter referred to as "Document A." The italicized portions thereof were inserted by defendant after the document had been executed and notarized and without the knowledge or consent of the signatory to the letter.

B

"Assignment Of Mortgage

"For, and in consideration of the sum of Ten (\$10.00) Dollars; in hand paid by the Golden State Holding Company, a Corporation, the receipt whereof is hereby acknowledged, I, Louis S. Dexter, do by these presents grant, bargain, sell and assign, transfer and set over unto the Golden State Holding Company, those two certain Indentures of Mortgages, bearing date the 28th day of May, 1915, made and executed by George M. Pierson, and Rena W. Pierson, his wife, Mortgagors, to Edward Russek, Mortgagee, and recorded on the 3rd day of June, 1915, in Book 3812 at page 182, and Book 3826 at page 217, of Mortgages, records of the Recorder's office of the County of Los Angeles, State of California, together with the therein described promissory notes, and the moneys due and to grow due thereon, with interest.

"To have and to hold, unto the said Golden State Holding Company, together with all my right, title and interest in and to the real property described in said mortgages, unto the said Golden State Holding Company, its successors and assigns, and for its use and benefit, subject only to the provisions in the said indentures of mortgages contained, and which said notes and mortgages are filed as exhibits in the case of Russek vs. Pierson, No. B 83046 in the Superior Court of the State of California, in and for the County of Los Angeles:

"That, the said Louie S. Dexter, the party of the first part, does hereby make, constitute and appoint the aforesaid Golden State Holding Company, the party of the second part, her true and lawful attorney, irrevocable, in her name, or otherwise, but at the proper cost and charge of the said second party to have, use and take all lawful ways and means for the recovery of

the said money, and interest; and in case of payment to discharge the same as fully as I could or might do if these presents were not made, together with the right to be substituted in any action for the foreclosure of the said Mortgages:

"In witness whereof, I have hereunto set my hand and seal this 28th day of February, 1927.

"Louie S. Dexter

"State of California

"County of Los Angeles } ss

"On this 28th day of February, 1927, before me Elliott H. Barrett, a Notary Public in and for the said county and state, duly commissioned and sworn and residing therein; personally appeared Louie S. Dexter, known to me to be the person who subscribed her name to the within instrument and acknowledged to me that she executed the same.

"In witness whereof I have hereunto set my hand and seal.

"[Seal] Elliott H. Barrett

"A notary public in and for the County of Los Angeles, State of California"

The foregoing assignment will be hereafter referred to as "Document B." It was prepared by defendant and the signatures of Louie S. Dexter and Elliott H. Barrett, the purported notary public acknowledging the instrument, were affixed to it by defendant.

After the "consolidated cases" were submitted a motion to reopen was made and defendant in the instant case after being duly sworn testified that:

(1) "Document A," supra, was exactly in the same form and wording as when she had received it from Mr. Dexter.

(2) She had obtained "Document B," supra, from the corporate record books of the Golden State Holding Company. (This, in fact, was not true.)

Defendant relies for reversal of the judgments on these propositions:

First. Her demurrer to counts VI and VII which charged her with the forgery of "Document B" and "Document A," supra, should have been sustained, since the documents described in these counts were not such as could be made the subject of forgery within the meaning of section 470 of the California Penal Code.

Second. The evidence is insufficient to sustain the judgments.

Third. "Document A" as altered and "Document B" were not material to any issue in the "consolidated cases."

Fourth. The trial court committed prejudicial error in sustaining an objection to the introduction in evidence by defendant of an exemplar, which was a picture of papers pasted on other papers, to illustrate the appearance of papers so placed when photographed.

Fifth. The trial court committed prejudicial error in overruling her objection to (a) questions asked her character witnesses upon cross-examination and (b) the admission in evidence of the judgment rendered in the "consolidated cases."

Sixth. The trial court committed prejudicial error in (a) instructing the jury, (b) giving as modified instructions to the jury, and (c) refusing to instruct the jury as requested by defendant.

Seventh. It was misconduct of the district attorney to release to the public press during the trial of the instant case information that the files in the courtroom where defendant was being tried had been rifled, and (b) it was prejudicial error for the trial judge to refuse to instruct the jury that the news articles appearing in the public print relative to the ransacking of his courtroom had no reference to defendant or her case then pending before the court.

[2,3] Defendant's first proposition is without merit. It is the established law in California that one who with intent to defraud either (1) falsely makes or (2) alters an assignment of real or personal property is guilty of forgery. Section 470, Pen.Code.

Count VI of the indictment charged defendant with having forged "Document B," supra. This document prepared by defendant was clearly an assignment of the notes and mortgages which were the subject of dispute in the "consolidated cases" and obviously under the rule of law above stated is such a document as when falsely prepared with intent to defraud constitutes the crime of forgery.

In count VII defendant was charged with having altered "Document A," supra. If the words added to this document are deleted, it does not convey the maker's interest in and to the notes and mortgages, the title to which was an issue in the "consolidated cases." Therefore, it is clear that the additions to this document were

such as to constitute the crime of forgery when falsely made with intent to defraud.

For the foregoing reasons the court properly overruled defendant's demurrers to counts VI and VII of the indictment.

[4] Defendant's second contention is untenable. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the facts set forth above, upon which the jury necessarily predicated its verdicts of guilty of the crimes charged in the various counts of the indictment. We therefore refrain from further discussion of the evidence. *Thatch v. Livingston*, 13 Cal.App.(2d) 202, 56 P.(2d) 549; *People v. Groves*, 9 Cal. App.(2d) 317, 321, 49 P.(2d) 888, 50 P.(2d) 813; *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 245, 128 P. 399.

[5] Defendant's third contention is likewise untenable. One of the principle issues in the "consolidated cases" was whether or not W. P. Nichols, the plaintiff in said cases, had acquired title to the notes and mortgages covered by "Document B" and the alterations to "Document A." Clearly had these documents been genuine in their entirety, W. P. Nichols would have been the owner of such notes and mortgages, since "Document B" transferred them to the Golden State Holding Company and "Document A" taken together with the quitclaim deeds mentioned therein conveyed them to Catherine McKenna, who in turn had transferred her interest to W. P. Nichols. The record discloses that defendant in the case now before us in fact attempted to use the documents for this purpose during the trial of the "consolidated cases."

[6] Defendant's further contention that there was no title either legal or equitable in the parties alleged to have been defrauded is wholly devoid of merit, in view of the holding of our Supreme Court in *Dexter v. Pierson*, 214 Cal. 247, 4 P.(2d) 932, and *Busing v. Pierson*, 1 Cal.(2d) 495, 36 P.(2d) 116, which cases established that Louie S. Dexter during her lifetime and subsequent to her death, H. D. Busing, the administrator of her estate were entitled to foreclose the mortgages as against Catherine McKenna.

[7,8] The fourth proposition urged by defendant is also untenable. The exemplar offered in evidence by defendant and to

which an objection was sustained was presented for the purpose of showing what would appear on a picture taken of one piece of paper pasted on another, the People having offered in evidence an exhibit of such nature.

The law is settled that an experiment (which the exemplar in the present case was) to be admissible in evidence must have been made under substantially the same conditions as existed at the time of the transaction which the experiment is attempting to prove or disprove. *People v. Halbert*, 78 Cal.App. 598, 607, 248 P. 969; *Nichols*, *Applied Evidence*, vol. II, 2049, § 3 (1928). In the present case the undisputed testimony established that the paper used as the basis of defendant's offered exemplar was not the same as the paper in the picture introduced in evidence by the People. Therefore, the trial court's ruling was correct.

[9, 10] Turning to the contention urged in paragraph (a) of defendant's fifth proposition, the record discloses that defendant called a number of character witnesses who testified that defendant's reputation for truth, honesty, and integrity in the community in which she resided was good. The following excerpts of cross-examination are typical of the cross-examination of each of defendant's character witnesses and defendant's objections thereto:

"Q. If you were told that Mrs. McKenna had agreed to continue in a case with an opposing counsel, and instead of living up to that agreement had gone in and taken a default judgment, would that change your opinion as to Mrs. McKenna's truth, honesty and integrity?

"Mr. Ostrom: Object to it, if your Honor please, as not being proper cross examination and assuming facts not in evidence.

"The Court: Overruled. Answer the question." * * *

"Q. If you believed it, if it was told you by a lawyer whom you had confidence in, would that change your opinion as to the reputation of Mrs. McKenna for truth, honesty and integrity? A. Well, well, if I believed that Mrs. McKenna did that, actually did that, and without a reason for it, that it was dishonest conduct, you would think it would be dishonest, but that would not necessarily change your opinion regarding her reputation in the community.

"Q. For truth, honesty and integrity, that is the one representation made, that is what you testified to on direct examination, and that is the only one I am questioning you on now, is for truth, honesty and integrity; would that change your opinion as to her reputation for truth, honesty and integrity? A. It would modify it.

"Q. It would modify it? A. If I believed it.

"Q. And suppose you heard that a great number of times, as many as ten times?

"Mr. Ostrom: Object, if your Honor please as not—as assuming a fact not in evidence.

"The Court: It is a question of her general reputation in the community in which she lives or works for truth, honesty and integrity. The objection is overruled.
* * *

"Q. Now, then, supposing you were told this by an attorney that you believed; that in an action to quiet title in which Mrs. McKenna represented one party, she maintained in that action, while on the witness stand, under oath, that she owned the property under tax conveyance, and that when it was proved that there was a defect in all the tax title deeds, she then maintained while on the witness stand, under oath, that she had acquired title to the property by adverse possession, and then evidence was produced which showed that the property was owned by a man in Australia, and he had sent his taxes to the Tax Collector and had a certificate of redemption for them, would you then say that her reputation for truth, honesty and integrity was good?

"Mr. Ostrom: Objected to, if your Honor please, as certainly assuming facts not in evidence, no testimony here about anybody in Australia that I ever heard of.

"The Court: The objection will be overruled."

It is the established law in this state that it is legitimate cross-examination of a character witness to ask whether he has ever heard of the person whose reputation is under investigation having been accused of committing acts inconsistent with the character which he has attributed to him. *People v. Weber*, 149 Cal. 325, 342, 86 P. 671; *People v. Rice*, 90 Cal.App. 590, 592, 266 P. 295; *Nichols*, *Applied Evidence*, vol. I, 1028, § 140 (1928). Applying this rule

of law to the instant case, it is evident that the trial court's rulings on the objections to the cross-examination of defendant's character witnesses were correct.

[11] The error alleged in paragraph (b) of defendant's fifth proposition will not be considered by us for the reason that the evidence was received without objection upon the part of defendant. It is the law that an objection to the introduction of evidence cannot be urged for the first time on appeal. 10 Cal.Jur. 824, § 111 (1923).

[12] The sixth contention of defendant is entirely without merit. An examination of the record fails to reveal any prejudicial error committed by the trial court either in (a) instructing the jury, (b) giving instructions as modified, or (c) refusing to give instructions requested by defendant. The jury was fully, fairly and accurately instructed as to the principles of law necessary for it to consider in deciding this case.

[13] The final proposition urged by defendant has no merit. During the course of the trial in the superior court the following articles appeared in the public press:

"Courtroom, Fitts' Office Burglarized.

"Files of Evidence Ransacked in Judge Dudley Valentine's Chambers; None Missing. Daring burglaries of a courtroom and three offices, including the private sanctum of District Attorney Fitts, were reported yesterday, after several days of secret inquiry had failed.

"Superior Judge Dudley Valentine revealed that twice last week someone invaded his courtroom and chambers and ransacked files of evidence.

"Office Invaded.

"Likewise the office of Judge Valentine's stenographic reporter, H. F. Sonneman, was invaded and searched and a similar burglary occurred in the office of Deputy District Attorney James Fredericks, who is assigned to Judge Valentine's department. No records were missing but Judge Valentine and Fredericks declared they were positive some person facing trial in the jurist's courtroom had sought to locate and destroy incriminating documents or other evidence.

"Check Made.

"Activities of all persons awaiting trial are being checked. Fitts disclosed that minor personal belongings were stolen from his desk."

"Puzzled police seek courtroom burglar.

"Los Angeles most daring burglar was sought today by puzzled authorities. Activities to date of the wanted party, who apparently just doesn't care where he operates, includes: two invasions of Superior Judge Dudley S. Valentine's courtroom and chambers, where files of evidence were ransacked. A similar invasion of the office of H. F. Sonneman, Judge Valentine's stenographic reporter, another in the office of Deputy District Attorney James Fredericks, who is assigned to Judge Valentine's office, another in the office of District Attorney Buron Fitts, where minor personal items were stolen from his desk.

"No records were missing, but Judge Valentine and Fredericks were convinced that someone facing trial in the jurist's court room had sought to locate and destroy incriminating documents.

"Activities of all persons awaiting trial are being checked."

The record is devoid of any evidence that either of the foregoing articles were brought to the attention of the jury or any individual member thereof. Therefore, it is clear that defendant has failed to direct this court's attention to any prejudicial error resulting to her from the publication of the articles.

After a careful examination of the record we are satisfied that defendant had a full and fair trial before the superior court and that no prejudicial error was committed.

For the foregoing reasons the judgments and orders are, and each is, affirmed.

I concur: CRAIL, P. J.

WOOD, Justice (dissenting in part).

I concur as to counts I, II, III, IV, V, and VI. I dissent as to count VII. In my opinion section 470 of the Penal Code, which designates the matters which may be the subject of forgery, does not include the letter called "Document A."

10 Cal.2d 147

In re HATCH.

Bar Misc. 1481.

Supreme Court of California.

Nov. 22, 1937.

1. Attorney and client ☞39

Under statute providing for suspension of an attorney who has been convicted of an offense involving moral turpitude, conduct involving "moral turpitude" constitutes anything done contrary to justice, honesty, modesty, or good morals (Code Civ.Proc. §§ 287-289, 299).

[Ed. Note.—For other definitions of "Moral Turpitude," see Words & Phrases.]

2. Attorney and client ☞58

Under statute, where offenses of which attorney was convicted involved moral turpitude, court was required to suspend attorney from practice in the state at least during the term of probation which had been granted him (Code Civ.Proc. §§ 287-289, 299).

3. Attorney and client ☞54

In proceeding to disbar attorney because of his conviction of an offense allegedly involving moral turpitude, court was not required to consider attorney's guilt, as under statute record of conviction was conclusive as to guilt (Code Civ.Proc. § 287, subd. 1).

4. Attorney and client ☞54

The State Bar is not deprived of jurisdiction in disciplinary proceedings to inquire into the fitness of an attorney to practice when the record of his conviction is on file with the court under statute (Code Civ.Proc. § 287 et seq.).

5. Attorney and client ☞39

"Moral turpitude" as used in statute providing for suspension of an attorney who has been convicted of an offense involving moral turpitude is not confined to offenses which are malum in se, and may include those which are merely malum prohibitum, as the concept of moral turpitude depends upon the state of public morals, varying according to the times, and involves moral turpitude if it involves violation of a rule of public policy and morals (Code Civ.Proc. §§ 287-289, 299).

6. Attorney and client ☞39

Conviction for violation of the Corporate Securities Act will authorize suspension of an attorney as for conviction of an of-

fense involving moral turpitude, on ground that the violation is contrary to honesty and good morals, when the intent is to evade the act's provisions with the object of gain or profit (St.1917, p. 673, as amended; Code Civ.Proc. §§ 287-289, 299).

7. Attorney and client ☞58

Conviction of an attorney for violation of the Corporate Securities Act in having knowingly authorized, directed, or aided in the issuance and sale of securities contrary to the provisions of the act authorized suspension of attorney from the practice of law for the same period as that for which he had been placed on probation following his conviction, where the attorney's violation was not merely technical but was to evade the necessity of a permit by purchasing securities and reselling them as his personally owned property (St.1931, p. 950, § 18; Code Civ.Proc. §§ 287-289, 299).

In Bank.

Proceeding in the matter of the disbarment of Ira S. Hatch, an attorney at law.

Defendant suspended from practice as indicated in opinion.

Houser, Houser & Houser, of Long Beach, for appellant.

Philbrick McCoy, of Los Angeles, for respondent State Bar.

PER CURIAM.

On February 10, 1937, Ira S. Hatch, an attorney at law, was found guilty by the court sitting without a jury on 52 counts in two informations charging violations of the Corporate Securities Act (St. 1917, p. 673 as amended) in that he knowingly participated in the issuance and sale of securities without first having obtained a permit from the commissioner of corporations; also that he engaged in the purchase of securities for the purpose of reselling them without first having obtained a broker's license from the commissioner of corporations. The record of his convictions was filed with this court pursuant to the provisions of sections 287, 288, 289, and 299 of the Code of Civil Procedure. Under those sections an attorney who has been convicted of a felony or misdemeanor involving moral turpitude must be suspended upon the receipt by the court of the record of conviction, and when the judgment of conviction has become final he must be permanently disbarred.

The question was raised whether the offenses of which Hatch was convicted were crimes involving moral turpitude. The matter is submitted on the record of conviction and the briefs filed on behalf of the attorney and the State Bar.

Upon his own application to the trial court, Hatch, hereinafter referred to as the defendant, was granted probation. The order of the court was that the "proceedings herein be suspended and defendants placed on probation as follows: Defendant Hatch is placed on probation for a period of ten years under the following conditions: Defendant shall not engage in any investment business or handle the money of others. Defendant is ordered released forthwith."

The record in each of the two criminal proceedings against the defendant presents the numerous counts based upon the complaint of the persons therein named, the finding by the court of the guilt of the defendant on specified counts, and the orders of the court on the motions to dismiss certain other counts and on the application for probation. Under the sections of the Code of Civil Procedure above cited the offense or crime, whether a felony or a misdemeanor, must be one involving moral turpitude, otherwise the court is not called upon to carry out the requirements of the statute.

[1,2] The defendant contends that the violations of the Corporate Securities Act, of which he was convicted, constitute merely technical violations and do not indicate that they were committed with moral turpitude; that the act of issuing and selling securities without a permit is not inherently bad, but is merely *malum prohibitum*, inasmuch as prior to the adoption of the act the issuance and sale of securities without a permit did not involve any question of right or wrong in human conduct. The defendant therefore stresses the view that, wherever suspension or disbarment pursuant to section 299 of the Code of Civil Procedure is concerned, moral turpitude must connote baseness, vileness, or depravity, such as is inherently a part of murder and other crimes *malum in se*. However, the courts of this state have rejected such a test as exclusive in determining whether an attorney has been guilty of conduct requiring disciplinary action or disbarment. Conduct involving moral turpitude has been defined as "everything done contrary to justice, honesty,

modesty, or good morals." *Matter of Coffey*, 123 Cal. 522, 524, 56 P. 448, 449; *Lantz v. State Bar*, 212 Cal. 213, 218, 298 P. 497; *Jacobs v. State Bar*, 219 Cal. 59, 64, 25 P.2d 401. Therefore, if the offenses of which the defendant was convicted meet the test and involve moral turpitude, this court under the Code sections must suspend him from the practice of the law in this state at least during the term of his probation. In *re Jacobsen*, 202 Cal. 289, 260 P. 294.

[3] This court is not called upon to consider the question of the defendant's guilt. Section 287, subd. 1, Code of Civil Procedure, makes the record of conviction conclusive on that point.

Conceivably not in every case of the conviction of violations of the Corporate Securities Act will the face of the record of conviction indicate conclusively whether the offense involved moral turpitude. No doubt attaches to the conviction of such crimes as murder, embezzlement, extortion, and many others. But convictions of violations of police regulations, or of simple assault or battery, may indicate without further inquiry that moral turpitude was not involved.

[4] There is necessarily a field of doubtful cases where the determination as to whether moral turpitude was involved may fall on one or the other side of the line, depending upon the circumstances of the particular case. That certain violations of the Corporate Securities Act may fall into this class of doubtful cases is evident from the fact that in the criminal prosecution of a person so charged the question of good or bad faith is not necessarily an element for consideration. *El Claro Oil, etc., Co. v. Daugherty*, 11 Cal.App.2d 274, 281, 53 P.2d 1028, 55 P.2d 488; *People v. McCalla*, 63 Cal.App. 783, 793-795, 220 P. 436. The fact that the Legislature has made the basis of conviction the bare act of knowingly authorizing or assisting in the issue or sale of securities without a permit leaves for the determination of the court the question whether such act involved moral turpitude. This court would not be justified in holding that, because the circumstances of any one such case might indicate a mere technical omission without the stigma of moral guilt, the entire class of offenses is one not involving moral turpitude. In some doubtful cases the record of conviction may not be sufficient upon which to base a determination one

way or the other on the question of moral turpitude, and appropriate action by the court may require a reference to the board of governors of the State Bar for an inquiry and recommendation. The State Bar is not deprived of jurisdiction in disciplinary proceedings to inquire into the fitness of an attorney to practice when a record of his conviction is on file with the court under section 287 et seq. of the Code of Civil Procedure. *Shafer v. State Bar*, 215 Cal. 706, 12 P.2d 957.

[5] "The concept of moral turpitude depends upon the state of public morals, and may vary according to the community or the times." *In re Bartos* (D.C.) 13 F.2d 138, 139. *In Beck v. Stitzel*, 21 Pa. 522, 524, citing among other cases, *In re Coffey*, supra, it was said: "This element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community." *In the case of Rudolph v. United States*, 6 F.2d 487, 55 App.D.C. 362, 40 A.L.R. 1042, it was said: "We are not much concerned with the distinction sought to be made between crimes *malum in se* and those which are merely *malum prohibitum*. Many things which were not considered criminal in the past have, with the advancement of civilization, been declared such by statute; and the commission of the offense, if it involves the violation of a rule of public policy and morals is such an act as may involve moral turpitude;" and, "There is no hard and fast rule as to what constitutes moral turpitude. It cannot be measured by the nature or character of the offense unless, of course, it be an offense inherently criminal, the very commission of which implies a base and depraved nature. The circumstances attendant upon the commission of the offense usually furnish the best guide."

[6,7] In sustaining legislation of the character of the Corporate Securities Act, it has been held that the general purpose and tenor of the act is to "protect the public against the imposition of unsubstantial schemes and the securities based upon them" and against "fraudulent or unlawful stock and investment schemes and enterprises." *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 37 S.Ct. 217, 220, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643; *In re Leach*, 215 Cal. 536, 543, 12 P.2d 3; *Daugherty v. Riley*, 1 Cal.2d 298, 305, 34

P.2d 1005, 1008; *Cecil B. De Mille Productions v. Woolery* (C.C.A.) 61 F.2d 45. It must necessarily follow that violations of the act are contrary to the concept of honesty and good morals where the intent is to evade its provisions with the object of gain or profit. Therefore the stigma of moral turpitude may attend the violation of the statutory requirement that a permit must be obtained from a body constituted to supervise the details and guard the interests of the public against impositions and frauds before the issuance or sale of securities. This stigma would seem to attach to the conviction of an attorney who, as charged and found guilty, "knowingly authorizes, directs, or aids in the issue and sale of" securities contrary to the provisions of the act (Stats.1931, p. 950, § 18), where the circumstances indicate that the omission was not merely technical but was done with the object and design of evading compliance with the act. See, also, *In re Diesen*, 173 Minn. 297, 215 N.W. 427, 217 N.W. 356.

The defendant claims that the failure to obtain the permit was in this case merely a technical omission, for which he should not be disbarred or suspended from the practice of the law, relying on *In re Kling*, 44 Cal.App. 267, 186 P. 152. The face of the record itself refutes the contention. Numerous persons to whom we may assume the securities were sold complained against the defendant. The defendant does not offer to show that his alleged "technical" omission was cured by a dilatory application for a permit, or that a permit was subsequently granted. On the contrary the plain indication from the two classes of charges is that the defendant's purpose was to evade the necessity of a permit by purchasing the securities and reselling them as his personally owned property. The trial court apparently concluded that the acts of the defendant were of such a serious and dishonest character that protection to society demanded that he should not, during the period of probation, engage in the investment business or handle the money of other persons. It would be anomalous to conclude that he should nevertheless be permitted to continue in the practice of the law during that period. The same reason for requiring that he be restrained from further engaging in the business of making investments for others or in handling the property of others is persuasive that the motive and intent with which he acted was such as to indicate

turpitude in the commission of the offenses of which he was convicted. The record of conviction therefore is sufficient upon which to dispose of the proceedings herein finally without a reference to and investigation and recommendation by the board of governors of the State Bar as to whether the defendant's acts involved moral turpitude.

It is therefore ordered that the defendant be suspended from the practice of the law in this state for the period of his probation in the action herein referred to and until the further order of this court.



10 Cal.2d 153

AMELL v. AMELL.

L. A. 15889.

Supreme Court of California.

Nov. 24, 1937.

1. New trial ⇨117(1)

A judgment entered in lieu of vacated judgment becomes only judgment in case and is judgment referred to in statute requiring instigation of new trial proceedings within 10 days after receipt of written notice of entry of judgment (Code Civ.Proc. § 659; § 663, as amended by St.1933, p. 1881).

2. Appeal and error ⇨113(1), 345(1)

A judgment entered in lieu of vacated judgment is appealable, and time for appeal is extended by subsequent seasonably instituted new trial proceedings (Code Civ.Proc. § 659; § 663, as amended by St.1933, p. 1881; § 939, as amended by St.1933, p. 306).

3. New trial ⇨117(1)

A new trial proceeding, instituted within ten days after service of notice of entry of new judgment in lieu of vacated judgment, was in time (Code Civ.Proc. § 659).

4. Appeal and error ⇨345(1)

The filing of notice of appeal from judgment, entered in lieu of vacated judgment, within 30 days after termination of new trial proceedings, instituted within statutory time, was in time (Code Civ.Proc. § 659; § 939, as amended by St.1933, p. 306).

5. Divorce ⇨186

Respondent's motion to dismiss appeal from divorce judgment, entered in lieu of vacated interlocutory decree granting him divorce, but awarding wife alimony, counsel fees, and costs, not referred to in new judgment, with appended request to affirm vacation of original judgment and entry of different judgment, will not be treated as motion to affirm, but appeal will be allowed to take regular course, where respondent does not undertake to justify entry of interlocutory decree; such issue being reviewable on wife's appeal therefrom (Code Civ. Proc. § 663, as amended by St.1933, p. 1881; Supreme Court Rules, rule 5, § 3).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by Lauren Pierce Amell against Beulah Jo Amell. Judgment for plaintiff, and defendant appeals. On motion to dismiss the appeal.

Motion denied.

Laurence B. Martin, of Los Angeles, for appellant.

Morris Lavine, of Los Angeles, and John J. Dillon, of Culver City for respondent.

PER CURIAM.

Motion to dismiss appeal.

Following trial, an interlocutory decree of divorce was entered in this action in favor of the plaintiff husband and against the defendant wife, the latter, however, being awarded, in addition to one-half of the community property, certain alimony, counsel fees, and costs. Pursuant to and within the time prescribed by the provisions of section 663 of the Code of Civil Procedure (as amended by St.1933, p. 1881), plaintiff moved to set aside and vacate the conclusions of law and to substitute another and different judgment consistent with the findings of fact. The motion was granted, the conclusions of law were modified, and a new and different judgment was entered in which no reference was made to alimony, counsel fees, or costs. This new and different judgment was entered on December 12, 1935. Within 10 days after service of notice of entry thereof and on December 23, 1935, the defendant wife moved for a new trial. The motion was dismissed by

the trial court on February 6, 1936, for an assumed lack of jurisdiction. Thereafter, and on February 13, 1936, the defendant wife noticed an appeal from the new and different judgment. Inasmuch as the motion to dismiss now before us is directed solely at said appeal, we make no mention of any other appeal in the cause.

[1,2] In our opinion, the motion must be denied. There can be only one final judgment in an action. If for any reason a judgment is vacated and another and different judgment is entered in lieu thereof, as was the case here, the new and different judgment becomes the only judgment in the case. It furnishes the sole guide as to the respective rights and obligations of the parties to the action and is the judgment referred to in section 659 of the Code of Civil Procedure wherein it is provided that new trial proceedings must be instituted "within ten (10) days after receiving written notice of the entry of the judgment." We entertain no doubt as to the appealability of such new and different judgment nor as to the extension of time for such appeal resulting from a subsequently and seasonably instituted proceeding for new trial. The following cases suggest the propriety of our conclusions: *Karsh v. Superior Court*, 124 Cal.App. 373, 376, 12 P.2d 658; *Bond v. United Railroads*, 169 Cal. 273, 146 P. 688; *McNutt v. City of Los Angeles*, 187 Cal. 245, 257, 201 P. 592; *Berry v. Monlie*, 180 Cal. 137, 179 P. 686; *Gillanders v. Da Silva*, 212 Cal. 626, 627, 299 P. 722; *McCaleb v. McCaleb*, 177 Cal. 147, 148, 169 P. 1023.

[3,4] In the instant case the new trial proceeding was instituted within 10 days after service of notice of entry of the new and different judgment, and was therefore within time. Section 659, *supra*. The filing of the notice of appeal from said judgment occurred within 30 days after termination of the new trial proceeding and likewise was within time. Section 939, Code Civ.Proc. (as amended by St. 1933, p. 306).

[5] The movant has also appended to the prayer of his motion to dismiss a request that we "affirm the actions of the trial court" in vacating the original judgment and entering another and different judgment. He does not, however, on this proceeding undertake to justify the entry of an interlocutory decree of divorce in

his favor, an issue also subject to review upon the defendant wife's appeal from such decree. We shall not, therefore, treat the motion as one to affirm under section 3 of rule V but shall allow the appeal to take its regular course.

The motion is denied.



10 Cal.2d 185

**WHEELER v. FIRST NAT. BANK OF
SANTA ANA et al.
L. A. 15567.**

Supreme Court of California.

Nov. 24, 1937.

Rehearing Denied Dec. 23, 1937.

1. Trusts ⇨374

Where trust created by husband and wife provided that on wife's death husband could withdraw specified personalty and remainder of trust estate should be divided into two equal parts, from which husband could withdraw income of both parts and principal of one part, and trustee transferred more than half of trust estate to husband, decree ratifying transfer and requiring husband to reimburse trust estate to extent of excess received was proper, as against contention that transfer should be annulled and money judgment rendered against trustee.

2. Appeal and error ⇨705

On appeal presented on clerk's transcript and briefs without reporter's transcript, by beneficiary of trust from decree ratifying trustee's transfers of trust property to trustor, but requiring trustor to reimburse trust estate to extent of inequality in division of trust estate created by such transfers, beneficiary could not urge that division would still be unequal after such reimbursement, but was confined to legal question of whether transfers should be canceled.

3. Trusts ⇨140(3)

A trust created by husband and wife, providing that on wife's death portion of trust estate should be divided into two equal parts, to be managed by husband, with husband having right to withdraw income from both parts and principal of one part, did not create tenancy in common between husband and other beneficiaries.

4. Trusts — 374

Where trustor, who was entitled under terms of trust to withdraw half of trust estate, was given half of orchard belonging to estate and other property aggregating more than half of estate, but resulting inequality was compensated by judgment requiring trustor to reimburse estate, equal apportionment of balance of mortgage indebtedness on orchard, as between trustor's share and share remaining, was proper.

5. Costs — 13

Where beneficiary of trust sought to cancel transfers made by trustee to trustor and other equitable relief, but transfers were affirmed and trustor was ordered to reimburse trust estate for inequality resulting from transfers, provision for reimbursement was not a "money judgment" in beneficiary's favor entitling beneficiary to costs as of course, and hence court's apportionment of costs was within court's discretion (Code Civ. Proc. § 1032(a, c), as added by St. 1933, p. 1901).

[Ed. Note.—For other definitions of "Money Judgment," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Orange County; Lloyd E. Griffin, Judge.

Suit by Sheldon C. Wheeler against the First National Bank of Santa Ana, as trustee under its declaration of trust 54-A, and others, wherein defendant the San Joaquin Fruit & Investment Company filed cross-complaint seeking foreclosure of mortgage. From a judgment in favor of the defendants and cross-complainant, plaintiff appeals.

Affirmed.

Clyde C. Shoemaker and John Stewart Ross, both of Los Angeles (Samuel W. Blum, of Los Angeles, of counsel), for appellant.

Rutan & Mize, of Santa Ana, for respondent San Joaquin Fruit & Inv. Co.

Forgy, Reinhaus & Förgy, of Santa Ana (A. M. Bradley, of Santa Ana, of counsel), for respondent First Nat. Bank.

R. Y. Williams, of Santa Ana, for respondents John L. Wheeler, Ralph E. Graves, and others.

SHENK, Justice.

The plaintiff sued the trustee of an express trust and the beneficiaries thereof

for an accounting, a declaration of the rights and duties of the respective parties under the trust provisions, and other equitable relief. From the judgment rendered the plaintiff appealed. No reporter's transcript was filed. The appeal is presented on the clerk's transcript and the briefs of the respective parties.

In February, 1929, John L. Wheeler and Louise A. Wheeler, the parents of the plaintiff, Sheldon C. Wheeler, entered into a declaration of trust whereby they conveyed to the First National Bank of Santa Ana certain described real and personal property, to hold for the benefit of the trustors in their lifetime, and thereafter for the benefit of their son and the brothers and sisters of John L. Wheeler. The real property consisted of a 40-acre orange grove situated in Orange county subject to a \$50,000 mortgage, and a residence in Santa Ana subject to a \$4,000 mortgage. The personal property consisted of money on deposit to the trustors' account in the trustee bank; ranch equipment, machinery, and tools; household goods and jewelry; certificates representing 1,000 shares of stock of Merchants Petroleum Company; five shares of Farmers & Merchants Savings Bank of Santa Ana; and six life and accident insurance policies issued on the life of John L. Wheeler.

Louise A. Wheeler died on November 13, 1930, survived by her cotrustor, John L. Wheeler. The only provisions of the trust declaration which are pertinent in this controversy are those which bear upon the happening of the contingency of the death of Louise A. Wheeler survived by John L. Wheeler.

Paragraph 5 of the trust declaration provides that, upon the happening of that contingency, John L. Wheeler should be permitted to withdraw from the trust corpus all the household furniture, automobiles, and the jewelry, clothing, and personal adornments of Louise A. Wheeler. The property remaining in the trust was then to be divided into two equal parts to be known as subdivisions "A" and "B." John L. Wheeler was given the right to manage both parts and, upon his written request at any time after three months following the death of Louise A. Wheeler, he had the right to withdraw from the trust the portion thereof comprising subdivision "A." He was permitted to retain all the income from both parts while they remained in the trust and to continue to receive the income from subdivision "B"

should he withdraw subdivision "A." It was further provided that thereafter should subdivision "A" and the income from subdivision "B" be insufficient for his support and comfort, he should receive sufficient amounts of the principal of subdivision "B" as the trustee in its uncontrolled discretion should deem necessary and advisable, but payments of principal from subdivision "B" could not be made to him so long as there remained in his possession any part of subdivision "A." The declaration of trust contained provisions for the distribution of subdivision "B" to Sheldon C. Wheeler and to the brothers and sisters of John L. Wheeler upon the latter's death, which it is not necessary to notice specifically. The controversy here is concerned only with the propriety of the withdrawal by John L. Wheeler of a portion of the trust estate following the death of Louise A. Wheeler.

In March, 1931, pursuant to a written request of John L. Wheeler, the trustee transferred to him the northeasterly one-half of the 40-acre orange grove, the ranch equipment, household goods, jewelry and other personal property, the entire residence property subject to the \$4,000 mortgage, one-half of the shares in the trust, and three of the insurance policies. John L. Wheeler also withdrew money on deposit amounting to about \$2,000. He paid to the trustee the sum of \$100 for the balance of the equity in the residence property. The mortgage on the 40-acre grove was adjusted by the payment thereon by John L. Wheeler of the sum of \$5,000, and by a separate renewal of one-half of the remaining indebtedness of \$45,000 against each 20 acres of the ranch property. The trustor failed to pay the insurance premiums on two of the insurance policies remaining in the trust, which thereupon lapsed. At the time of the trial he reconveyed to the trust a one-half interest in the farm equipment and machinery.

The trial court declared the rights of the parties and the powers and duties of the trustee, as to which no controversy is presented on this appeal. It found that a division of the estate at the time requested and a withdrawal of one part thereof was authorized by the trust provisions, but that the division made was not equal; that the part withdrawn by John L. Wheeler exceeded in value the part remaining by the sum of \$15,786. After allowing certain credits on account of sums advanced by John L. Wheeler for the benefit of the

trust, it adjudged that equality would be attained by the payment into the trust, or upon the mortgage on the real property remaining in the trust, of the sum of \$5,000. It therefore ordered that the defendant reimburse the trust estate and the trustee in the sum of \$5,000. The judgment was made a lien upon all of the property transferred and withdrawn by John L. Wheeler from the trust estate, subject to the existing encumbrances thereon. The judgment contained the provision that the trustee should be under no obligation to cause execution to issue against any property of John L. Wheeler so long as the orchard property was owned by him without an increase otherwise in the encumbrances upon it. It also provided that John L. Wheeler should be relieved of the lien against his property upon the payment by him of \$5,000 on the principal of the indebtedness against the orchard property remaining in the trust. The court decreed that the transfers of property withdrawn from the trust by John L. Wheeler were not void and that the plaintiff was not entitled to judgment setting aside any of said transfers. It accordingly expressly ratified and confirmed such transfers.

The defendant San Joaquin Fruit & Investment Company, which held the note and mortgage on the orchard property, filed a cross-complaint seeking a foreclosure of the mortgage indebtedness amounting to \$22,500 against the orchard property remaining in the trust. Judgment of foreclosure was rendered by the court.

The court ordered that each party pay his own costs, except as specially otherwise provided by the judgment of foreclosure.

[1,2] The plaintiff's contention is that the trial court erred in refusing to set aside and cancel the transfers to John L. Wheeler and restore the property to the trust estate. The plaintiff seems to have assumed that the court's findings and conclusions are to the effect that the transfers were wrongful and in violation of the terms of the trust. He therefore places reliance on cases wherein property has been converted by the trustee, or some other wrongful disposition thereof has been made in contravention of the trust. But we are satisfied that the plaintiff has misconceived the result of the trial court's action. Contrary to the plaintiff's assump-

tion, the court found that the transfers were not void but were authorized, and that the division of the property was merely unequal. It provided for equality by a judgment that \$5,000 be placed in the trust estate by the surviving trustor, and otherwise ratified and confirmed the transfers. The plaintiff is not here in a position to urge that with the \$5,000 additional placed in the trust the division would still be unequal in so far as value is concerned. He must rest his contentions on the argument that as a matter of law the findings require a judgment of cancellation. However, the provisions of the trust agreement support the court's conclusion that the transfers were authorized and nothing appears on the record which indicates any abuse in the exercise by the court of its equity powers to equalize the division of property. The foregoing also answers the contention that the court should have ordered a money judgment as well against the trustee. We find no basis in the record for any assumption that the trustee acted wrongfully or that any obligation rested upon it to restore anything to the trust corpus.

[3] Relying on *Estate of Spreckels*, 162 Cal. 559, 123 P. 371, the plaintiff urges that the trustors intended to create a tenancy in common between John L. Wheeler and the other beneficiaries of the trust and did not provide for a physical division of the property. That result in the *Spreckels* Case was reached because of a permissible interpretation of the will which, when given effect, would carry out the testator's intent and avoid intestacy. In the present case such an interpretation is diametrically opposed to the specific provisions of the trust declaration and the obvious purpose of the trustors.

[4] Likewise nothing appears to cast any doubt upon the propriety of the trial court's approval of the equal apportionment of the balance of the mortgage indebtedness between the part of the orchard property withdrawn from the trust and the portion remaining therein. If there was an inequality in that division, the apportionment, so far as the record shows, has been equalized by the judgment of the court.

[5] The plaintiff also urges that he should have been allowed his costs. He takes the view that having recovered a "money judgment" he has obtained partial relief, and that his costs should follow as

a matter of right pursuant to the provisions of subdivision (a) of section 1032 of the Code of Civil Procedure (as added by St.1933, p. 1901). But again the plaintiff has misconceived the relief accorded to him. The provision for payment of \$5,000 into the trust corpus by the defendant Wheeler is not a money judgment in favor of the plaintiff in the sense in which that term is used to denote the recovery of money as damages or as a debt due. The recovery by the plaintiff was confined to strictly equitable relief, being the specific enforcement of the provisions of the trust by a judgment to return property, although in the converted form as to at least a portion thereof, to the trust estate to equalize the division of the property which was authorized by the trust agreement. So far as appears the result is the same as though the court had ordered the return of all property and a new and equal division in kind. There was therefore no error in the exercise of discretion to withhold or apportion the costs permitted by subdivision (c) of section 1032 of the Code of Civil Procedure (as added by St.1933, p. 1901). *Carter v. Chotiner*, 210 Cal. 288, 292, 291 P. 577.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.



23 Cal.App.2d 528

FISHER v. SUPERIOR COURT IN AND FOR VENTURA COUNTY.

Civ. 2137.

District Court of Appeal, Fourth District,
California.

Nov. 18, 1937.

1. Courts ⇐198

The superior court's probate jurisdiction is separate and distinct from its jurisdiction in civil action or equity, and differs therefrom in that it is essentially under Legislature's control.

2. Wills ⇐260

The Probate Code section authorizing contest of will within six months after its admission to probate by filing petition to re-

voke probate in court wherein will was proved is both statute conferring jurisdiction and statute of repose (Probate Code, § 380).

3. Wills ⇨260

The jurisdiction of superior court, sitting in probate, to entertain petition contesting will after its admission to probate, depends on filing of petition within statutory time, in which case a citation thereafter issued may be sufficient (Probate Code, §§ 380, 381).

4. Wills ⇨355

The statute requiring that petition to revoke probate of will be filed in court wherein will was proved requires that it be filed in same jurisdiction of such court or, in other words, that it reach superior court sitting as probate court exercising probate jurisdiction (Probate Code, § 380).

To "revoke" means to repeal, annul, withdraw, and rescind, and carries idea of cancellation by same power which originally acted, not setting aside of original order by another form of power or jurisdiction.

[Ed. Note.—For other definitions of "Revoke; Revocation," see Words & Phrases.]

5. Wills ⇨260

The superior court's transfer of action in equity to contest will to probate proceeding over six months after entry of order admitting will to probate could not have retroactive effect (Probate Code, § 380).

6. Action ⇨20

The one form of action in California relates to legal and equitable actions only and has no bearing on probate proceedings.

7. Wills ⇨222, 260

The filing of separate action, distinct from probate proceeding, to contest will, though within six months allowed by statute after probate of will and in same superior court, is not sufficient compliance with statutory requirements, and transfer or consolidation of such contest to or with probate proceeding after lapse of statutory time is ineffectual, so that such court is without jurisdiction to entertain further proceedings in matter (Probate Code, §§ 380, 381; Code Civ.Proc. § 22, as amended by St. 1933, p. 1805, § 2).

8. Prohibition ⇨3(1)

The question of existence of plain, speedy, and adequate remedy at law, bar-

ring issuance of permanent writ of prohibition, depends on circumstances of particular case and rests to some extent in court's discretion.

9. Prohibition ⇨3(5)

A permanent writ of prohibition, restraining superior court from proceeding further in will contest action, transferred to or consolidated with probate proceeding over six months after entry of order admitting will to probate, may properly issue as against contention that petitioner has plain, speedy, and adequate remedy at law by appeal.

Proceeding by Willa Meyer Fisher for a writ of prohibition to the Superior Court of the State of California in and for Ventura County.

Peremptory writ granted.

Sheridan, Orr & Bates, of Ventura, for petitioner.

Eli F. Bush, of Los Angeles, and John H. Miller, of San Francisco, for respondent.

BARNARD, Presiding Justice.

This is an application for a writ of prohibition restraining the respondent court from taking any further steps or proceedings in connection with or based upon a certain complaint filed in that court by one Ruth Vance.

The will of J. Valentine Fisher, deceased, was admitted to probate in the respondent court, sitting as a court of probate, on February 8, 1937. That proceeding was numbered 20109 on the register kept by the clerk. On August 5, 1937, a complaint was filed in the respondent court which was entered as a separate action or proceeding and given the number 20585. This complaint is entitled: "Ruth Vance, Plaintiff, vs. John Messer, as Executor of the Last Will and Testament of J. Valentine Fisher, deceased, and Willa Meyer Fisher, Defendants." It is headed "Complaint Contesting Will after Probate." The complaint starts out: "The above named plaintiff complains of the above-named defendants and alleges." Paragraph I alleges the death of J. Valentine Fisher and that the plaintiff is his only heir at law. Paragraph II alleges the filing of a purported last will with a petition for the probate thereof, a hearing on this petition, the admission of the will to probate on February 8,

1937, the issuance of letters testamentary to the defendant John Messer, and his qualification as such executor. Paragraph III alleges that Willa Meyer Fisher was named in the will as sole legatee and devisee. In paragraph IV it is alleged that said writing is not the last will and testament of J. Valentine Fisher; that he was not of sound mind at the date of its execution; and that the defendant Willa Meyer Fisher induced the said J. Valentine Fisher to execute said pretended will by falsely and fraudulently representing that she would enter into a valid and lasting marriage with him, knowing that he was incompetent to make a valid disposition of his property by will or otherwise, and that he was mentally incapable of entering into a lasting marriage contract. The prayer is: "That said pretended last will and testament of the said J. Valentine Fisher and the probate thereof be set aside and for such other and further different relief as to the Court may seem meet and proper." A summons was issued on the same day, naming the same parties as plaintiff and defendants, numbered 20585, and headed: "Action brought in the Superior Court of the State of California, County of Ventura." In the body of the summons appears the usual statement notifying the defendants that they are required to appear "in an action" brought in the Superior Court of Ventura County and to "answer the complaint" within 10 days if served within the county or within 30 days if served elsewhere, and that if they fail to appear and answer the plaintiff will take judgment for any money or damages demanded in the complaint or will apply to the court for any other relief therein demanded.

On August 30, 1937, this petitioner appeared specially and moved the court to strike the complaint and dismiss the action filed on August 5 upon the grounds that the court had no jurisdiction to grant the relief prayed for and that the rights of the plaintiff in that action, if any, were limited and governed by the provisions of the Probate Code relating to contests after probate. At the same time a motion was presented by Ruth Vance, the plaintiff in that action, for the issuance of a citation. The court denied the motion to strike the complaint and dismiss that action and then ordered as follows: "That defendants be, and hereby are given thirty days within which to appear, and answer said complaint, or otherwise plead; that the above entitled

cause be, and hereby is ordered consolidated with and included in that certain matter on file in this Superior Court, entitled Matter of the Estate of J. Valentine Fisher, Deceased, No. 20,109, and that citation issue as prayed." Thereafter, the present proceeding was initiated and an alternative writ was issued by the Supreme Court which has been made returnable here.

The petitioner contends that a petition to probate a will is the beginning of a special proceeding; that a contest after probate is a part of that proceeding and is neither a new and distinct proceeding nor an action as defined by the Code of Civil Procedure (section 22, as amended by St. 1933, p. 1805, § 2); that such a contest has its origin in the original probate proceeding and is authorized only by the statutory provisions governing probate proceedings; that a contestant has such rights and only such rights as are given him by the statutes governing these proceedings; and that, in the instant case, the statutory procedure was not followed but instead thereof an independent action in equity was filed. On behalf of the respondent it is argued that the insertion of the word "complaint" before the words "contesting will after probate" and the omission of "In the Matter of the Estate of J. Valentine Fisher, Deceased," may have misled the clerk into giving the matter a new number instead of filing it as a part of the probate proceeding; that the words thus inserted and omitted are no part of the pleading; that since it has been held that we have but one form of action in this state the pleading filed was in fact a petition to contest the will after probate; and that it follows that the statute was complied with and the court had jurisdiction to proceed.

Section 380 of the Probate Code provides that any person, with certain exceptions not material here, may at any time within 6 months after the admission of a will to probate contest the same or the validity of the will. It then provides: "For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate be revoked." Section 381 provides for the issuance of a citation directed to the executor and all devisees, legatees, and heirs, directing them to plead to the contest within 30 days. Section 384 provides that if no person contests within the time specified the probate of the will is conclusive,

with a saving clause in favor of infants and persons of unsound mind.

[1-3] In this state probate jurisdiction is vested in the superior court, but this probate jurisdiction is separate and distinct from the jurisdiction of this court in a civil action or in equity, and differs from them in that it is essentially a jurisdiction under the control of the Legislature. In *re Estate of Davis*, 136 Cal. 590, 69 P. 412, 414. In *Re Estate of Whiting*, 110 Cal.App. 399, 294 P. 502, 503, it is said: "The right to contest a will after probate is purely statutory; no such right existed under the common law. 40 Cyc., p. 1240. Therefore a contest after probate is limited to the rights given by the statute as to time, grounds, and persons, and the Legislature may repeal or amend the statute at any time." Section 380 of the Probate Code is both a statute conferring jurisdiction and a statute of repose. *Scott v. Superior Court*, 125 Cal. App. 513, 14 P.2d 99. The jurisdiction of a superior court, sitting in probate, to entertain a petition contesting a will after its admission to probate, depends upon the filing of such a petition within the time allowed, and if filed within that time a citation thereafter issued may be sufficient. *Los Angeles First Nat., etc., Bank v. Superior Court*, 94 Cal.App. 79, 270 P. 710; In *re Estate of Logan*, 171 Cal. 357, 153 P. 388.

While the point here raised seems never to have been decided in this state, the converse of the proposition now presented was discussed in *Re Estate of Davis*, supra, where it was contended that a petition to revoke, filed in a probate proceeding but after the statutory time had elapsed, should be treated as an action in equity to establish a trust under the decree of distribution. In discussing this contention the court said: "Now the metamorphose sought to be made by counsel in the character of this pleading is very great. To change the proceeding to revoke the probate of a will into a bill in equity to establish a trust in property under a decree of distribution is a very wide departure from the relief originally contemplated. Even under the liberal rules of code pleading allowed in this state, it would be an innovation almost startling to hold that such a change could take place. It may be said that at the present time in this state there is no probate court, in the sense that the term has been used in the earlier volumes of the California Reports. Under the fundamental law there is a probate jurisdiction vested in the superior court. It may

be said that the probate court is gone, but that the probate jurisdiction remains. And that jurisdiction is now vested in the same court that exercises jurisdiction in cases of law and equity. Yet the probate jurisdiction of the superior court is different from its law and equity jurisdiction, in this: it is essentially a jurisdiction under the control of the state legislature. That lawmaking power may enlarge it or may restrict it. The character and extent of the jurisdiction is not only a matter under legislative control alone, but the procedure by which that jurisdiction may be invoked, and rights thereunder adjudicated, is expressly laid down by statute; and that procedure must be followed, or relief under that jurisdiction cannot be secured. While the superior court in this state exercises both equity and probate jurisdiction, still the procedure to be followed in seeking relief within those two jurisdictions is widely varied. And if the probate procedure laid down by the Code is followed, then only relief under probate jurisdiction can be granted. In such a case general equity relief cannot be secured."

It seems clear that in attempting to file a contest here no effort was made to follow the procedure outlined in sections 380 and 381 of the Probate Code, and it seems equally clear that the original intent was to proceed by a separate action. The pleading filed was not only denominated a complaint but was in the form of the ordinary complaint in an equitable action. It made no mention of the name or number of the pending probate proceeding, it was separately filed under a different number, and both in form and substance it was to all intents and purposes a separate action. Presumably a separate filing fee was paid and a regular summons was taken out requiring an appearance in 10 days instead of the 30 days allowed in the controlling statute. There the matter rested until the statutory time for filing a contest had expired. Thereafter, and after a motion to dismiss had been presented through a special appearance, the plaintiff in that action moved for the issuance of a citation. If the complaint as filed be considered as a petition to revoke the probate of this will, and if the court then had jurisdiction to hear such a contest in the probate proceeding, perhaps a citation could then be issued although the 6-month period had elapsed. The controlling question, however, is whether the filing of the complaint in this manner and, in effect, its transfer to the probate proceeding or what

may be referred to as the probate department, after the 6-month period had expired, would constitute a sufficient compliance with the statute and support the issuance of a citation.

[4, 5] The statute requires not only that the petition must be filed in the court in which the will was proved but that the prayer must be "that the probate be revoked." To revoke means to repeal, annul, withdraw, and rescind. It carries the idea of cancellation by the same power which originally acted, and not the setting aside of an original order by another form of power or jurisdiction. From its wording and from the context the only reasonable interpretation of section 380 of the Probate Code seems to be that it was intended to provide a means by which a contestant might present a request for its revocation to the same jurisdiction which had admitted a will to probate. Not only in form but in substance the complaint with which we are here concerned is not a petition to a superior court, in the exercise of its probate jurisdiction, to revoke or withdraw something which it has done in that capacity, but is an appeal to another jurisdiction of that court to undo what was done in a probate proceeding. Aside from the question of form, such a petition to revoke must reach or be brought within the probate jurisdiction of the court before it can become effective for any purpose. We think that the provision that a petition must be filed in the same court means that it must be filed in the same jurisdiction of the court which made the order which is objected to, in other words, the petition must in some manner reach the superior court sitting as a court of probate and exercising probate jurisdiction. While this petition was filed in the same superior court, it was not brought within the probate jurisdiction of that court within 6 months of the admission of the will to probate. Assuming, without holding, that the superior court, sitting as a court of equity, could have transferred the matter within the statutory time, the transfer actually made here could not have a retroactive effect. If it may be considered that a transfer was here made, through the order of consolidation, the matter first reached and came under the probate jurisdiction of this court at a time more than 6 months after the order admitting the will to probate had been entered

and after that order had become final. The very fact that some form of transfer was necessary when the motions were heard on August 30, 1937, clearly indicates that the matter was then pending in the wrong jurisdiction and rather conclusively shows that the statute had not then been complied with.

[6, 7] Under our Codes probate proceedings are entirely separate and distinct from actions either at law or in equity. The fact that we have had one form of action in this state relates to legal and equitable actions but has no bearing on probate proceedings. Although one court has jurisdiction over all these matters, an entirely different procedure has been provided by statute for bringing a matter within its probate jurisdiction. A part thereof affords ample opportunity for the initiation of a contest after the probate of a will, and no good reason appears for changing or extending that statutory procedure through judicial interpretation. We conclude that the filing of a separate action, even though it be within the 6-month period and in the same superior court, is not in itself a sufficient compliance with the statutory requirements for filing a contest after probate of a will, and that after the statutory time has elapsed the transfer or consolidation of a contest filed in that manner is ineffectual. It follows that the respondent court is without jurisdiction to entertain further proceedings in this matter.

[8, 9] It is further urged, in behalf of respondent, that a permanent writ should not issue in this instance because it does not appear that the petitioner would not have a plain, speedy, and adequate remedy through an appeal. The question whether or not a plain, speedy, and adequate remedy at law exists depends upon the circumstances of the particular case and to some extent rests in the discretion of the court. Under the views above expressed this contest should not be permitted to drag through a trial and an appeal, and a writ may properly issue. *Consolidated, etc., Co. v. Superior Court*, 189 Cal. 92, 207 P. 552; *Fletcher v. Superior Court*, 79 Cal.App. 468, 250 P. 195.

The peremptory writ will issue as prayed for.

We concur: MARKS, J.; JENNINGS, J.

23 Cal.App.2d 743

**MESSER v. SUPERIOR COURT IN AND
FOR VENTURA COUNTY.**

Civ. 2138.

District Court of Appeal, Fourth District,
California.

Nov. 18, 1937.

Prohibition ⇨28

The court of appeal having held on application for writ of prohibition, restraining superior court from proceeding further in action to contest will, that latter court's transfer of action to its probate jurisdiction after statutory time for contest, conferred no jurisdiction on it to proceed with matter, need not consider whether consolidation of action with probate proceeding to accomplish transfer was particularly authorized by law.

Proceeding by John Messer, as executor of the last will and testament of J. Valentine Fisher, deceased, for a writ of prohibition to the Superior Court of the State of California in and for Ventura County.

Peremptory writ granted.

Mark H. Edwards, of Santa Paula, for petitioner.

Eli F. Bush, of Los Angeles, and John H. Miller, of San Francisco, for respondent.

BARNARD, Presiding Justice.

The facts which are material here are identical, or similar in all respects, with and to those involved in *Fisher v. Superior Court* (Cal.App.) 73 P.2d 892, this day decided. The petitioner here raises the additional point that the order consolidating the civil action with the probate proceeding was unauthorized and not founded on law. If we are correct in the conclusion announced in the other case, that a transfer of the civil action to the probate jurisdiction of the same court after the statutory time for starting a contest had expired would confer no jurisdiction to proceed with the matter, it is unnecessary to consider whether or not the consolidation, through which the transfer was sought to be accomplished, was particularly authorized by law. For the reasons given in the case referred to and on the authority thereof, the petitioner herein is entitled to a writ.

The peremptory writ will issue as prayed for.

We concur: MARKS, J.; JENNINGS, J.



23 Cal.App.2d 597

In re PETERKIN'S ESTATE.

PETERKIN et al. v. EDWARDS et al.

Civ. 2129.

District Court of Appeal, Fourth District,
California.

Nov. 24, 1937.

Hearing Denied by Supreme Court
Jan. 20, 1938.

1. Appeal and error ⇨927(3)

The question on appeal from judgment entered after granting motion for nonsuit at conclusion of will contestants' evidence is whether there was any substantial evidence supporting judgment in their favor when viewed in light most favorable to them.

2. Wills ⇨50

A testator is of sound and disposing mind and memory if he has sufficient mental capacity at time of making will to understand nature of his act, understand and recall nature and situation of his property, and remember and understand his relations to persons having claims on his bounty and interests affected by provisions of will.

3. Wills ⇨50

A testator of sufficiently sound mind to be capable of understanding nature and situation of his property and disposing thereof intelligently, without any delusions affecting his action, has sufficient capacity to make will, though feeble in health, suffering from disease, aged, and infirm.

4. Wills ⇨53(2)

Testator's actual mental condition at time of executing will is question to be determined in contest thereof on ground that he was of unsound mind, and evidence of his mental condition before or after execution thereof is important only so far as it tends to show his mental condition at such time.

5. Wills ⇨52(1)

The presumption always is that person is sane, and burden is always on will con-

testant to show affirmatively by preponderance of evidence that testator was of unsound mind at time of executing will.

6. Evidence ⇨67(3)

Insanity exists as matter of law only from time it is shown to exist, and proof of subsequent insanity will not create nor carry presumption of its past existence.

7. Wills ⇨31

Not every mental departure from normal will destroy testamentary disposition of testator's estate; rule being, not that no insane person may make valid will, but that will of person incapable of making valid testamentary disposition of his estate because of insanity shall not be upheld.

8. Wills ⇨31

Mental derangement, sufficient to invalidate will, must be insanity of such broad character as to establish mental incompetency generally or some specific and narrower form of insanity, under which testator is victim of hallucinations or delusions bearing directly on and influencing creation and terms of will.

9. Wills ⇨55(1)

Evidence in will contest *held* insufficient to show testator's general mental incompetency or lack of sufficient mental capacity to understand what he was doing and to understand and recall nature and situation of his property and his relations to persons having natural claims on his bounty when will was made.

10. Wills ⇨55(3)

Evidence in will contest *held* insufficient to support finding that will, which disinherited testator's children, was result of delusions on his part that they were persecuting him and attempting to take his property from him.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

In the matter of the estate of William H. Peterkin, deceased. From a judgment entered after granting a motion by N. T. Edwards and another, as executors of the estate, and others for a nonsuit at the conclusion of evidence introduced by W. D. Peterkin and others in support of their petition to revoke the probate of deceased's will, petitioners appeal.

Affirmed.

Charles D. Swanner and R. Y. Williams, both of Santa Ana, for appellants.

Head, Wellington & Jacobs, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

William H. Peterkin died on November 15, 1935, at the age of seventy-eight years, leaving an estate of the value of about \$30,000. In 1929 he and his wife separated after a marriage which had lasted more than fifty years and, in 1930, they were divorced. At that time the property which they had accumulated, then worth more than \$100,000, was about equally divided between them. Under his will, dated May 12, 1931, with an holographic codicil dated September 23, 1933, he left his property to a sister, a cousin, seven nephews, five nieces, and four children of nephews and nieces. The will and codicil were admitted to probate on December 6, 1935. A petition to revoke the probate of said will was filed by the three sons and three daughters of the deceased upon the ground that on May 12, 1931, and for at least a year before and at all times subsequent thereto he was of unsound mind and incompetent to make a will, and upon the further ground that throughout said time he was in declining health and in an enfeebled mental condition; that he was suffering from delusions that his said children did not care for him, that they wanted him to die in order to get his property, that they were conspiring to make his home life unhappy, and that they were unfairly siding with their mother in the domestic differences which had arisen; that said delusions grew until they became a monomania which existed at the time of the signing of said will and codicil and up to the time of his death; and that said delusions were the controlling mental factors governing the making of said will and codicil.

[1] This contest came on for hearing before a jury, and the contestants have appealed from a judgment entered after a motion for nonsuit was granted at the conclusion of their evidence. Under familiar rules the question presented is whether, viewed in the light most favorable to appellants, there was any substantial evidence which would have supported a judgment in their favor.

All of the appellants testified that they considered that he was of unsound mind on May 12, 1931, and September 23, 1933,

and gave their reasons therefor. One son testified that in 1899 or 1900, when he was four or five years old, the decedent horsewhipped him and then horsewhipped his mother when she came to his aid; that a year or two later he horsewhipped him and his sister; and that when he was about thirteen years old his father struck him and knocked him down and when his mother interfered struck her with his fist. He told of several acts of cruelty on the part of the decedent toward his horses which occurred about the same time; that in 1917 he went to France and his father never wrote to him while he was away; that in 1924 he was in a hospital with a broken leg and his father did not go near him; and that the decedent frequently cursed his mother and threw things at her. He further testified that after his father and mother separated he never went to his father's house, had nothing to do with him, had no conversations with him, and knew nothing of his business dealings or transactions after 1930. Another son related a series of acts commencing as early as 1900, consisting of horsewhipping his children, fits of rage during which he would whip his wife and children, brutality with his horses, and threatening the witness with a gun. He also testified that his father signed a note for \$1,000 for him and another for \$2,000 for his son, which the father paid in 1930 or 1931; that prior to the divorce he told his father that he would have to side with his mother; that from that time he never had any conversations with him; that his father transacted his own business and accumulated considerable wealth; that he was a hard worker, took good care of his groves, and accumulated something over \$100,000 between 1904 and 1929; that he did not consider that his father used bad judgment in a business way; and that at the time of the divorce a proposition was submitted by which the property was divided and his mother was offered a choice as to which she would take. The wife of this witness testified that the decedent attempted to caress her in the year 1916, that she had seen him in numerous rages when he would curse his wife and children, and that on one occasion he threatened her husband with a gun. Another son told of his father's horsewhipping his children, of his brutality in striking horses, of his threatening to put dynamite in a wagon in which the witness was living, of his padlocking a

gate, a storehouse and garage, and of his drawing a gun on one of his sons. He also testified that he visited his father after the divorce and up to the time he died; that on some of these occasions his father was normal and they "got along fine" and at other times, after a few words, his father would go off on one of his rages; that many times they visited together and his father was perfectly normal; that his father took good care of his orange groves and carried on his business transactions; that on his visits they would have a general conversation, talk about something from a newspaper or "whatever it was"; that during all of these conversations his father knew who he was, knew what his own properties were and who his children were; and that ever since he was a child he had thought "more or less" that his father was of unsound mind.

A daughter of the decedent testified to a course of conduct over a long period of years, including horsewhipping his wife and children, an undue familiarity with the witness prior to 1904 when she was ten or eleven years of age, a jerking of his head which had become prominent as early as 1927, and that his fits of rage continued up to the time of his death. She also testified that in domestic arguments which arose she took sides with her mother; that he took good care of his ranches; that he transacted his business right along from as early as she could remember; that he nearly always had advice from a lawyer or from a banker; that she never visited him after he separated from her mother; and that the last time she spoke to him was in 1929. Another daughter testified that she left home in 1915 when she was married; that on several occasions a number of years before that her father improperly placed his hands upon her; that he would do the same thing with other girls who came to the house; that in 1911 he threw his wife to the floor when she wanted to go to her mother's funeral; that in 1913 when her mother was sick he accused her of not being sick; that she based her opinion that her father was of unsound mind entirely upon these things which had occurred before she left home; and that she did not visit him very much after she left home because she never felt like being around him. Another daughter related a series of events beginning as early as 1902 consisting of horsewhipping his children, fits of rage when he would curse his wife

and children, brutality to his horses, throwing dishes at the witness, and accusing his children of giving away his things and "bleeding him of all his money." She testified that she never had a conversation with him after her parents separated.

Of the witnesses who were not members of the family one testified that she had known the decedent since 1929, often invited him to dinner, and saw him frequently until the day of his death. She gave as her reasons for thinking he was of unsound mind that he used to shake his head and mumble to himself a great deal; that he told her he was going to commit suicide; that he would neglect his orchard and spend his time picking berries; that he always talked about girls; that he told her at one time that he loved no woman except his wife and at another time that he hated his wife and wanted to get rid of her; that he carried pictures of two girls in a nudist colony; and that he told her he liked to go to the beach and watch the girls in bathing. She also testified that she asked and accepted his advice about her orange trees, that he talked intelligently about business, and that during their frequent visits, aside from the matters above related, he talked intelligently to her. Another witness testified that, with the exception of two years, he purchased the decedent's orange crop each year from 1921 until the date of his death; that he formed the opinion that the decedent was of unsound mind in 1924 or 1925; that he continued to do business with him; that the decedent knew what he was doing and the price he was obtaining for oranges; that decedent would attend to a berry patch and neglect his oranges; that on occasions he could not remember the number of boxes of fruit taken from his orchard and the witness would have to correct him; that decedent would mutter to himself; that in 1924 or 1925, when asked about his son who had been injured, he replied that he did not care whether his son died or not; that he would object to fruit contracts but would accept them when rewritten practically the same way; that he was a hard man to deal with; and that he was always talking about women and sex. Another witness testified that he had known the decedent about eleven years; that he had transacted business with him during the last three years of his life, during which he saw him nearly every day; that the decedent was very erratic but that

he could not say he had formed any opinion as to whether he was of sound or unsound mind.

Three doctors testified. One said he treated the decedent beginning in July, 1931, when he fell and fractured his pelvic bone, that for several weeks he was in the hospital and the witness saw him nearly every day. He expressed the opinion that the decedent was not "of good sane reliable mind" at that time and that he had senile dementia and delusions of persecution from members of his family and friends. On cross-examination he stated that he was not told of the difficulty decedent had had with his family in 1930, and when asked if he based his opinion that decedent was of unsound mind "on the proposition that he refused to see his son, William Peterkin, and made the statement that he would be damned if he would allow any of them to come into his room, and his refusal to cooperate such as you believed that he should do under the conditions, and his impatience under restraint," he replied: "Yes, I think that expresses it as near as one can." When asked whether the decedent knew what he was doing and what was going on while he was in the hospital, he answered: "Very much." Another doctor testified that he treated the wife of the decedent between 1928 and 1930; that he talked to decedent in April, 1930, and again in June, 1930; that in his opinion the decedent was a victim of senile dementia; that his reasons for this belief were the attitude of the decedent and the results of conversations with him concerning his wife; that senile dementia is a relative term and a person may be of unsound mind on some subjects and be shrewd on other subjects; that he inferred from his conversations with the decedent that he had the idea that his family were intent on stripping him of his resources; that the decedent told him that his wife's illness was entirely in her own mind and that it was unnecessary for her to incur the expense of hospital care; and that the decedent told him that his children were in cahoots with the mother and sympathized with her and if he didn't watch his step "they would ruin him for all he had." Another doctor, who had never seen the decedent, testified, in answer to a hypothetical question enumerating many of the acts and conduct of the decedent over a period of years, that in his opinion such a man was suffering from

progressive senile dementia with maniacal outbursts of anger, with gradual evidence of a depressed mental attitude; that such a person has hardening of the arteries which terminates in senile dementia; that such a person is bound to have an erratic and unstable mind and is apt to form opinions that certain persons hate them or that they hate certain persons over imaginary offenses; that such persons are inclined to have unnatural ideas of love; and that senile dementia is not a type of insanity that comes overnight any more than old age comes overnight. On cross-examination he testified that his opinion as given was a medical opinion and that he would naturally be in a better position to express an opinion regarding a person's senility if he was able to discuss with that person business and other transactions. He was then given certain facts corresponding to the actions of the decedent after 1929, covering such matters as the way he had carried on his business transactions, and asked whether he considered these an indication of an advanced stage of senile dementia. He replied that he would say these acts did not indicate an advanced stage, that such a man might have mental streaks in which he was very calm and might have a greatly distorted mind, that these additional facts would not indicate senile dementia and then said: "Senile dementia must not be confused with insanity. * * * It is a progressive evidence of mental failure and those acts I couldn't possibly describe as that."

The appellants argue that this evidence, with the fact that the will was unnatural in that it disinherited his children, was sufficient to establish that the testator was suffering from senile dementia, a progressive mental disease, and that he was suffering from delusions that his children were persecuting him or attempting to take his property from him, and that he would not have made the will except for these delusions.

[2] "The law is well settled in this state that a testator is of sound and disposing mind and memory, if, at the time of making his will he has sufficient mental capacity to be able to understand the nature of the act he is doing, and to understand and recall the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty, and whose interests are affected by the provisions of

the instrument.'" Estate of Bemmerly, 110 Cal.App. 550, 294 P. 33, 37.

[3] "It must be borne in mind that it is not every weakness and impairment of the faculties of the testator that will invalidate a will. Even where a testator is feeble in health, suffering under disease and aged and infirm, yet if he was of sufficiently sound mind to be capable of understanding the nature and situation of his property, and of disposing thereof intelligently, without any delusions affecting his action, he had sufficient capacity to make a will." Estate of Casarotti, 184 Cal. 73, 192 P. 1085, 1087.

[4-8] The general principles applicable here are thus set forth in Estate of Perkins, 195 Cal. 699, 235 P. 45, 46:

"It is well settled that, upon the contest of a will on the ground that the deceased was of unsound mind, the actual mental condition of the testatrix at the time of the execution of the will is the question to be determined. [Citing cases.] Evidence as to mental condition before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will. The presumption is always that a person is sane, and the burden is always upon the contestants of the will to show affirmatively, and by a preponderance of the evidence, that the testatrix was of unsound mind at the time of the execution of the will. [Citing cases.] Insanity exists as a matter of law only from the time it is shown to exist and proof of subsequent insanity will not create nor carry a presumption of its past existence. Estate of Dolbeer, supra, [149 Cal. 227, 86 P. 695, 9 Ann.Cas. 795.]

"Every mental departure from the normal will not destroy a testamentary disposition, otherwise valid, of the testatrix's estate. It is not the rule of law that no person who is insane may make a valid will. The real rule is that the will of a person, who by reason of insanity is incapable of making valid testamentary disposition of his estate, shall not be upheld. Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Wasserman, 170 Cal. 101, 148 P. 931.

"Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the

testator is the victim of some hallucination or delusion. Even in the latter class of cases, it is not sufficient merely to establish that a testator was the victim of some hallucination or delusion. The evidence must establish that the will itself was the creature or product of such hallucination or delusion; that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument. The evidence must establish, in addition to the fact of the existence of the hallucinations or delusions, the fact that by reason of these hallucinations or delusions the testatrix devised or bequeathed her property in a way which, except for the existence of such delusions, she would not have done. In short, the abnormality of mind must have had a direct influence upon the testamentary act."

We are unable to agree with the contention that this was an unnatural will under the circumstances, although no provision was made for the testator's children. Irrespective of whose fault it was, he was not on friendly terms with his children, they had all sided with their mother in the rather recent divorce proceeding, he had turned over to his wife approximately half of his property at that time and it cannot be said that it was an unnatural thing for him to give no more to that part of his family.

[9] While the evidence indicates that the testator possessed many qualities which are not admirable, it is far from sufficient to show general mental incompetency at the time the will was made or that he did not then have sufficient mental capacity to understand what he was doing and to understand and recall the nature and situation of his property and his relations to the persons who had a natural claim on his bounty. His will names his six children and states that he makes no provision for any of them or for his former wife "purposely and for reasons that I consider good and sufficient". He gave varying amounts to eighteen of his other relatives, naming them and naming their relationship to him. Most of the evidence relates to things which occurred long before the time which is in question and is of a character which, while indicative of other things, does not show lack of testamentary capacity. It appears without conflict that he worked hard, cared for his ranch properties and handled his business until a short time before his death and long after the will was made. None of the children visited him after the

parents separated except one son and his evidence in no way indicates that the testator was without testamentary capacity at the time those visits were made. We find no evidence in the record which would have supported a finding of insanity in its general broad sense of mental incompetency.

[10] Nor do we think the evidence would support a finding that this will was the result of delusions on the part of the testator that his children were persecuting him and that they were attempting to take his property from him. The only evidence of delusions is found in the testimony of the doctors. The doctor who had been treating the testator's wife during a period immediately preceding and following the divorce drew the inference from his conversations with the testator that he was laboring under the idea that his family were intent on stripping him of his resources. He had just turned over half of his property to his wife, he knew that the children were siding with her, and he had paid \$3,000 about that time on notes which he had signed for his son and grandson. The doctor who treated him when he broke a bone in July, 1931, expressed the opinion that he then had senile dementia and delusions of persecution on the part of members of his family and friends. In support of his conclusion he stated that the testator refused to have company, refused in particular to have any of his children visit him, and insisted upon being allowed to sit up and otherwise refused to cooperate with the nurse. This was after the will was executed and, whatever else may be said of it, it indicates that he had considerable strength of mind left. The testimony of the other doctor, who replied to hypothetical questions when given facts corresponding to the actions of the testator after 1929, admitted that many of these acts could not be described as indicating an advanced stage of senile dementia. There is little, if any, evidence that he had any delusions about his children at any time. They had taken their mother's part in the domestic difficulty and with one exception had not visited with him or talked with him after that separation. The only inference possible from the evidence is that most, if not all, of the children felt unfriendly toward him and that he entertained a like feeling toward them. No matter whose fault it was, there was a strong factual background to the entire situation and in our opinion there is nothing in the evi-

dence, taken in the light most favorable to the appellants, which would have supported a judgment in their favor based upon a finding, express or implied, that this will and codicil were the result of any such delusions as those relied upon by the appellants. Viewed in its entirety, the evidence fails to show that the testator on the dates in question was without testamentary capacity or that he was suffering from delusions which led to a result which he would not otherwise have intended.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



10 Cal.2d 93

**BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. STANDARD OIL CO.
OF CALIFORNIA et al.**

L. A. 16359.

Supreme Court of California.

Nov. 12, 1937.

1. Execution ☞7

Where judgment in action by trustee for declaratory relief and instructions as to disposition of a trust fund determined as between trustee and one of claimants that such claimant was entitled to a specified percentage of trust fund but did not determine amount of trust fund nor completely fix liability of trustee to claimant, no execution could issue on behalf of claimant for percentage awarded to him under statute (Code Civ.Proc. § 682, as amended by St.1933, p. 1885).

2. Execution ☞7

A final decree in equity must state in plain figures the amount which a party must pay in the way both of debt or damages and costs, as well as every other matter adjudicated, in order to authorize issuance of execution thereon (Code Civ.Proc. § 682, as amended by St.1933, p. 1885).

3. Execution ☞7

When a final decree in equity does not state the amount which a party must pay in the way both of debt or damages and costs and such fact does not appear in the

judgment roll, the defect cannot be supplied by an affidavit submitted ex parte so as to justify the issuance of an execution (Code Civ.Proc. § 682, as amended by St. 1933, p. 1885).

4. Execution ☞7

Where judgment determined that as between trustee and one of claimants to trust fund, such claimant was entitled to a specified percentage of fund, without determining amount of fund or completely fixing liability of trustee to the claimant, defect in judgment in not stating amount of fund could not be supplied by affidavit submitted ex parte by claimant, and hence execution could not be issued (Code Civ.Proc. § 682, as amended by St.1933, p. 1885).

5. Appeal and error ☞479(1)

Where judgment in action by trustee for declaratory relief and instructions as to disposition of trust fund determined that one claimant was entitled to a specified percentage of fund, the trustee was entitled to supersedeas to stay proceedings for the enforcement of judgment pending appeal by unsuccessful claimant, since trustee should not have burden of recovering funds if judgment were reversed or modified.

In Bank.

Original proceeding by the Bank of America National Trust & Savings Association, trustee under a trust indenture executed by Bastanchury Ranch Company, as of the 1st day of July, 1923, for a writ of supersedeas to stay the execution of the judgment, pending appeal therefrom, in an action for declaratory relief and instructions in aid of the administration of a trust and the disposition of funds held thereunder by the Bank of America National Trust & Savings Association against the Standard Oil Company of California, and others.

Writ of supersedeas issued.

Lawler & Felix, of Los Angeles, for appellant Standard Oil Co. of California.

Max Felix, of Los Angeles, for defendant, cross-complainant, and appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and Hugo A. Steinmeyer, both of Los Angeles, for respondent Bank of America Nat. Trust & Savings Ass'n.

Cruickshank, Brooke & Evans, of Pasadena, for plaintiff and respondent.

Andrews & Andrews, Mortimer A. Kline, and Andrews, Blanche & Kline, all of Los

Angeles, for respondents Sunny Hills Ranch, Inc., Alfred R. Thomas and others.

EDMONDS, Justice.

Bank of America National Trust & Savings Association is the respondent on an appeal from a judgment rendered in an action brought by it for declaratory relief and instructions in aid of the administration of a trust and the disposition of funds held thereunder. By the present proceeding it seeks a writ of supersedeas staying the execution of the judgment pending the determination of the appeal.

Petitioner is the successor trustee under a trust indenture executed by Bastanchury Ranch Company to secure an issue of bonds in the principal amount of \$1,500,000. Subsequent to the execution of this instrument, the trustor executed a crop mortgage to Maria O. Bastanchury, which mortgage was assigned to Union Bank & Trust Company of Los Angeles. Later, petitioner entered into an agreement with the trustor and Standard Oil Company of California, wherein the latter company agreed to advance approximately \$87,000 for pest control on property subject to the trust indenture. Less than a month afterward, Consolidated Securities Company commenced an action to foreclose a junior encumbrance on this property. A receiver for the assets of the trustor was appointed in that action and, pursuant to the request of the receiver, the petitioner consented that Consolidated Securities Company might advance the sum of \$50,000 to protect the property. However, the petitioner alleges that it does not know how much money, if any, was advanced by Standard Oil Company of California or Consolidated Securities Company under their respective agreements.

At a subsequent time, petitioner took possession of the property described in the trust indenture and afterward sold and conveyed it to Alfred R. Thomas, Harold D. Spear, and Walter C. Austin, constituting a protective committee formed by the owners of over 90 per cent. of the outstanding bonds secured by the deed of trust, for the sum of \$610,000. The controversy in the action for declaratory relief concerns the right to the proceeds of this sale.

The defendant Standard Oil Company of California on its own behalf and as assignee of Consolidated Securities Company claims the sum of \$44,421.38, with interest, and Maria O. Bastanchury, also a defendant, claims the sum of \$40,846.39 from the mon-

ey now held by the petitioner. Contrary to these contentions the defendant, Sunny Hills Ranch, Inc., as assignee of the bondholders' committee, asserts that the proceeds of the sale of the property should be paid to it for the benefit of the bondholders. The superior court decreed that Standard Oil Company of California should recover from plaintiff \$24.15 and ordered the petitioner to pay 91.7949 per cent. of the remainder of the amount in its possession, after the deduction of this sum and interest thereon and all costs and expenses properly incurred or chargeable by it, to Sunny Hills Ranch, Inc., and the balance to the owners and holders of bonds not deposited under that agreement. The execution now outstanding was procured by Sunny Hills Ranch, Inc., upon this judgment several months after a notice of appeal therefrom was filed by the defendants Standard Oil Company of California and Consolidated Securities Company.

The petitioner contends that in the event it now complies with the judgment of the superior court and disburses the funds in its possession as required therein and this court upon the determination of the appeal should reverse the judgment, it may not be able to recover the fund so paid in order to disburse them pursuant to the further order of this court or the superior court. It alleges that Sunny Hills Ranch, Inc., is engaged in the business of owning and operating citrus properties; that these properties are subject to a first lien securing indebtedness of \$700,000; that it is otherwise indebted; and that its income is uncertain by reason of the variations in the amount of crops harvested and the amounts obtainable therefor. It asserts that it is willing to pay the funds in its possession to the person or persons finally determined to be entitled thereto, and it claims no interest in the funds other than the costs and expenses payable to it under the provisions of the trust indenture.

Two points are made by the petitioner as grounds for its contentions. The first is that the judgment from which the appeal has been taken is not a judgment directing the payment of money, hence the writ of execution was improperly issued. It is also urged that under the circumstances here shown, this court, as a matter of discretion and in the aid of its appellate jurisdiction, should stay execution upon the judgment until the conflicting claims to the fund are finally determined.

[1-4] Neither the findings of fact, conclusions of law, nor the judgment specify the amount of money actually held by the trustee. The judgment directs the plaintiff to pay "all costs and expenses incurred by it in accordance with and payable under the terms and provisions of the aforesaid trust indenture," but there is no determination of their amount. Also, the judgment inferentially suggests that the trustee holds funds other than the proceeds of the sale of the real estate, for it directs the plaintiff to "pay all of the purchase money and the proceeds and avails of the sale held February 17, 1933, under and in pursuance of the provisions of the aforementioned trust indenture now retained by it together with any other amounts which may have been retained by said trustee under the provisions thereof as part of said trust estate or proceeds thereof."

This judgment is not a complete determination of the rights of the trustee and the claimants to the fund. As between the trustee and the ranch company, it is an adjudication that the latter is entitled to a specified percentage of the net proceeds of the trust fund as against the claims of the defendants who have not appealed from it. But it is not a judgment upon which execution may issue. An execution must refer to the judgment, and state, "if it be for money, the amount thereof, and the amount actually due thereon." Section 682, Code Civ.Proc. (as amended by St.1933, p. 1885).

Recognizing the deficiencies in the judgment, but claiming that the petitioner must disburse the funds in its hands notwithstanding the appeal, the ranch company on March 9, 1937, made an ex parte application to the superior court for the issuance of a writ of execution. In support of this application it presented an affidavit alleging that petitioner holds \$47,869.79 after payment of the amount found to be due to Standard Oil Company of California and all costs and expenses of the trustee. The court thereupon made an order "that a writ of execution issue for the enforcement of the judgment made and entered in the above entitled action * * * commanding said Bank of America National Trust and Savings Association to pay to Sunny Hills Ranch, Inc., in pursuance of the aforementioned judgment, the sum of \$43,942.02 from the fund now held by it. * * *" This amount is 91.7949 per cent. of the total sum which, it is stated in the affidavit, is in the possession of the petitioner. Pursuant to this order a

writ of execution was issued reciting that on November 25, 1936, Sunny Hills Ranch, Inc., recovered a judgment against petitioner "for 91.7949 per cent of certain funds" and that "by court order of March 9, 1937, the sum of \$43,942.02 is now due" to the ranch company by the bank from the fund now held by it. This writ was levied upon the petitioner, which alleges that it has not paid the sum demanded to the sheriff and that he threatens to seize the property unless the amount of the execution is forthwith paid.

As between the petitioner and the ranch company, the judgment which is now on appeal is only an adjudication that the owners of the bonds originally secured by the deed of trust, or their successors, are entitled to the trust fund as against other claimants. It does not completely fix the liability of the petitioner to the ranch company. "A final decree in equity must state in plain figures the amount which a party must pay in the way both of debt or damages and costs, as well as every other matter adjudicated." *Johnson's Case*, 242 Mass. 489, 136 N.E. 563, 566. When the amount is not so stated and does not appear in the judgment roll, it cannot be supplied by an affidavit submitted ex parte. The superior court had no authority to order a writ of execution to issue upon the facts stated in the affidavit made on behalf of the ranch company, and its writ should be recalled.

[5] However, even if the judgment were for a stated amount, the situation shown by the petitioner is one which warrants the issuance of the discretionary writ. The trustee should not be required to pay out trust funds pending an appeal and have the burden cast upon it of recovering those funds if the judgment is reversed or modified. While Sunny Hills Ranch, Inc., is apparently now in sound financial condition, there is no such certainty in human affairs that we may say this condition will continue during the remaining period of the litigation. On the other hand, the petitioner is a national bank, and the rights of all parties will be amply protected if the money is held by it pending the final judgment.

It is, therefore, ordered that a writ of supersedeas issue staying all proceedings for the enforcement of the judgment pending a final determination of the appeal.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; NOURSE, Justice pro tem

10 Cal.2d 156

WATSON et al. v. PEYTON.**L. A. 15763.****Supreme Court of California.****Nov. 24, 1937.****Rehearing Denied Dec. 23, 1937.****1. Evidence** *↔* 461(2)

In action to have judgment declared a valid lien against homestead which had been purchased by widow and her deceased husband during his lifetime with community funds and conveyed to them as joint tenants with right of survivorship in accordance with their written request, parol evidence to show that widow did not know that her name was on deed and that she did not intend to alter character of property from its community status to that of a joint tenancy was inadmissible (Civ.Code, §§ 172, 172a; Code Civ.Proc. § 1856).

2. Homestead *↔* 84, 134, 141(1)**Joint tenancy** *↔* 1, 6

Where wife consented to taking of title to realty purchased with community funds as joint tenants with right of survivorship, husband's estate in realty was coupled with right of immediate possession and was his separate "property" from which he could select a homestead without wife's consent, and such estate covered the whole interest in realty, subject to right of survivorship, and on husband's death the entire estate, subject to homestead, vested absolutely in wife and was not thereafter subject to payment of any debt existing against either spouse at husband's death (Civ.Code, §§ 1238, 1239, 1265; Probate Code, § 663).

[Ed. Note.—For other definitions of "Property," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by J. D. Watson and another against Mary Ann Peyton. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Davis & Thorne and Leland S. Davis, all of Los Angeles, for appellants.

Thomas W. Cochran, of Los Angeles, for respondent.

NOURSE, Justice pro tem.

In 1927 this defendant, Mary Ann Peyton, and her husband purchased with community funds a family home, taking title

as joint tenants with right of survivorship. On January 8, 1935, the husband filed a declaration of homestead on the property, in which the wife did not join. On April 22, 1935, the husband died, and the property passed into probate for distribution to the widow. In 1934 these plaintiffs had foreclosed a mortgage on other land of the Peytons and on June 28, 1935, they secured a deficiency judgment against them. A controversy arose as to whether this judgment constituted a valid, subsisting lien against the homesteaded property. The plaintiffs therefore filed the present action for declaratory relief, praying to have their judgment declared a valid lien and the homestead declared invalid. Defendant widow answered alleging that the home was purchased and held as community property, despite the joint tenancy deed, and asking that the homestead be declared valid and free of the lien of plaintiffs' judgment. Upon trial of the action the court permitted the widow to testify that she left all business transactions to her husband, and that she had always believed that they had acquired the home as community property, with community funds; that she knew nothing of taking record title as joint tenants with right of survivorship.

The trial court found that, although the deed described the grantees as joint tenants with right of survivorship, there was no intention on the part of either spouse to alter the character of the property from its community status to that of a joint tenancy and that said property, purchased with community funds, was and continued to remain community; hence the homestead filed by the husband was valid. Judgment followed declaring the homestead valid and free and clear of plaintiffs' lien. Plaintiffs have appealed, arguing two main points.

[1] First question: Was it proper for the court below to admit parol evidence of community ownership to vary the terms of the conveyance to the husband and wife as joint tenants with right of survivorship? Appellants argue that it was improper. Both parties cite *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003, which discusses the point without deciding it. The recent case of *Cummins v. Cummins*, 7 Cal.App.2d 294, 304, 46 P.2d 284, 289, is cited in support of respondent's position. The court there said: "In the presence of such undisputed evidence of both owners [testimony of spouses to vary terms of

deed] there can be no question of their intention to hold the property as community property regardless of the terms of the joint tenancy deed."

It may be assumed from the statements made in both of these cases that the evidence of the intention of the parties was admitted without objection. In neither case was its admissibility for that purpose squarely decided. Section 1856 of the Code of Civil Procedure limits the use of extrinsic evidence when the terms of the contract have been reduced to writing. Here the writing—the joint tenancy deed—was executed to husband and wife in 1927 upon their written request and mutual consent. The pleadings do not put in issue any mistake or imperfection in the writing, nor is the validity of the document in dispute. The purport of the testimony objected to is that the property was purchased from community funds and that the wife did not know that her name was on the deed as one of the grantees. From this testimony it is argued that there was no intention on the part of either spouse to alter the character of the property from its community status to that of a joint tenancy. There is no testimony of the intention of the husband, but this appears clearly upon the face of the writing. The wife having requested in writing the execution of the joint tenancy deed, she cannot defeat her act by testimony of a hidden intention not disclosed to the other party at the time of the execution of the document. *Brant v. California Dairies, Inc.*, 4 Cal.2d 128, 133, 48 P.2d 13. Since the property was purchased with the earnings of the husband, which were community property, and, since the wife gave her written consent to the transfer of this community personal property into a joint tenancy estate in the realty, all the restrictions of sections 172 and 172a of the Civil Code were met, and no evidence of the secret and undisclosed intention of the wife was admissible.

[2] Second question: If the deed could not be varied by parol evidence, and we consider the homestead as one declared by the husband alone on joint tenancy property, then is that homestead valid?

Section 1238, Civil Code, prior to 1929, provided: "the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property." Section 1239 provided: "The

homestead cannot be selected from the separate property of the wife, without her consent, shown by her making or joining in making the declaration of homestead."

In 1929 (St.1929, p. 339), the Legislature added the following sentence to section 1238: "Property, within the meaning of this section, includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such right of possession is not exclusive." Section 1265 of the Civil Code provides: "If the selection was made by a married person from the community property, or from the separate property of the spouse making the selection or joining therein, the land so selected, on the death of either of the spouses, vests in the survivor." Section 663 of the Probate Code provides: "If the homestead * * * was selected * * * from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of either spouse, absolutely in the survivor."

There is language in the *Siberell Case*, supra, indicating that the estate of each spouse in a joint tenancy is the separate property of each, subject to the right of survivorship. Since the respondent herein consented to the creation of such an estate, she must be deemed to have given her husband all the incidents of such ownership. Each having held the freehold title, subject to the right of survivorship, the interest, or estate, of the husband therein, coupled as it was with the right of immediate possession, was property within the meaning of section 1238 of the Civil Code, as amended, from which the husband was entitled to select a homestead. And, since this "property" was the separate property of the husband, the consent of the wife was not necessary.

Prior to the amendment to section 1238 of the Civil Code, where the joint tenants were husband and wife, it was held that the wife alone, or the husband and wife together, could make a valid declaration of homestead upon the property held in joint tenancy. *Swan v. Walden*, 156 Cal. 195, 103 P. 931, 134 Am.St.Rep. 118, 20 Ann.Cas. 194; 13 Cal.Jur., p. 451, 452. A different rule obtains as to joint tenants and tenants in common who are not husband and wife. *Schoonover v. Birnbaum*, 148 Cal. 548, 83 P. 999. The *Swan Case* rested upon the theory that the interest of each spouse in the joint tenancy was

separate property and that the wife had the power to declare a homestead on her husband's interest, though he had no such power over hers. This ruling was supported by numerous authorities. The amendment to section 1238 of the Civil Code followed these cases and declared that the "property" from which a husband could select a homestead was that "estate" which vests in the claimant the immediate right of possession, even though such right of possession is not exclusive. It is such an estate that the husband has in property held in joint tenancy with his wife—a right of possession though not exclusive, but nevertheless a separate estate upon which he may declare a homestead. This estate covers the whole interest in the land, subject to the right of survivorship, and, upon the death of the husband, the entire estate, subject to the homestead, vests absolutely in the survivor, and is not thereafter subject to the payment of any debt existing against either spouse at the time of death. Section 663 of the Probate Code.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.



23 Cal.App.2d 445

SANTA ANA MORTG. & INV. CO. v. ERNEST RURUP ESTATE et al.

Civ. 2115.

District Court of Appeal, Fourth District,
California.

Nov. 15, 1937.

I. Appeal and error Ⓒ609

The filing of a "Clerk's Supplemental Transcript," marked as "prepared by" counsel for appellant, containing a notice of motion to vacate an order denying a motion for new trial and affidavits supporting motion all certified by clerk to be correct copies of the originals, was insufficient to authorize consideration of an appeal from denial of motion in absence of a properly authenticated record, as required by court rule, showing what was before court when motion was denied (Rules for the Supreme

Court and District Courts of Appeal, rule 29).

2. New trial Ⓒ165

A notice of entry of judgment on the reverse side of the memorandum of costs and disbursements was sufficient and precluded the granting of a motion to vacate order denying motion for a new trial on the ground that such notice was not discovered until after motion for new trial was denied for lack of jurisdiction, though it would have been better practice to type the notice on a separate sheet of paper.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Santa Ana Mortgage & Investment Company against the Ernest Rurup Estate, a copartnership or association, and others. Judgment for plaintiff, and defendants appeal from an order denying a motion to vacate and set aside an order denying a motion for new trial. On plaintiff's motion to dismiss the appeal or affirm the judgment.

Motion granted, and appeal dismissed.

Bryce Swartfager, of Santa Rosa, for appellants.

R. Y. Williams and Charles D. Swanner, both of Santa Ana, for respondent.

BARNARD, Presiding Justice.

In this action on a promissory note judgment was entered in favor of the plaintiff on April 30, 1937. A memorandum of costs and notice of entry of judgment were mailed to counsel for the defendants on the same day, and were filed with an affidavit of mailing. On May 10, 1937, the defendants secured and filed an ex parte order purporting to stay proceedings for a period of thirty days. On June 11, 1937, the defendants served and filed a notice of intention to move for a new trial, which was noticed and set for July 2, 1937. On that day the motion was denied on the ground that the court had no jurisdiction to grant the same. On July 15, 1937, the defendants filed a notice of motion to vacate and set aside the order denying the motion for a new trial. This motion was heard and denied on July 23, 1937. On August 20, 1937, the defendants filed a notice of appeal from the order denying the motion to vacate and set aside

the order denying the motion for a new trial.

[1] After the opening brief was filed the respondent filed this motion to dismiss the appeal or to affirm the judgment on the ground that no record had been brought up, by bill of exceptions or otherwise, showing what papers, evidence or affidavits were before the trial court on the hearing of the motion, as required by rule 29 of the rules governing this court, and on the further ground that said appeal is unsubstantial and taken for the purposes of delay only.

A clerk's transcript was filed containing the judgment roll, notice of intention to move for a new trial, minute order denying the same, memorandum of costs and notice of entry of judgment with affidavit of mailing, order staying execution, and notice of appeal from order denying the motion to set aside the order denying the motion for a new trial. Thereafter, the appellants filed what is denominated a "Clerk's Supplemental Transcript," marked as "prepared by" counsel for the appellants, containing a certificate of the county clerk that "the foregoing Notice of Motion to Vacate and Set Aside Order Denying Motion for a New Trial, Affidavit of Merits and of Facts on Motion to Set Aside Order Denying Motion for New Trial," and two other affidavits are correct copies "of the originals on file in my office." No transcript or bill of exceptions showing what papers, evidence, or affidavits were before the court or were used on the hearing of the motion which resulted in the order appealed from have been filed, and in connection with the present motion to dismiss or affirm there was filed the certificate of the clerk to the effect that no proceeding is pending for the preparation of a bill of exceptions or of a transcript.

No properly authenticated record is before us showing what was before the trial court in connection with the motion in question, and in the absence of a proper record the appeal may not be considered. *H. & J. Mabury Company, a corporation v. Bryant* (Cal.Sup.) 68 P.2d 359.

[2] Moreover, if the purported clerk's supplemental transcript were to be con-

sidered it appears therefrom and from the opening brief that the appellant would be in no better position. The motion to set aside the order denying a new trial, and this appeal, are based upon the contention that counsel for the appellants did not receive any notice of the judgment and that he knew nothing of the entry thereof until July 13, 1937. If this were true it seems strange that an "Order Staying Execution" was obtained on May 10, 1937. Counsel for appellants admits that he received the copy of the memorandum of costs which was mailed on April 30, 1937, but states that on July 13, 1937, he discovered for the first time that on the reverse side of that document, "in an inconspicuous place," was a notice of entry of judgment. We may assume for the sake of argument that circumstances might exist where such a notice might be so buried in other matter as to require a holding that no notice was in fact given. Nothing here appears, however, except that the notice of entry of judgment was typed on the reverse side of an instrument denominated "Memorandum of Costs and Disbursements." As set forth in the supplemental transcript, which appellants would have us consider, this notice is headed in capital letters "NOTICE OF ENTRY OF JUDGMENT." The notice following is in the usual form and contains seven ordinary typewritten lines, the first three lines being in capital letters. Below that are two lines with two names of "Attorneys for Plaintiff," and the words "Filed Apr. 30, 1937—J. M. Backs, County Clerk, By H Deputy." While it would have been better practice to have typed the notice of entry of judgment on a separate sheet of paper, we know of no rule of law requiring that this be done. The notice was not concealed or buried in other matter and, in our opinion, was sufficient. The notice was received in due course after having been mailed on April 30, 1937, and no sufficient reason is offered for a failure to observe it. It therefore appears that no ground of appeal exists which requires further consideration.

The motion to dismiss the appeal is granted and the appeal dismissed.

We concur: MARKS, J.; JENNINGS, J.

23 Cal.App.2d 389

In re MCCARTHY'S ESTATE.

MCCARTHY et al. v. SCHWERIN et al.
Civ. 2056.District Court of Appeal, Fourth District,
California.

Nov. 8, 1937.

1. Wills ⚭364

Attempted appeal from order denying the right to hear a petition for probate of a lost or destroyed will was premature and required to be dismissed where there was a subsequent order denying probate to such lost or destroyed will.

2. Descent and distribution ⚭63

Where divorced wife's motion to set aside interlocutory and final decrees of divorce was denied and order therefor was affirmed on appeal, the divorced wife was not the "widow" of divorced husband on his death with rights pertaining thereto.

[Ed. Note.—For other definitions of "Widow," see Words & Phrases.]

3. Appeal and error ⚭966(1)**Continuance** ⚭7

Generally, courts are liberal in granting continuances, but an application for a continuance is addressed to sound discretion of trial court, and its ruling will not be disturbed except for the most cogent reasons when there is a showing of an abuse of discretion.

4. Wills ⚭319

Refusal to grant contestants a further continuance of their opposition to probate of will was not an abuse of discretion in absence of showing of diligence where various continuances had theretofore been granted, much of the evidence of contestants would have to be produced in form of depositions, and, during several months that had elapsed between time case was first set for trial and final action by trial court, nothing was done to prepare case for trial.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceeding in the matter of the estate of Charles F. McCarthy, deceased, with respect to the admission to probate of an holographic will of the decedent, proposed by Kate A. Schwerin and another and contested by Mayzellia Ann McCarthy and another. From an order admitting the

will to probate and appointing Kate A. Schwerin executrix thereof, the contestants appeal, attempting to appeal also from an order denying them the right to hear a petition for the probate of a lost or destroyed will.

Purported appeal from purported order denying a hearing on the petition to probate a lost or destroyed will dismissed, and order admitting the will to probate and appointing Kate A. Schwerin executrix affirmed.

W. S. Staley, Lewis R. Kirby, and George A. Malette, all of San Diego, for appellants.

Stearns, Luce, Forward & Swing, of San Diego, and Henry E. Barbour, and William B. Backlund, both of Fresno, for respondents.

MARKS, Justice.

Three separate appeals have been taken by Francis C. McCarthy and Mayzellia Ann McCarthy from various orders and decrees made in the Matter of the Estate of Charles F. McCarthy, deceased. They are submitted on a single set of briefs and counsel have stipulated that they may be consolidated. As the orders were made by different judges, and for our own convenience, we prefer to decide the appeals separately. In re McCarthy's Estate (Cal. App.) 73 P.2d 913; Id. (Cal.App.) 73 P.2d 914.

[1] This is an appeal from an order admitting the will of Charles F. McCarthy to probate and appointing Kate A. Schwerin executrix thereof. The notice of appeal also specifies an appeal from an order of May 14, 1936, made by the Honorable Arthur L. Mundo denying the right to hear a petition for probate of a lost or destroyed will. We find no such order in the record. One of the companion appeals is from an order of the Honorable L. N. Turrentine made on June 12, 1936, denying probate to this lost or destroyed will. It is evident that the attempted appeal from this order in this cause is premature and must be dismissed. We will consider that matter on the appeal from the later order of Judge Turrentine.

[2] Charles F. McCarthy and Mayzellia Ann McCarthy were married in 1903. On March 13, 1914, she instituted an action for divorce. On February 21, 1917, she was given an interlocutory decree of divorce. On March 8, 1918, she was given a final decree of divorce on motion of

her own counsel. She recently moved to set aside both decrees, but this motion was denied by the superior court. Its order has just been affirmed on appeal. *McCarthy v. McCarthy* (Cal.App.) 72 P.2d 255. It follows that Mayzellia Ann McCarthy is not now the widow of deceased.

Charles F. McCarthy died testate on June 27, 1935, in the city of San Diego. He left an holographic will dated April 23, 1924, in his safe deposit box in the Bank of America National Trust & Savings Association. On its discovery the will was filed without petition to probate in the office of the county clerk of San Diego county. This will left decedent's furniture in San Mateo to his son and bequeathed the balance of his estate equally to Francis C. McCarthy, his son, Mrs. Kate A. Schwerin, his sister, and Charlotte M. Morrow. Mrs. Schwerin was nominated executrix without bonds.

On July 30, 1935, Francis McCarthy was appointed special administrator of his father's estate. About August 7, 1935, Mrs. Schwerin filed her petition for appointment as executrix of the will of 1924 and its admission to probate. On August 23, 1935, Francis C. McCarthy filed a contest to the appointment of Mrs. Schwerin as executrix and sought his appointment as administrator of the estate with the will annexed. On January 3, 1936, Francis C. McCarthy filed an amended pleading in which he contested the probate of the will of 1924 on many grounds. Among other things, it was alleged in this pleading "that said document dated April 23, 1924, filed as aforesaid, purporting to be the last will and testament of the said decedent, and now offered for probate by the said Kate A. Schwerin and the said Charlotte M. Morrow, is not the last will and testament of said decedent." It was also alleged in this pleading that "deceased was not of sound mind and memory on the 23rd of April, 1924, nor for a long period of time prior thereto, nor for a long period of time thereafter until the date of his death, by reason of his mental and physical ailments and sickness as hereinabove set forth."

On August 23, 1935, Mayzellia Ann McCarthy filed a contest of the probate of this will, alleging that she was the widow of deceased. Her contest was principally based on the alleged undue influence of Charlotte M. Morrow over deceased at the time the will was executed.

It is admitted in the briefs that the petition to probate the will and the contests were first set for hearing on January 18, 1936; that to permit contestants to take depositions it was continued to February 18, 1936. On that date it was again continued to March 17, 1936, as a demurrer of contestants to the answer of proponents had not been ruled upon. On that date contestants appearing by counsel, specially, moved for a further continuance. The motion was resisted, but the case was continued to March 25, 1936. On that date the contestants again moved for a continuance, which motion was resisted. The court took the testimony of three witnesses of proponents of the will and continued the cause to April 15, 1936. On April 13, 1936, contestants again moved for a continuance and the motion was against resisted and was denied. On April 15, 1936, the motion for continuance was renewed and contested. We find that at that time the following colloquy occurred between the court and counsel for contestants:

"The Court: I said it once before we are not going to have any more continuances—

"Miss Leep: Make it an order, if Your Honor please, that we won't have any more.

"The Court: But I do not want it said that we are trying to rush this case through to a conclusion. I want this matter heard properly and I want everybody who has anything to say in the matter to come forth and say it and I want counsel to be expeditious in the procuring of these depositions.

"Miss Leep: I certainly will.

"The Court: You assure me that you will go to trial on the 15th of May?

"Miss Leep: On the 15th of May, meaning that by order there will be no further continuance. The 15th—that is a bad day,—that is a Friday, but then it won't take more than one day maybe. Supposing we make it the 14th, if Your Honor please, that would give us Thursday and Friday if necessary. This is shortening my time one day if you have nothing else for that day?

"The Court: Upon the condition stated, the contest will be continued until May 14th, at 10 o'clock.

"Miss Leep: Thank you very much."

On May 14, 1936, contestants appeared and again moved for a continuance of the

case. The motion was denied and the court took the evidence of the proponents of the will of April 23, 1924. The contestants offered no evidence and the cause was submitted over the objection of their attorneys. The will was admitted to probate and Kate A. Schwerin was appointed executrix.

On May 14, 1936, Francis C. McCarthy filed a petition for probate of a lost or destroyed holographic will. A copy of this will was attached to his petition. The copy was dated December 27, 1934, and did not contain the signature of any witness. This petition was set for hearing on June 12, 1936.

The evidence offered by the proponents of the will of April 23, 1924, is legally sufficient to support the order admitting it to probate and appointing Mrs. Schwerin executrix. The only legal ground that can be urged for a reversal of this order is the refusal to grant a further continuance on May 14, 1936.

The various continuances were asked and secured on the grounds of the rapid changes of counsel and of the illness of Francis C. McCarthy. About every time the case was called he was represented by a different attorney or firm of attorneys. Of course, each new counsel was not prepared for trial. Mrs. McCarthy was not represented by counsel until May 14, 1936, except by counsel appearing specially to obtain continuances. From the record it would appear that contestants had taken no steps to prepare for trial at any time up to May 14, 1936.

[3] The rule by which we must measure the action of the trial judge in this case, in refusing to grant contestants a further continuance on May 14, 1936, is clearly set forth in 5 California Jurisprudence 968: "As a general rule, courts are indulgent and liberal in granting continuances, and it has been said that they are seldom or never appealed to in vain in a proper case. Even where it is simply expedient that a continuance should be had, and much more where any necessity for it exists, they will not deny a postponement. However, it is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons. The trial court is apprised of all the circumstances of the case and the previous proceedings, and is, therefore, better

able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable, and not an arbitrary discretion, its action will not be disturbed. It follows that an abuse of discretion must be shown to justify a reversal of the judgment because of a ruling on such matters. Thus it has been held that the sickness of a party to an action, preventing his attendance on the court, does not ipso facto require the court to grant an application for a continuance, made on his behalf; especially where the showing before the court fully justifies the conclusion that injustice will be as likely to follow from the granting of the continuance as from its refusal. Nor does the absence of a party always furnish ground for a continuance. It has likewise been held that the granting or refusing a continuance on account of the illness or absence of counsel is a matter which rests largely, if not wholly, in the discretion of the trial court, and such discretion will not be reviewed unless it is clearly shown to have been abused. The rule as to review of the exercise of discretion applies with equal force where the continuance is requested for the purpose of enabling a party to procure the presence and testimony of absent witnesses; and it must therefore be made to appear very clearly that such discretion has been abused before the cause will be reversed on appeal." See cases there cited, and those cited in 4 Ten Year Supp. p. 32, § 5.

[4] When, by the rules thus announced, we measure the discretion exercised by the trial court in refusing to grant a further continuance on May 14, 1936, we cannot conclude that there was an abuse of discretion. It is clear from the statement of counsel that much of the evidence of contestants would of necessity have to be produced in the form of depositions. During the several months that had elapsed between the time the case was first set for trial and the final action by the trial court, nothing was done to prepare the case of contestants for trial. There was no showing of diligence on their part.

The purported appeal in this case from a purported order denying a hearing of a petition to probate a lost or destroyed will is dismissed as that question is not involved in this appeal.

The order admitting the will of April 23, 1924, to probate and appointing Kate

A. Schwerin executrix thereof is affirmed. Appellants to pay costs of appeal.

firmed where there was no evidence supporting purported will.

We concur: BARNARD, P. J.; JENNINGS, J.



23 Cal.App.2d 395

In re MCCARTHY'S ESTATE.

SCHWERIN et al. v. MCCARTHY et al.

Civ. 2049.

District Court of Appeal, Fourth District,
California.

Nov. 8, 1937.

1. Wills ⌘358

An order denying a continuance in probate matters is not appealable (Probate Code, § 1240, as amended by St.1935, p. 1972).

2. Wills ⌘384

An order denying a continuance in probate matters may be considered on appeal from final order made in matter in which the continuance was denied (Probate Code, § 1240, as amended by St.1935, p. 1972).

3. Appeal and error ⌘966(1)

Continuance ⌘7

The granting of a continuance is a matter within sound discretion of trial judge, and, where his action in denying a continuance is not unreasonable or arbitrary, it will not be disturbed on appeal.

4. Wills ⌘319

Refusal to grant proponents of alleged lost or destroyed will a continuance on hearing of contest because proponents were not represented by counsel was not an abuse of discretion where application for continuance was not supported by affidavit or in any other manner, and proponent, who had filed petition to probate the alleged lost or destroyed will, had been served with notice of withdrawal by his attorneys on May 19th and hearing was on June 12th following (Probate Code, § 1240, as amended by St. 1935, p. 1972; Code Civ.Proc. § 595, as amended by St.1933, p. 1873).

5. Wills ⌘386

Order denying probate to alleged lost or destroyed will was required to be af-

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding in the matter of the estate of Charles F. McCarthy, deceased, with respect to the probate of an alleged lost or destroyed will, proposed by Mayzellia Ann McCarthy and Francis C. McCarthy and contested by Kate A. Schwerin and another. From an order denying probate to the alleged lost or destroyed will, and an order denying the motion of proponents for relief under Code of Civil Procedure, § 473, as amended by St. 1933, p. 1851, relating to relief from a judgment on ground it was entered by surprise, mistake, or excusable neglect and the refusing to vacate an order denying the proponents a continuance, proponents appeal, attempting to appeal also from an order denying them a continuance.

Attempted appeal from order denying a continuance dismissed, appeal from order denying the proponents relief under Code of Civil Procedure, § 473, as amended by St. 1933, p. 1851, and refusing to vacate the order denying a continuance dismissed without prejudice, and order denying probate to the alleged lost or destroyed will affirmed.

W. S. Staley, Lewis R. Kirby, and George A. Malette, all of San Diego, for appellants.

Stearns, Luce, Forward & Swing, of San Diego, and Henry E. Barbour and William B. Backlund, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal in the same case as In re Estate of McCarthy, Deceased, 73 P.2d 910, this day filed. Many facts pertinent to this appeal are set forth in that opinion and will not be repeated here.

The notice of appeal specifies the following orders from which the appeal is taken: (1) Order entered June 16, 1936, denying appellants a continuance; (2) order denying alleged lost or destroyed will admission to probate and dismissing the petition for its probate; (3) order made and entered August 12, 1936, denying motion of appellants for relief under section 473 of the Code of Civil Procedure (as amended by St. 1933, p. 1851) and refusing to vacate the order of June 16, 1936.

[1,2] An order denying a continuance is not appealable. Section 1240, Probate

Code, (as amended by St. 1935, p. 1972); In re Estate of Olmstead, 216 Cal. 585, 15 P.2d 495. It may be considered in the appeal from the final order made in the matter in which the continuance was denied.

There is nothing in the bill of exceptions in this appeal pertaining to the order of August 12, 1936, denying relief under section 473 of the Code of Civil Procedure and refusing to vacate the order of June 16, 1936. That matter is covered in the third appeal taken in this cause. To preserve our right to consider the question in that appeal, we will dismiss this portion of the appeal without prejudice.

On May 14, 1936, Francis C. McCarthy, through L. B. Leep and William Schultz, his attorneys, filed his verified petition to probate an alleged lost or destroyed holographic will of his father, Charles Francis McCarthy, deceased. The purported will bears date of December 27, 1934. A copy of this will is attached to the petition for its probate. The copy does not bear the signatures of any witnesses.

On the request of attorneys for petitioner the hearing of the petition was set for June 12, 1936. Charlotte M. Morrow and Kate A. Schwerin filed their contest to the probate of the will. Mayzellia Ann McCarthy filed no pleading, though she took an active part at the hearing as a proponent of the probate of the will.

On June 12, 1936, Francis C. McCarthy and Mayzellia Ann McCarthy appeared without counsel, Miss Leep and Mr. Schultz having previously withdrawn. Their notice of withdrawal in this proceeding is dated May 18, 1936. It bears a note that it was served on Francis C. McCarthy on May 19th. It was filed on May 21st.

[3,4] The application for continuance was made orally. It was not supported by affidavits or in any other manner. It was made on the sole ground that appellants were not represented by counsel. The name of any purported witness was not disclosed nor did they disclose any of the evidence they expected to produce.

It is clear that appellants presented no legal grounds for a continuance. Sections 1230, 1233, 1205, Probate Code; section 595, Code Civ.Proc., (as amended by St. 1933, p. 1873); Flynn v. Fink, 60 Cal.App. 670, 213 P. 716; Berger v. Mantle, 18 Cal.App.2d 245, 63 P.2d 335. The granting of a continuance is a matter within the sound discretion of the trial judge and, where his

action in denying a continuance is not unreasonable or arbitrary, it will not be disturbed on appeal. 5 Cal.Jur. 968, § 5, and cases cited; 4 Ten Year Supp. 32, § 5. As appellants showed no legal grounds for a continuance, there was no breach of discretion in denying their motion.

[5] The trial court gave appellants every opportunity to present any evidence they had in support of the petition to probate the alleged lost or destroyed will. This they refused to do. As there was no evidence supporting this purported will, the order denying it probate and dismissing the petition must be affirmed.

The attempted appeal from the order denying a continuance is dismissed.

The appeal from the order of August 12, 1936, denying appellants relief under section 473 of the Code of Civil Procedure and refusing to vacate the order of June 16, 1936, is dismissed without prejudice to permit us to consider that matter in Re McCarthy's Estate, 73 P.2d 914, which presents the record of those proceedings.

The order appealed from is affirmed. Appellants will pay the costs of this appeal.

We concur: BARNARD, P. J.; JENNINGS, J.



23 Cal.App.2d 398

In re MCCARTHY'S ESTATE.

SCHWERIN et al. v. MCCARTHY et al.

Civ. 2050.

District Court of Appeal, Fourth District,
California.

Nov. 8, 1937.

1. Appeal and error ☞982(1)

Judgment ☞344

Whether a motion to vacate a judgment on ground of surprise, inadvertence, or excusable neglect shall be granted rests with sound discretion of trial court, and an order thereon will not be disturbed on appeal in absence of abuse of discretion (Code Civ. Proc. § 473, as amended by St.1933, p. 1851).

2. Appeal and error ☞935(1), 948

All presumptions are in favor of correctness of trial court's ruling on motion to

vacate a judgment on ground of surprise, inadvertence, or excusable neglect, notwithstanding rule that reviewing courts will listen more readily to an appeal from an order refusing to set aside a default than where the motion has been granted, and burden is upon appellant to make it appear that trial court's discretion was abused (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

3. Wills ⇨355

In proceeding by proponents of an alleged lost will to set aside order denying probate of such will under statute authorizing relief against default judgments, that proponents first disclosed names of witnesses to will in proceeding to set aside order after they had filed a copy of will, which did not show signatures of any witnesses with their verified petition to probate will, and that one of proponents had favored probate of a prior will with knowledge of alleged false will, would go to weight of evidence in support of proponents' motion to set aside order (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

4. Appeal and error ⇨982(2)

Exercise of discretion in overruling motion to set aside judgment on ground that it had been entered through mistake or excusable neglect will not be disturbed where affidavits are conflicting on essential facts (Code Civ.Proc. § 473, as amended by St. 1933, p. 1851).

5. Appeal and error ⇨1024(4)

The credibility of affiants who have executed affidavits supporting motion to set aside judgment sought on ground of mistake or excusable neglect and weight of evidence adduced are questions exclusively for trial court (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

6. Appeal and error ⇨1024(1)

In the consideration of an appeal from an order made on affidavits involving the decision of a question of fact, reviewing court is bound by same rule that controls where oral testimony is presented for review, and, if there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true and facts stated therein as established.

7. Wills ⇨386

In proceeding by proponents to have order denying a continuance and denying petition for probate of an alleged lost or

destroyed will set aside under statute authorizing a judgment to be set aside where it has been entered against a party by mistake or excusable neglect, conflicting affidavits raising questions of fact were for trial court (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

8. Appeal and error ⇨780(1)

Appeal from orders which were not supported by any record in the cause, and which had been affirmed or appeal from them dismissed in another opinion, was required to be dismissed.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Proceeding in the matter of the estate of Charles F. McCarthy, deceased, with respect to the admission to probate of an alleged lost or destroyed will, proposed by Mayzellia Ann McCarthy and Francis C. McCarthy, and contested by Kate A. Schwerin and another. From an order denying the application of the proponents for a continuance, an order denying admission to probate of the alleged lost or destroyed will and dismissing the petition to probate such will, and an order denying the motion of the proponents for relief under Code of Civil Procedure, § 473, as amended by St.1933, p. 1851, relating to relief from a judgment entered by inadvertence, mistake, or excusable neglect and refusing to vacate the judgment denying the continuance, the proponents appeal.

Order denying motion of the proponents for relief under Code of Civil Procedure, § 473, as amended by St.1933, p. 1851, affirmed, and appeals from all other orders dismissed.

W. S. Staley, Lewis R. Kirby, and George A. Malette, all of San Diego, for appellants.

Stearns, Luce, Forward & Swing, of San Diego, and Henry E. Barbour and William B. Backlund, both of Fresno, for respondents.

MARKS, Justice.

The amended notice of appeal in this proceeding contains the notice that appellants "appeal to the Supreme Court of the State of California from that certain Order made and entered in said cause June 17, 1936, denying the application of said parties for continuance, and the further Order Denying Alleged Lost or Destroyed Will

to Probate and Dismissing Petition to Probate Said Will. Said parties also appeal from the Order of said Court made and entered August 12, 1936, denying the motion of said parties for relief under section 473 of the Code of Civil Procedure [as amended by St.1933, p. 1851] and refusing to vacate the said judgment of June 17." The only order denying probate in any of the records to which this notice can be directed is dated June 12, 1936. We are not informed when it was entered. We have disregarded the variance in dates in the notices of appeals.

The bill of exceptions in this matter is directed entirely to the order made on August 12, 1936, which will be considered here. Our opinion in *Re Estate of McCarthy, Deceased*, 73 P.2d 913, in our Civ. 2049, this day filed, has disposed of the other matters presented by the notice of appeal.

Many of the pertinent facts of this case are set forth in opinions this day filed in the cases bearing our Civ. 2056 and 2049, entitled, *In re Estate of Charles F. McCarthy, Deceased*, 73 P.2d 910, and will not be repeated here.

On August 12, 1936, appellants, represented by counsel, presented their motion under section 473 of the Code of Civil Procedure, for relief from the order of the Honorable L. N. Turrentine, Judge, denying their motion for a continuance and denying the petition of Francis C. McCarthy, in which he was assisted by his mother, for probate of the alleged lost or destroyed will of December 27, 1934. The trial court denied the motion for relief.

[1,2] In *Startzman v. Los Banos Cotton Gins*, 82 Cal.App. 624, 256 P. 220, 223, a case where defendant was not represented by counsel at the trial and subsequently moved to have the judgment rendered against it vacated under the provisions of section 473 of the Code of Civil Procedure, it was said: "It is the settled rule that whether a motion to vacate a judgment on the ground of surprise, inadvertence, or excusable neglect shall or shall not be granted is a matter which rests in the sound discretion of the trial court, and that the order either granting or denying the motion will not be disturbed upon appeal unless it clearly appears from the record that, in making its order on such motion, the trial court has been guilty of an abuse of discretion. [Citing cases.] It is true that some of the cases say that

reviewing courts will 'listen more readily to an appeal from an order refusing to set aside a default than where the motion has been granted. *Moore v. Thompson*, supra, [138 Cal. 23, 70 P. 930]. All presumptions, however,' proceeded the court in the case just named, 'will be indulged in favor of the correctness of the court's action, and the burden in all cases is upon the appellant to make it appear that its discretion was abused in making the order.'" See, also, *Bruskey v. Bruskey*, 4 Cal.App.2d 472, 41 P.2d 203.

[3] The motion was heard on affidavits by and on behalf of the moving parties and also counteraffidavits which raised questions of fact. One affidavit was by a purported witness who swore he and another had signed the will of December 27, 1934, as witnesses. This is the first occasion on which the proponents of the will disclosed the names of any witnesses or disclosed any of the evidence they hoped to produce in support of the will. Further, the verified petition to probate this purported lost or destroyed will had attached to it a copy of the will which bore no signature of any witness.

On August 6, 1935, Francis C. McCarthy wrote Mrs. Kate A. Schwerin a letter stating: "I am petitioning the court here (San Diego) to probate the will that has been deposited with the county clerk on July 16, 1935. Now, that I am sure you feel is my duty for I am past legal age, and should take my rightful place as my father's son and heir; therefore I am asking to be appointed administrator with the will annexed of my father's estate." The will referred to in this letter is the one dated April 23, 1924. The next day Mrs. Schwerin filed her petition to probate this will. By a pleading filed on August 23, 1935, Francis C. McCarthy virtually joined in the petition to probate this will but asked to be appointed administrator with the will annexed. From his verified petition to probate the purported lost or destroyed will of December 27, 1934, which petition was filed on May 14, 1936, it was made to appear that Francis C. McCarthy knew of the purported will of December 27, 1934, from the time of its alleged execution and that he had a copy of it. His attitude, expressed in writing in August, 1935, was inconsistent with that first appearing on May 14, 1936, and since maintained. These facts bear strongly on the verity and good faith of Francis C. McCarthy and present a question for the decision of the trial judge as to the weight to be given the evidence

submitted in the form of affidavits in support of his motion here under consideration.

[4-6] In *Zuver v. General Development Company*, 136 Cal.App. 411, 28 P.2d. 939, 940, it is said:

"The affidavits which were presented for and against the motion to set aside the default judgment were conflicting with respect to the essential facts related. Since the evidence is conflicting upon which the motion to set aside the default judgment was denied, this court may not interfere with the discretion of the trial court with respect thereto. [Citing cases.] It was exclusively the province of the trial judge to determine the credibility of affiants and the weight of the evidence adduced. *Sheehan v. Osborn*, 138 Cal. 512, 515, 71 P. 622; *Smith v. Pickwick Stages System*, 113 Cal.App. 118, 297 P. 940. Regarding the effect of conflicting affidavits upon an order denying a motion to set aside a default judgment, it is said in *Williams v. Reed*, 43 Cal.App. 425, 431, 185 P. 515:

"Thus, we see that a very sharp and decided conflict as to the questions presented was present. Under these conditions, we are powerless to interfere with the conclusion of the trial court herein. The rule is, as it has been so frequently stated, both by the Supreme Court, as well as by this court, that "in the consideration of an appeal from an order made upon affidavits, etc., involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be taken as established." *Doak v. Bruson*, 152 Cal. 17, 91 P. 1001; *Hyde v. Boyle*, 105 Cal. 102, 38 P. 643; *Bernou v. Bernou*, 15 Cal.App. 341, 114 P. 1000, 1001."

[7] Under the foregoing rules of law, which must govern here, we cannot reverse the order here presented.

[8] The order of August 12, 1936, is affirmed at appellants' cost of appeal. As the other orders mentioned in the notice of appeal are not supported by any record in this cause, and as they are affirmed or the appeal dismissed in another opinion this day filed in *Re Estate of McCarthy, Deceased*, the appeal from them in this cause is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

23 Cal.App.2d 464

**GAUME et al. v. CITY OF REDLANDS
et al.**

Civ. 2119.

District Court of Appeal, Fourth District,
California.

Nov. 16, 1937.

Hearing Denied by Supreme Court
Jan. 13, 1938.**1. Eminent domain ⇨82**

Damages to buildings or other improvements or fixtures is a necessary part of the compensation that must be paid to one whose property is condemned and taken for a public use.

2. Municipal corporations ⇨458

Proceeding under statute which was designed to limit the amount of special assessments for public improvements and acquisitions of property for public purposes constituted no part of subsequent local street widening project proceeding except that it imposed a continuing limitation on maximum amount of assessments to be levied (St.1931, p. 1372, as amended St.1933, p. 1987).

3. Municipal corporations ⇨513(1)

Proceedings conducted under Debt Limitation Act could furnish no basis for restraining assessments for street opening project after such proceeding had provided a continuing limitation on the maximum amount of assessments to be levied, since the act was intended only to provide a special proceeding, the function of which was discharged when it was determined that assessments would not exceed prescribed limits (St.1931, p. 1372, as amended St.1933, p. 1987).

4. Eminent domain ⇨8**Municipal corporations ⇨408(1)**

The purpose of the Street Opening Act of 1903 is to permit a public agency to acquire private property for public use, to compensate owners of private property for property taken, and for severance damages, and to provide a fund by way of assessment of property benefited to pay such damages, and the legitimate costs of the proceeding (St.1903, p. 376, as amended).

5. States ⇨85

The state may acquire parts of a needed right of way by purchase and the balance by condemnation (St.1933, pp. 2029-2033, §§ 2, 3, 5).

6. States ☞85

The state may acquire by private contract of purchase the part of a right of way, consisting of improvements, and the balance by condemnation through local improvement proceedings instead of by the exercise of the power of eminent domain through direct condemnation suit (St.1933, pp. 2029-2033, §§ 2, 3, 5).

7. States ☞127

Under statute relating to the acquisition of property for public purposes, the state is not required to expend its donated money through local improvement proceedings or in payment of any judgment rendered therein in preference to payment of property or removal of improvements by purchase (St. 1903, p. 376, as amended; St.1931, p. 1372, as amended St.1933, p. 1987; St.1933, pp. 2029-2033, §§ 2, 3, 5).

8. States ☞127

Where state donation was not included in local street opening improvement proceedings, and improvements with one exception were specifically excepted from the damages fixed in condemnation action, state was free to use its donated funds to acquire such portion of the right of way by private contract with the property owners (St.1903, p. 376, as amended; St.1931, p. 1372, as amended St.1933, p. 1987; St.1933, pp. 2029-2033, §§ 2, 3, 5).

9. Municipal corporations ☞513(1)

Under statute permitting state or its agencies to acquire rights of way by private purchase, where condemnation proceedings did not include damages to improvements, property owners were not entitled to restrain assessments for street opening project on ground that funds donated to state were improperly applied to payment of damages to improvements under private contract and that such expenditure was in improvement of the right of way rather than for acquisition thereof, notwithstanding that resolution and other proceedings under Debt Limitation Act recited that state and other sources would contribute not less than a designated amount to the "acquisition of the property" (St.1903, p. 376, as amended; St. 1931, p. 1372, as amended St.1933, p. 1987; St.1933, pp. 2029-2033, §§ 2, 3, 5).

10. States ☞127

Where there were no representations in any of proceedings under Street Opening Act that state donation would be used to pay

condemnation judgment, but right of acquiring the portion of right of way represented by improvements was expressly reserved to state, state was authorized in its discretion to acquire the portion of the right of way represented by improvements with donated funds, rather than applying such funds to payment of condemnation judgment (St.1903, p. 376, as amended; St. 1931, p. 1372, as amended St.1933, p. 1987; St.1933, pp. 2029-2033, §§ 2, 3, 5).

11. Injunction ☞1

Equity will not restrain one from doing in a proper manner that which the law authorizes him to do.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by T. A. Gaume and others against the City of Redlands, and Will L. Fowler and others, as members of and constituting the city council of the City of Redlands. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

Walter J. Hartzell, of Redlands, and Hill, Morgan & Bledsoe and Kenneth K. Wright, all of Los Angeles, for appellants.

Wilson & Coughlin, of San Bernardino, for respondents.

MARKS, Justice.

This is an appeal from a judgment perpetually enjoining defendants from making or issuing any assessment to pay for the acquisition of property in the City of Redlands in a street opening proceeding.

Plaintiffs own property within the exterior boundaries of the district formed to pay the cost of the improvement. The City of Redlands is a municipal corporation and the individual defendants are the members of its city council.

On November 15, 1933, by resolution No. 513, the city council of the City of Redlands initiated proceedings under the Special Assessment Investigation, Limitation and Majority Protest Act of 1931 (St.1931, p. 1372, as amended St.1933, p. 1987) to determine the cost of the acquisition of property for widening three streets in the city to form a portion of the state highway leading into Imperial Valley and points east. We will refer to this act as the Debt Limitation Act. The resolution contained the following:

"3. That the amount and portion of the cost and expense of the proposed acquisition proposed to be paid by the City of Redlands from its proportion of the State Gas Tax hereafter coming to the City of Redlands is the sum of \$20,000.00; and the proportion of the cost and expense of said acquisition proposed to be paid by the Department of Public Works of the State of California, Division of Highways and from other sources is a sum in excess of \$160,000.00.

"4. The Statute under which it is proposed to conduct proceedings for the proposed acquisition is the Street Opening Act of 1903 [St.1903, p. 376, as amended], with bonds to be used as authorized under the Street Opening Bond Act of 1911 [St.1911, p. 1192]."

The proceedings were completed and it was found that the estimated cost of the proposed acquisition, less the amounts to be contributed towards this cost by public agencies, was well within the requirements of the Debt Limitation Act.

On February 14, 1934, the city council initiated proceedings for acquiring the necessary property for the improvements under the Street Opening Act of 1903 (St.1903, p. 376, as amended) by passing its ordinance of intention, No. 773. This ordinance contained the following:

"Section 5. That the estimated expense of said improvement, inclusive of the incidental expenses of the proceedings under this ordinance of intention and inclusive of the incidental expenses incurred under the 'Special Assessment Investigation, Limitation and Majority Protest Act of 1931', as amended, is the sum of One Hundred Forty-five Thousand Seven Hundred Thirty-two and 56/100 Dollars (\$145,732.56), exclusive of damages to buildings attached to and a part of the property to be acquired, the removal of which buildings and/or remodeling of the same is to be done and performed by the Department of Public Works of the State of California, Division of Highways.

"That it is further ordered and determined that the City of Redlands will pay a portion of the cost and expenses of said improvement, to-wit: the sum of Twenty Thousand Dollars (\$20,000.00), such payment to be made from its proportion of the State Gas Tax hereafter coming to the City of Redlands."

It should be particularly noted that in resolution No. 513, and in all other proceedings taken under the Debt Limitation Act, it

was recited that the city would contribute \$20,000 to the costs of the acquisition of property, and the state and other sources would contribute not less than \$160,000. In the report of the estimated costs under this proceeding there were included items totaling \$106,429 for "Damages to improvements," "Damage to leases," and, "Moving costs not included in other items."

In the street opening proceedings the donation by the City of Redlands was set forth at \$20,000, but the donation of \$160,000 was not particularly set forth. Instead, it was recited that the damage to buildings and the cost of their removal or remodeling was to be paid by donations of state funds and from other sources. This was carried through all of the street opening proceedings. This cost was actually paid from these donated funds. Herein lies the source of the present litigation. Our statement of facts will therefore be limited to those bearing on this variance between the two proceedings and such others as may be necessary to a proper understanding of this issue. No other defect in either proceeding is pointed out either by counsel or by the trial judge in the findings. We will therefore assume that in all other respects both proceedings are regular and legally sufficient.

On March 21, 1934, the city council of the City of Redlands passed its ordinance No. 773-A in which it directed the city attorney to institute an action to condemn the property described in ordinance No. 773 as necessary to be acquired for the public improvement. This action was instituted and proceeded to trial. The findings of fact were signed on September 27, 1935, and an interlocutory judgment was rendered. In the findings the damages to each parcel of property, all, or any part of which was to be condemned, was set forth. Just prior to the list of the respective owners and the respective damages appears the following: "Wherever in the following portions of this paragraph under the parcels numbered 1 to 57, both inclusive, the words 'Part Taken' are used they shall mean 'the value of each parcel of property sought to be condemned and all improvements therein pertaining to the realty', as to Parcel No. 29, but not including improvements as to the remaining parcels. * * *

The total damages awarded, including damages to improvements on parcel No. 29, but exclusive of damages to improvements on all other parcels, was \$131,657.

The street superintendent of the City of Redlands made his report of assessment which may be summarized as follows:

Damages awarded in court action	\$131,657.00
Interest from date of order for immediate possession	17,542.95
"Cost of removing, remodeling and/or rearranging improvements" on parcels of condemned land	121,457.28
Defendants' costs	47.20
Various expenses of proceeding	12,081.62
Total costs and expenses..	\$282,786.05
Less paid by state for removing, remodeling and/or rearranging improvements	\$121,457.28
To be paid by City of Redlands	20,000.00
Gas tax allotment.....	60,000.00
Less amount awarded for parcel No. 29 covered in allotment by state	4,121.88
Total credits	\$205,579.16
Balance (Total assessment)...	\$ 77,206.89

The foregoing report was filed on January 4, 1936. This action to restrain the assessment followed on February 10, 1936.

The theory of plaintiffs, adopted by the trial court in its findings and judgment, is that, since the interlocutory judgment in the condemnation action awarded damages in the total sum of \$131,657, and since, in the proceedings under the Debt Limitation Act it was stated that a sum in excess of \$180,000 would be donated to pay the cost of the acquisition, the total cost should have been paid out of the donations, leaving nothing to be assessed on the property owners in the assessment district.

This theory fails to take into consideration the fact that the estimated damages in the Debt Limitation Act proceeding included damages to the improvements while the damages awarded in the condemnation proceeding did not include damages to these improvements except those on parcel No. 29, and the further fact that in the street opening proceedings, of which the condemnation suit was a part, there had been actually paid, or made available for payment by public agencies, on the cost of the acquisition of property, a sum in excess of the \$180,000 donation mentioned in the Debt Limitation Act proceedings. The question thus presented seems to be a novel one in California jurisprudence.

[1] Damages to buildings is a necessary part of the compensation that must be paid to a property owner when his property is condemned and taken for a public use. In *City of Los Angeles v. Klinker*, 219 Cal. 198, at page 206, 25 P.2d 826, 829, 90 A.L.R. 148, it is said:

"Where land is condemned for public uses, the value of buildings or other improvements and fixtures on the land must be considered in determining the owner's compensation." 20 Cor.Jur., p. 799.

"When fixtures become part of the realty, if the land on which the building stands is taken in whole or in part for the public use, the owner is entitled to have the fixtures considered in determining the amount of his compensation." 10 R.C.L., 142."

We are not greatly assisted in the solution of the problem confronting us by any other cases cited by counsel or by any which we have discovered in the course of our investigation. Therefore, with the foregoing rules of law in mind, we must turn to three acts of the Legislature which we believe must be decisive of the question here involved. They are the Debt Limitation Act, the Street Opening Act of 1903, and an act which we will call the State Fund Allocation Act. St.1927, p. 1562, as amended, St.1933, p. 2029.

[2, 3] The purposes and scope of the Debt Limitation Act are thus clearly and briefly set forth in its title: "An act to limit the amount of special assessments for public improvements and acquisitions of property for public purposes; to provide for a preliminary investigation, report and hearing upon proposed public improvements and acquisitions of property for public purposes where the cost of such improvements or acquisitions is to be paid in whole or part by special assessments; to provide a basis for valuation of property for the purpose of establishing a special assessment limitation, and to authorize the payment of a part of the cost of such public improvements and acquisitions of property from any available public fund where a part of such cost is paid by special assessment on benefited property, and to provide that a majority protest shall be a bar to any proceeding."

A study of this act leads us to the conclusion that it was intended as a special proceeding to limit the amounts of assessments that may be levied in local improvement proceedings and thereby prevent

former abuses which have occurred in levying assessments on properties far in excess of actual values. The purposes of the act were fully accomplished when it was determined that the assessments would not exceed prescribed limits.

The Debt Limitation Act proceeding was no part of the local improvement proceeding which was to follow except that it imposed a continuing limitation on the maximum amount of the assessments to be levied, and, through that limitation, a continuing limitation on the cost of the public improvement except in certain particulars with which we are not here concerned. The act accomplished its purpose when those results were achieved, and, except in the particulars specified, did not carry forward or become any part of any future proceeding. The act required that donations to the cost of the improvements be set forth. This was done. It further provided that the amount to be assessed on the property be not more than one-half of its actual value. This provision was complied with. There seems to be no legal ground to be urged to the validity of this proceeding.

[4] The purpose of the Street Opening Act of 1903 is to permit public agencies to acquire private property for public use, to compensate owners of private property for the property taken, and for their severance damages, and to provide a fund by way of assessment of property benefited to pay these damages and the legitimate costs of the proceeding. Those purposes were all accomplished in the proceeding under consideration here if the money contributed by the state agencies could be lawfully used to pay some of the damages of the acquisition by private contract with property owners independent of the street opening proceedings, including the condemnation suit.

[5,6] Generally speaking, the State Fund Allocation Act permits state agencies to allocate and use state funds "for the acquisition of rights of way" for state highways. See sections 2, 3, 5, as amended in 1933 (pages 2029-2033). Section 5 contains the following: "The Department of Public Works is hereby authorized to acquire the necessary land or rights of way by purchase, condemnation or donation for any said highway or the legislative body of the municipality may acquire the necessary land or rights of way by purchase, condemnation or donation and title to any

said land or right of way may be taken in the name of the State or in the name of the municipality."

Thus it is quite apparent that the state itself, or through a municipality, may acquire rights of way by contract of private purchase from property owners. This power is expressly granted by the Legislature in the provisions of the State Fund Allocation Act just quoted. We can see no valid reason why the state cannot be permitted to acquire parts of a needed right of way by purchase and the balance by condemnation. If this can be done there should be no valid objection to permitting the state to acquire by private contract of purchase the part of the right of way consisting of improvements, and there should be no objection to acquiring the balance of the right of way by condemnation. There should be no objection to the condemnation of this balance of the right of way through local improvement proceedings instead of the exercise of the power of eminent domain through direct condemnation suit. Acquisition of private property for public use through such proceedings has been a recognized and approved right and an approved method of procedure for so many years that it cannot now be questioned. A property owner should not be heard to complain if he ultimately receives the full amount of the damage he suffers. No more should a property owner be permitted to complain if he is required to pay no more than his just and legal share of the improvement cost through just assessment of the benefits which it confers. It should make no difference to him through what channel the money donated towards the cost of the improvement flows if the cost to him is proportionately reduced by the donations.

[7,8] This is exactly what was done in the instant case. The state through one of its agencies contracted with private property owners and acquired part of the right of way by private purchase. While it did not actually pay for the buildings on the property to be condemned and thus take title to them, it contracted with the owners and paid for their removal and remodeling to fit the new boundaries of the proposed street. This is but one means of accomplishing the end of clearing the street of obstructions and making it fit for public use and probably at a considerable saving to the state. If the buildings had been acquired by purchase and title taken by the

state, the cost of demolition or removal would still have to be paid by the state.

All of the local improvement proceedings under the Street Opening Act of 1903 carried notices to the property owners that this method would be followed in paying damages to improvements outside of the local improvement proceedings. In the condemnation action the findings fixed values of the property taken and severance damages to the land alone and did not include improvements except on lot No. 29. The property owners were fully informed of the methods to be used and were not misled in any particular. It is not suggested that any contract with a property owner was unfair or that any one received undue benefits. More than the \$160,000 promised to be contributed by the state and other sources in the Debt Limitation Act proceeding was actually contributed and expended to acquire portions of the right of way. The burden on the property within the assessment district was lessened by that amount. Every promise or representation to the property owners made in either proceeding was faithfully kept.

While there is a requirement in the Debt Limitation Act that the amount of donations be set forth there is no requirement in that act that these donations be used to pay the judgment in the condemnation action instituted under the Street Opening Act of 1903. There is no requirement in that act that all moneys donated be used to pay the judgment in the condemnation action. In the proceedings under the Street Opening Act of 1903 it was only necessary to specify the part of the donations to be used to pay on this judgment. This was done. Under the State Fund Allocation Act the state is authorized to use its money to acquire rights of way by purchase. There is no requirement in any of the three acts compelling the state to expend its money through the local improvement proceedings or in payment of any judgment rendered therein. As the state donation was not included in the local improvement proceedings and as the improvements, except those on lot No. 29, were specifically excepted from the damages fixed in the condemnation action, the state was free to use its donated funds to acquire this portion of the right of way by

private contracts with the property owners.

[9] Respondents strongly urge that the cost of "removing, remodeling and/or rearranging improvements" for which the money donated by the state was largely used, was an expense of improving the right of way after title had passed from private ownership and not an item of cost of the right of way; that therefore the property owners had been misled in the Debt Limitation Act proceeding by the statement that in excess of \$160,000 would be donated by the state and other sources to be applied on the cost of the acquisition. There might be some merit in this argument had the court included in the damages awarded, damages to improvements. It did not do so. Those damages were specially excepted with the statement that they would be paid by the state outside of the condemnation proceedings. The property owners were fully advised of this fact at all stages of the proceedings under the Street Opening Act of 1903. They were not misled.

[10,11] As there were no representations or statements in any of the proceedings under the Street Opening Act of 1903 that the state donation would be used to pay the judgment in the condemnation proceedings and as the right of acquiring the portion of the right of way represented by the improvements was reserved to the state in those proceedings, the manner of acquisition by the state was largely a matter of discretion on the part of the representatives of the state. As the law conferred on them the right to acquire this property by purchase they were exercising a discretion vested in them by law in acting as they did. "Equity will not restrain one from doing, in a proper manner, that which the law authorizes him to do." 14 Cal.Jur. 206, § 22, and cases cited.

The judgment is reversed, with directions to the trial court to amend its findings in accordance with the views herein expressed and enter judgment for defendants.

We concur: BARNARD, P. J.; JENNINGS, J.

PEOPLE v. ZIMMER et al.

Cr. 3024.

District Court of Appeal, Second District,
Division 2, California.

Nov. 24, 1937.

Hearing Denied by Supreme Court
Dec. 23, 1937.**1. False pretenses** ⇨49(3)

Evidence that defendant in conspiracy with employees of a certain bank cashed checks drawn on various other banks in which defendant had insufficient funds, thereafter cashing additional checks and depositing the money therefrom in the various banks to pay the checks theretofore drawn, sustained conviction for uttering bank checks with intent to defraud (Pen.Code, § 476a).

2. False pretenses ⇨22

Knowledge of unlawful practice by bank employees with whom defendant conspired in cashing worthless checks was not available as defense to prosecution for uttering bank checks with intent to defraud, on ground that bank had knowledge, since such employees had no authority to defraud the bank (Pen.Code, § 476a).

3. Principal and agent ⇨148(4)

An agent can never have authority, either actual or ostensible, to do an act which is known or suspected by the person with whom he deals to be a fraud upon the principal (Civ.Code, § 2306).

4. False pretenses ⇨22

Defendant could not bribe employees of bank to accept worthless checks, knowing that the employees were violating their trust in appropriating the bank's funds, and escape liability by asserting that knowledge on part of employees was knowledge of the bank (Civ.Code, § 2306; Pen.Code, § 476a).

5. False pretenses ⇨12

Where defendant in conspiracy with employees of a certain bank cashed checks drawn upon various other banks in which defendant had insufficient funds, thereafter cashing additional checks and depositing the money in the various banks to pay the checks theretofore drawn, conviction of uttering bank checks with intent to defraud was authorized, notwithstanding that some of the checks were actually paid, since crime was complete upon the drawing and uttering of the checks with intent to defraud, it being unnecessary that the victim actually was defrauded (Pen.Code, § 476a).

6. Embezzlement ⇨24

Conviction of defendant as a principal for grand theft for having conspired and co-operated with corrupted bank employees to fraudulently appropriate funds of the bank, by a scheme of cashing worthless checks, was authorized, although defendant could not have been guilty of embezzling funds not intrusted to his care if acting alone (Pen. Code, § 971).

7. Criminal law ⇨200(1)**Indictment and Information** ⇨191(5)

A defendant may be convicted of both grand theft and of issuing a check with intent to defraud, although both offenses arise out of the same transaction, since under statute neither offense is included in the other, and the only common element is the intent to defraud (Pen.Code, §§ 476a, 971).

8. Criminal law ⇨200(1)

The test to determine whether a defendant may be convicted of two offenses arising out of the same transaction is the identity of the offenses as distinguished from the identity of the transaction.

9. Criminal law ⇨200(1)

A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included in the other.

10. Criminal law ⇨423(3)

In prosecution for grand theft and for uttering bank checks with intent to defraud, where offenses were accomplished by conspiracy with certain bank employees, records of the bank which had been falsified by the employees to carry out the purposes of the conspiracy were admissible as acts and declarations of coconspirators (Pen.Code, §§ 476a, 971).

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

B. H. Zimmer and others were convicted of grand theft and of uttering bank checks with intent to defraud, and the named defendant appeals.

Affirmed.

G. Vernon Brumbaugh, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Warner I. Praul, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jesse J. Frampton,

Deputy Dist. Atty., both of Los Angeles, for respondent.

WOOD, Justice.

The appellant, Robert Rubin, and Harry R. Neumann were jointly accused in an indictment containing eighteen counts charging grand theft and thirteen counts charging drawing and uttering bank checks with intent to defraud in violation of section 476a of the Penal Code. The action was tried before the court without a jury and all of the defendants were found guilty on all of the counts. Defendant B. H. Zimmer appeals from the judgments and from the order denying his motion for a new trial.

Appellant contends that the evidence is insufficient to sustain the judgments of conviction. Defendants were connected with the Rose Corporation, which operated a cafe in the city of Los Angeles known as El Mirador Café. They opened accounts in the Hollywood State Bank under the names of "Rose Corporation" and "B. Zimmer Agent." Defendants thereafter caused to be opened in their respective names bank accounts in various other banks in the city of Los Angeles. Defendants entered into a conspiracy with certain employees of the Hollywood State Bank in which it was agreed that in consideration of the receipt by the employees of certain bribes in money, clothing, meals, and liquor the bank employees would cooperate with them in fraudulently obtaining the funds of the bank to the uses and purposes of the defendants. In furtherance of the conspiracy defendants drew checks upon various outside banks in which, to the knowledge of defendants and the corrupted employees of the Hollywood State Bank, the drawers of the checks had insufficient funds or credit. These checks were cashed by the corrupted employees, who used the funds of the Hollywood State Bank intrusted to their care. The funds so obtained were used by defendants until the checks had gone through the usual clearing house channels, whereupon defendants wrote a second group of checks under the same circumstances, which in turn were cashed by the corrupted employees and the cash obtained thereon deposited by defendants in the various bank accounts to pay the checks theretofore drawn. Various sums of money were delivered by the corrupted

employees to defendants on street corners in return for the worthless checks given by defendants. These checks were withheld by the employees, who in some instances carried them in their pockets for days. Another method was followed by the conspirators by which defendants drew checks against the accounts in the Hollywood State Bank. These checks were cashed at an outside bank and upon their reaching the Hollywood State Bank through the clearing house the corrupted employees caused the checks to be paid by draft but failed to charge the checks so paid to the accounts of the Rose Corporation and B. Zimmer, Agent. In furtherance of the conspiracy the corrupted employees accepted false deposit slips from defendants and in one instance in order to cover up the defalcation they removed from the ledger a sheet containing an inactive account of another customer. In order to prevent suspicion on the part of the officials of the banks in which defendants were depositing the funds so fraudulently obtained, defendants converted the currency obtained from the corrupted employees into cashiers' checks which they purchased from other outside banks, and the cashiers' checks were deposited in the banks against which the checks were drawn in lieu of the currency. The conspirators began operation in August, 1926, and continued until February 4, 1937, when the defalcations were discovered. During this time the Hollywood State Bank suffered a loss of \$19,151 and the defendants fraudulently obtained the use of approximately \$366,000 of the funds of the bank.

[1] The prosecution presented evidence covering all the necessary elements of the crime of drawing and uttering checks as defined in section 476a of the Penal Code. The checks were drawn by defendants upon banks in which, to their knowledge, they did not have sufficient funds or credit for the payment of the checks upon their presentation. Appellant argues that he had a reasonable expectation that the checks would be paid upon their presentation and that some of the checks were actually paid. The funds, however, with which the checks were paid were obtained by a repetition of the fraudulent acts and by the issuance of additional worthless checks. Defendants had no reasonable expectation of having the checks paid without the drawing and uttering of additional worthless checks upon the same

victim they had defrauded by the original transaction.

[2-4] Appellant is not aided by the argument that certain employees of the Hollywood State Bank had knowledge concerning the value of the checks. Defendants are not charged with issuing the checks with the intent to defraud the corrupted employees but rather they are charged with issuing checks with intent to defraud the banks. The corrupted employees, with the knowledge of defendants, were falsifying the records of the Hollywood State Bank and concealing from its officers the facts concerning the transaction with defendants. They had no authority to defraud the bank. "An agent can never have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom he deals, to be a fraud upon the principal." Section 2306, Civ.Code. Defendants cannot bribe employees of the bank to accept their worthless checks, knowing that the employees are violating their trust in appropriating the funds of the bank, and escape liability by asserting that knowledge on the part of the employees was knowledge of the bank.

[5] Appellant points out that some of the checks were actually paid. Payment of the checks under the circumstances here shown does not constitute a defense. The crime was completed upon the drawing and uttering of the checks with the intent to defraud. It was not necessary to show that the victim actually was defrauded. *People v. Williams*, 69 Cal.App. 169, 230 P. 667; *People v. Khan*, 41 Cal.App. 393, 182 P. 803; *People v. Sherman*, 100 Cal.App. 587, 280 P. 708.

[6] The convictions on the counts charging grand theft are also sustained by the evidence. The corrupted employees fraudulently appropriated funds which had been intrusted to them and defendants conspired and co-operated with them. Although defendants could not be guilty of embezzling funds not intrusted to their care if acting alone and independently, the facts of the case disclose that defendants were acting in conjunction with and as accomplices of the employees of the bank. They are punishable as principals. *People v. Fronk*, 82 Cal.App. 465, 255 P. 777; section 971, Pen.Code.

[7-9] Appellant contends that he may not be found guilty of both the offenses of

grand theft and issuing a check with intent to defraud in violation of section 476a of the Penal Code in view of the fact that the two offenses arise out of the same transaction. He cites no authority to support his contention. There is but little in common between the two offenses. To establish the crime of grand theft, when based upon the acts formerly classified as embezzlement, the prosecution must prove that a defendant fraudulently appropriated property which had been intrusted to him. To establish the crime of drawing and uttering a check in violation of section 476a of the Penal Code, the prosecution must prove that defendant willfully and with intent to defraud drew, uttered, or delivered a check with knowledge at the time of such making or uttering that the maker did not have sufficient funds in or credit with the bank for the payment of the check in full upon its presentation. It is apparent that the two offenses have but one element in common, the intent to defraud. Neither offense is included in the other. The test is the identity of the offenses as distinguished from the identity of the transactions from which they arise. A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included within the other. *People v. Majors*, 65 Cal. 138, 145, 3 P. 597, 52 Am.Rep. 295; *People v. Bentley*, 77 Cal. 7, 9, 18 P. 799, 11 Am. St.Rep. 225; *People v. Ciulla*, 44 Cal.App. 725, 726, 187 P. 49; *People v. Brannon*, 70 Cal.App. 225, 228, 233 P. 88; *People v. Herbert*, 6 Cal.2d 541, 547, 58 P.2d 909.

[10] Appellant contends that the trial court erred in admitting in evidence certain books and records of the Hollywood State Bank which had been falsified. The ruling of the court was correct. The records had been falsified by the employees of the bank who made the false entries in order to carry out the purposes of the conspiracy with the defendants. They were acts and declarations of coconspirators made during the existence of the conspiracy. *People v. Double*, 203 Cal. 510, 265 P. 184.

The judgments and order denying a new trial are affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

COSTA v. NEVES.***WILLIAMS v. COSTA et al.**

Civ. 5873, 5874.

District Court of Appeal, Third District,
California.

Nov. 12, 1937.

Courts 106

Where omission of certain findings from opinion might have handicapped petitioner in full presentation of matter on appeal to Supreme Court, District Court of Appeal would incorporate findings in opinion denying petition for new trial in order that petitioner might have opportunity to have case fully reviewed on appeal to Supreme Court.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 72 P.2d 906.

C. Ray Robinson, Willard B. Treadwell, and James D. Garibaldi, all of Merced, for appellants.

Andrew R. Schottky and Edward Bickmore, both of Merced, for respondents.

PER CURIAM.

We have examined the petition of respondent for rehearing in this matter, but adhere to our former opinion. However, petitioner feels that without certain findings being set forth he will be handicapped in the full presentation of his matter to the Supreme Court in case of a petition for a hearing before that tribunal, and in order that petitioner may have every opportunity to have his case fully reviewed we incorporate herewith findings VIII, IX, and X, which read as follows:

"VIII. That on February 19th, 1934, said Alfonso Bastos made and executed a deed of said real property to said A. P. Costa; that said deed was recorded in the office of the County Recorder of the County of Merced, in Book 416 of Official Records, at page 345; that said Alfonso Bastos re-

ceived no consideration for the making and execution of said deed; that said deed was made by the parties thereto, and recorded, with the intent to delay and defraud said Larry Ferreira, a creditor of said Alfonso Bastos; that said deed was made and executed by the parties thereto to defeat the said judgment recovered by said Larry Ferreira against said Alfonso Bastos; that said Alfonso Bastos never did by said deed or otherwise intend thereby to divest himself of title to said real property therein except as above found.

"IX. That on the 3rd day of May, 1934, said Larry Ferreira made and executed a quitclaim deed of said real property to A. P. Costa; that said deed was never recorded; that said A. P. Costa paid no consideration for said deed to said Larry Ferreira or to said Alfonso Bastos; that the consideration for said deed was paid by Alfonso Bastos to said Larry Ferreira; that said deed was executed by said A. P. Costa to fully consummate the plan, design, and intent of A. P. Costa and Alfonso Bastos to defraud and delay said creditor of said Alfonso Bastos and to defeat the full satisfaction of said judgment then held by said Larry Ferreira against said Alfonso Bastos; that said A. P. Costa by becoming the grantee in said deed never intended thereby to divest Alfonso Bastos of any title to said property except as hereinabove found; that in said transaction said Alfonso Bastos by consenting to said Larry Ferreira making said deed to A. P. Costa, never intended to divest himself of his title to said real property except as hereinabove found.

"X. That prior to the filing of the complaint herein, and at the time of filing the complaint herein, Amos O. Williams, the administrator of the estate of Alfonso Bastos, deceased, claimed to be in possession of said real property, through and by a tenant, to-wit, Neves, under written lease, and since said time and ever since he has claimed to be in possession of said real property by said tenant. That said Neves first leased said premises from Bastos and paid rent to him until the time of deed from Bastos to Costa; then paid to Costa to September 1, 1934, and thereafter to Williams to date."

Rehearing is denied.

*For subsequent opinion see 82 P.2d 600.

23 Cal.App.2d 449

DAIGH et al. v. SCHAFFER, Superior Judge.

Civ. 5958.

District Court of Appeal, Third District,
California.

Nov. 16, 1937.

**1. Constitutional law ⇨205(2)
Judges ⇨40**

Portion of statute authorizing attorney in criminal case to challenge judge without setting forth any grounds of disqualification, and denying same privilege to district attorney, is unconstitutional as violating constitutional provision that no citizen or class of citizens shall be granted privileges or immunities which upon same terms shall not be granted to all citizens (Code Civ. Proc. § 170.5, as added by St.1937, p. 1496; Const. art. 1, § 21).

2. Constitutional law ⇨205(1)

The word "privilege" within constitutional provision that no citizen or class of citizens shall be granted privileges or immunities which upon same terms shall not be granted to all citizens means a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantage of other citizens (Const. art. 1, § 21).

[Ed. Note.—For other definitions of "Privilege," see Words & Phrases.]

3. Constitutional law ⇨60

The Legislature cannot delegate to another body power which has been delegated to Legislature.

4. Constitutional law ⇨64

The Legislature has plenary power to prescribe grounds which shall constitute disqualification of a judge, but Legislature has no power to delegate to private citizen or to attorney at law right to determine judge's disqualification, based upon citizen's or attorney's peculiar wishes, desires, or antipathies (Const. art. 6, §§ 1a(6), 5, 6, 10, 23).

5. Judges ⇨11

The Constitution provides the method by which Legislature may remove a judicial officer, and that is the limit both of power and method by which judicial officer may be removed from office (Const. art. 6, § 10).

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6. Statutes ⇨64(6)

As respects validity of statute authorizing party or his attorney to peremptorily challenge judge sitting in case, unconstitutional portion whereby people or district attorney in criminal case may not make such peremptory challenge was not severable from remainder of section, where limiting part as to district attorney was part of same sentence which granted right of challenge to other parties (Code Civ.Proc. § 170.5, as added by St.1937, p. 1496).

7. Constitutional law ⇨64

Statute authorizing litigant or his attorney by mere challenge to bar a qualified judge from trying cause pending in court over which he presides is unconstitutional as delegating judicial authority to private individual who arbitrarily may by few words disrupt ordinary functions of one of coordinate branches of state government (Code Civ.Proc. § 170.5, as added by St.1937, p. 1496; Const. art. 3, § 1; art. 6, § 1).

8. Statutes ⇨74(2), 87

Statute authorizing litigant or his attorney by mere challenge to bar qualified judge from trying a cause pending in court over which he presides is violative of constitutional provisions that all laws of general nature shall have a uniform operation, and that Legislature shall not pass local or special laws in certain instances (Code Civ.Proc. § 170.5, as added by St.1937, p. 1496; Const. art. 1, § 11; art. 4, § 25).

9. Constitutional law ⇨249

Statute authorizing litigant or his attorney to peremptorily challenge right of presiding judge to sit in cause in court over which he presides, in so far as statute disallows district attorney to exercise challenge which is granted to a defendant in criminal action, is unconstitutional as in violation of Fourteenth Amendment to Federal Constitution in denying equal protection of the laws (Code Civ.Proc. § 170.5, as added by St.1937, p. 1496; Const.U.S. Amend. 14).

Petition for prohibition by Elmer Daigh and others against the Honorable H. S. Schaffer, Judge of the Superior Court of the State of California, in and for the County of Merced.

Petition denied, temporary restraining order vacated, and proceeding dismissed.

Rae B. Carter, of Fresno, for petitioners.

F. A. Silveira, Dist. Atty., C. Ray Robinson, James D. Garibaldi, and Willard B. Treadwell, all of Merced, for respondent.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Deputy Dist. Atty., and Cecil Mosbacher, all of Oakland, and Gilford G. Rowland, of Sacramento, amici curiæ.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the application of the petitioners for a writ of prohibition to restrain the above-named respondent, as a judge of the superior court of the state of California, in and for the county of Merced, from proceeding with, or trying, a certain action now pending in the superior court of the county of Merced, numbered 11522, in which the Commercial Transfer, Incorporated, a corporation, and Elton C. Gorman are plaintiffs and the petitioners above named are defendants. Upon the filing of the petition a temporary restraining order was issued enjoining further action by the respondent in said cause until a further order of this court, and also an order to show cause why the respondent should not be permanently enjoined from acting as a judge of the superior court in the trial of said action, or taking further action therein.

The petition sets forth that, upon the filing of the complaint in said action and the filing of the petitioners' answer thereto, Ray B. Carter, as attorney for the defendants, and attorney for the petitioners herein, filed in the office of the clerk of the county of Merced, as ex officio clerk of the superior court in and for the county of Merced, a written challenge to prevent the respondent from taking any further proceedings in action No. 11522, pursuant to the provisions of section 170.5 of the Code of Civil Procedure (as added by St. 1937, p. 1496). That section provides, among other things, that "any party or his attorney to any cause or proceeding of any nature pending in a superior or municipal court, except the people or district attorney in a criminal case, may make and file with the clerk of the court in which the action is pending, and serve on the opposite party, a peremptory challenge in writing of the judge assigned to try or hear the cause or pending matter. Thereupon, without any further act or proof, the presiding judge in those counties where there is a presiding

judge who assigns causes for hearing or trial, or the chairman of the judicial council in other counties, shall assign some other judge to try the cause or hear the pending matter. * * * If it is necessary to secure a judge from another county, the chairman of the judicial council shall assign such judge." The section further provides that only one challenge may be allowed to each of the respective parties in the action or proceeding.

Nothing in the section, *supra*, relates to the disqualification of a judge on account of bias, prejudice or interest. No reason need be given. The barring of the judge to try the cause pending before him or in the court over which he presides is not based upon any grounds of disqualification named by the Legislature, but rests wholly upon the arbitrary act of an attorney or party to the action. In other words, the challenged judge may possess all of the constitutional qualifications, be absolutely free from bias or prejudice, and yet, if the section is valid, be set aside according to the whim, caprice, antipathy, or desire on the part of a party or his attorney to have substituted in the place of a challenged judge some one more to his personal liking, perhaps more learned or less learned in the law, that may be involved in the action, or for the undisclosed purpose that the challenged judge shall never try a case in which the challenging attorney appears. The power to remove the challenged judge is thus vested in the attorney or in the party he represents, and is without any legislative action designating grounds of disqualification.

Neither in the common law nor by statutes have we found any authority for barring a judge from the trial of a cause, except for a common-law or statutory disqualification specifically named. Nothing is contained therein providing for arbitrary action by either a party to a cause or his attorney. In other words, the law specifies grounds constituting the disqualification of a judge, and neither courts nor attorneys may add thereto. In the article on "Judges" found in 33 C. J. beginning on page 988, the causes which disqualify a judge to act are set forth at length, and no arbitrary action appears to be allowed.

Has an attorney or a private citizen, for no common law or statutory reason whatsoever, by a mere challenge, power to bar a duly elected and qualified judge from trying a cause pending in the court over which he presides?

Section 23 of article 6 of the Constitution sets forth the eligibility and qualification of judges, as follows, to wit: "No person shall be eligible to the office of a justice of the supreme court or of a district court of appeal, or of a judge of a superior court, or of a municipal court, unless he shall have been admitted to practice before the supreme court of the State for a period of at least five years immediately preceding his election or appointment to such office."

Section 6 of the same article is to the effect that there shall be at least one judge of the superior court in every organized county. Section 5 of article 6, *supra*, reads: "The superior courts shall have original jurisdiction in all civil cases and proceedings, * * * in all criminal cases amounting to felony," etc. The section then goes on to provide for the exercise of certain appellate jurisdiction, of the right of the judge to issue certain special writs, and that the process of the court shall extend to all counties in the state.

Subdivision 6 of section 1a of article 6 of the Constitution relative to the powers of the chairman of the judicial council is in these words: "The chairman shall seek to expedite judicial business and to equalize the work of the judges, and shall provide for the assignment of any judge to another court of a like or higher jurisdiction to assist a court or judge whose calendar is congested, to act for a judge who is disqualified or unable to act, or to sit and hold court where a vacancy in the office of the judge has occurred." Here, the question arises, has the chairman of the judicial council authority to appoint or designate a judge to act in the place and stead of a judge who is constitutionally qualified to act, and against whom no disqualification can be urged? If not, then the provisions of section 170.5 are void for the reason that it gives to an attorney or a private citizen the right to restrain or prohibit the functioning of a co-ordinate branch of the state government. The section as it reads sets forth no legislative specification of disqualification; it simply provides, as we have said, for an arbitrary act on the part of an attorney or on the part of a private citizen appearing as a party in the action. If the chairman of the judicial council has power to act, the judge selected and designated by him to try the case may be challenged by the attorney for the opposite party, and the action of the chairman of the judicial council nullified.

The petitioners contend that the challenge of a judge is analogous to the peremptory challenging named in a venire calling a number of citizens who thereafter may be chosen to act as jurors. The analogy, however, is not complete. The challenge of a venireman must be taken before he is clothed with authority to act as a juror. When sworn in to try the case the right of peremptory challenge has ended. When a judge of the superior court is elected constitutionally, and by the laws of the state qualified to act, the right of challenge, if compared with the challenge of the juror, would likewise cease when each one is installed and regularly empowered to proceed with the trial.

In this proceeding the petitioners rely especially upon the case of *Sacramento & San Joaquin Drainage District v. Rector*, 172 Cal. 385, 156 P. 506, 508. That case, however, when properly considered, is a complete answer negating the petitioners' contention. We quote therefrom the following: "Considering the section as one 'regulating the practice in courts of justice,' and hence as one coming under the constitutional mandate that the Legislature 'shall not pass local or special laws' on that subject, we are met by respondent's objection that the classification of causes which may not be heard by judges of counties in which the subject-matter of the litigation exists is not founded upon any natural, intrinsic, or constitutional distinction. And in the development of this objection it is specified by respondent that the act applies only to part of a class, in that judges are not disqualified from hearing causes involving properties in their respective counties belonging to irrigation districts, sanitary districts, protection districts, water districts, lighting districts, storm water districts, and other public agencies. The rule undoubtedly is that any classification of the sort attempted in this statute must be founded upon some good reason and may not rest in the arbitrary will of the Legislature; but it is also true that, if good ground for the classification exists, such classification is not void because it does not embrace within it every other class which might be included"—citing cases.

The court in the above case had under review, among other questions, the third subdivision of section 25 of article 4 of the Constitution, which prohibits special local or legislative acts regulating the practice of courts of justice, and considers the disquali-

fication there passed upon as being a regulation of the practice in courts of justice.

Before pointing out the special nature of section 170.5, *supra*, we call attention to section 21 of article 1 of the State Constitution, wherein it says: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

[1] The first sentence of section 170.5, *supra*, violates the provisions of the Constitution which we have quoted. That sentence gives to an attorney appearing in a criminal case the right to challenge the regularly elected and qualified judge, without setting forth any grounds of disqualification, and denies to the district attorney the same privilege.

Referring again to the case relied upon by the petitioners and requoteing the language therein, to wit: "The rule undoubtedly is that any classification of the sort attempted in this statute must be founded upon some good reason and may not rest in the arbitrary will of the legislature." If this granting of a privilege to the attorney on one side of a case, and denying the exercise of the same privilege of an attorney on the opposite side of the case, is not purely arbitrary, we are unable to conceive of what would be an arbitrary distinction. There is no reason why the rights of the people are not equal to the rights of a defendant. Justice cannot be meted out unless the principle of equality is observed in all court proceedings.

While it may be contended that the court is a distinct entity and does not etymologically include the judge, yet, if the court is considered simply as an idea, the judge elected and qualified to act therein is the exemplification of that idea in practice. Without the judge the court is inanimate and motionless; with the presence of the judge it is an active and going entity, and as stated by some of the text-writers, the judge is likewise included in the idea of a court.

[2] Again referring to the constitutional prohibition against granting of privileges to one and withholding them from another, we may quote the definition of "privilege" found in 5 California Jurisprudence, p. 740, to wit: "A privilege is a

particular and peculiar benefit or advantage enjoyed by a person, company or class beyond the common advantage of other citizens." If we consider the case in its collective interpretation and excluding both the attorney for the defendant and the district attorney who represents the people, the section gives to the defendant an exclusive privilege which it denies to the people or to the state.

[3] It is a maxim of constitutional law that the Legislature cannot delegate to another body the power which has been delegated to it.

[4] That the Legislature has plenary power to prescribe the grounds which shall constitute the disqualification of a judge is undoubtedly the law, but that its power to delegate to a private citizen or to an attorney at law the right to determine that disqualification, based upon his or their own peculiar wishes, desires or antipathies, is an entirely different matter. The cases to which we have been cited setting forth the rule which we have just mentioned do not go to the extent that the Legislature may abdicate its right to set forth the grounds of disqualification and transmute that right or privilege to a private citizen or his attorney.

The extent to which the challenge provided for in section 170.5, *supra*, may be carried shows that it is beyond any constitutional authority. Thus, in counties having but one judge and a limited number of attorneys, one at least of the attorneys of the county appearing therein might, by concerted action of the attorney appearing with other attorneys who would probably appear in other actions, bar a regularly elected and constitutionally qualified judge of the superior court from ever trying a case during his entire term of office.

[5] The Constitution (article 6, § 10) provides the method by which the Legislature may remove a judicial officer, and that is the limit both of the power and method by which a judicial officer may be removed from office. The possible preventing of a judge of the superior court, in counties having but one judge, from ever trying a case therein, would indirectly remove him from exercising the powers and duties of his office which the people have, by their votes, empowered him to perform.

We think the language found in 14 California Jurisprudence, p. 795, is applicable here: "As is pointed out in another article,

the Judiciary is an independent department of the State Government, and the Constitution shows a wise and peculiar solicitude to secure its independence."

Notwithstanding what we have said that we have found no authority either in the statutes of the several states or the decisions of the courts therein, supporting the contention that a mere challenge is sufficient to bar an otherwise qualified judge from acting in a particular case, it is contended by the petitioners and amicus curiæ that a large number of other states have upheld statutes similar to the provisions of section 170.5, supra, and cite as a leading case supporting such statement *U'Ren v. Bagley*, 118 Or. 77, 245 P. 1074, 1076, 46 A.L.R. 1173. The contention made by the petitioners and the friends of the court is just as strongly controverted by the respondents. That the case relied upon as showing that statutes in other states similar to section 170.5, supra, are not at all similar to said section, and that the contention that there is a similarity has no foundation, is clearly shown by an examination of the different laws and Code provisions and should have been apparent to the friends of the court.

Section 170.5, supra, set forth herein in full, provides only for the filing by an attorney, or a party, with the clerk of the court, a simple challenge setting forth the title of the action, and that the party or his attorney challenges peremptorily the judge to whom the case has been assigned for trial. No affidavit is required, no cause for challenge, and applies equally to a qualified judge who is absolutely unprejudiced, unbiased, and has no pecuniary interest nor is connected in any way by marriage or blood as a relative of any party engaged in the action.

We unhesitatingly state from an examination of all the authorities cited by the petitioners and the friends of the court that there can be found in no other state a statute or Code section which is so wide-sweeping or absolutely barren of any legal statement of a cause to bar a judge from hearing a cause, whether qualified or unqualified, as section 170.5, supra.

We turn now to the opinion in the case of *U'Ren v. Bagley*, supra, where the Oregon laws are quoted, and in which case we find the opinion stating that a certain number of other states have similar statutes, all of which we have examined and find the statement of the court substan-

tially correct. We may further add, the opinion in the *U'Ren* Case appears to be the basis for the contention that the statutes referred to in other states are similar to our own Code provision.

Section 45-1, and section 45-2 of the Oregon Laws, as amended in 1925 (Laws 1925, p. 218) read as follows:

"§ 45-1. *Judge Prejudiced not to Try Any Suit or Action; Presiding Judge or Chief Justice to Call in Another Judge or Change Venue.* No judge of a circuit court of the state of Oregon shall sit to hear or try any suit, action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the suit or action to another department of the same court, or call in a judge from some other court, or apply to the chief justice of (the) supreme court to send a judge to try the case; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action or suit is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court.

"Sec. 45-2. *Party or Attorney May File Affidavit of Prejudice.* Any party to or any attorney appearing in any action, suit or proceeding in a circuit court may establish such prejudice by motion supported by affidavit that the judge before whom the action or suit is pending is prejudiced against such party or attorney, so that such party or attorney can not, or believes that he can not, have a fair and impartial trial before such judge. And that it is made in good faith and not for the purpose of delay, and shall be filed with such motion at any time prior thereto or within one day after such action, suit or proceeding is at issue upon a question of fact, or such further time as the court may allow, and not otherwise, except that in judicial districts having a population of 100,000 or more, the affidavit and motion for change of judges shall be made at the time and in the manner prescribed in section 45-3, Oregon Laws."

It will be perceived that the sections of the Oregon laws provide not only the procedure that shall be followed but also what shall constitute sufficient evidence to bar a judge from the trial of an action. The question of prejudice is established in a certain manner, and then, what shall be

contained in the affidavit is likewise specified. Not only a question of procedure, but a question of sufficiency of the evidence of the bias or prejudice of the judge, forms a part of the substance of the two sections, and constitutes a sufficiency of what we may call a trifle more than a scintilla of evidence supporting the charge. There is absolutely nothing in section 170.5, *supra*, conformable to either one of the two sections of the Oregon laws, save and except that they are both intended to bar a judge from presiding at the trial of a particular case. The motion and the affidavit mentioned in the Oregon laws must show good faith, and that the action is taken not for the purposes of delay. Good faith is not required by section 170.5, *supra*.

Even in the U'Ren Case it appears that the opinion was by a divided court. The petitioner and friends quote from the opinion in the U'Ren Case the following: "No judge has a vested right to sit in a particular case. Neither has the litigant nor an attorney a vested right to have his case heard by any particular judge." That does not appear to us to be a full or logical determination of the questions involved. It is correct so far as it states that no litigant nor an attorney has a vested right to have his cause heard by any particular judge, but there should be added, no attorney nor litigant has a vested right to object to a judge elected by the people, qualified as provided by law, and against whom no intimation of prejudice, bias, pecuniary interest or relationship exists tending to prevent a fair trial. That is the interest of the public. The public, as a third party, has gone to the expense of electing a qualified judge to hear and determine every case which arises within the jurisdiction of the court over which such judge is elected to preside, and no party has a vested right to add to the expense of the public by interposing a challenge, where no cause therefor exists, as he has no vested right to have his cause heard by any particular judge, and, if the judge provided by the public who pays his expenses is qualified, as we have said, all the rights of the parties to the action have been fully and completely provided for. We have already shown that the challenge to an unaccepted juror bears no relation to the challenge of a court.

That the statement in the U'Ren Case that the Oregon laws are similar to those of other states and are not in any wise similar to section 170.5, *supra*, we cite, first,

the case of *Conkling v. Crosby*, 29 Ariz. 60, 239 P. 506, decided by the Supreme Court of Arizona. Paragraph 500, Revised Statutes Arizona 1913 (Civ.Code), contains, among other things, the following: "If either party to a civil action brought in any superior court shall file an affidavit alleging either:" (Omitting specifications 1, 2 and 3) "4. That the affiant has cause to believe, and does believe that on account of the bias or prejudice or interest of said judge he cannot obtain a fair and impartial trial. It shall be the duty of said judge to at once request the judge of the superior court of some other county to hold the superior court in the county where such action is pending," etc.

In *State ex rel. Beach v. Fifth Judicial District*, 53 Nev. 444, 5 P.2d 535, 537, the opinion of the Supreme Court of Nevada rests upon an act of the Legislature containing the following words: "If either party to a civil action in the district court of his or its attorney or agent shall file an affidavit alleging that the affiant has cause to believe and does believe that on account of the bias or prejudice or interest of said judge he cannot obtain a fair and impartial trial," etc., another judge shall be called in. St. 1931, c. 153, § 1.

In *State v. Armijo*, 38 N.M. 73, 28 P.2d 511, 512, the decision of the Supreme Court of the state of New Mexico rested upon a statutory provision (Laws 1933, c. 184, § 1) reading as follows: "Section 1. Whenever a party to any action or proceeding, civil or criminal, shall make and file an Affidavit that the Judge before whom the action or proceeding is to be tried or heard cannot, according to the belief of the party to said cause making such affidavit, preside over the same with impartiality, such Judge shall proceed no further," etc. These references show absolute want of any basis for the contention that any of the states referred to have statute or Code provisions similar to section 170.5, *supra*.

It is further contended that the Supreme Court of the United States, in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481, supports the validity of our Code provision. This contention, however, is likewise unsound. The section of the Judicial Code (section 21 [28 U.S.C.A. § 25]) involved in that action reads: "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or

proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the last preceding section [section 24 of this title]," etc. While the decision is by a divided court, it is to the effect that when an affidavit is filed alleging bias or prejudice, the power of the presiding judge is terminated, and another judge shall be called in; that is, there must be some evidence showing disqualification, all of which is wanting in section 170.5, *supra*.

All the cases having to do with the disqualification of judges require an affidavit, and the affidavit must state that the affiant has reason to believe that he cannot have a fair and impartial trial. The conflict between the courts rests not upon the necessity of such an affidavit, but upon the sufficiency and conclusiveness of an affidavit alleging bias or prejudice. This conflict is clearly described in 33 C. J. p. 1015, to wit: "There is a conflict of authority as to the sufficiency and conclusiveness of an affidavit alleging bias or prejudice, due largely to lack of uniformity in the various constitutional and statutory provisions. In some jurisdictions an affidavit alleging bias or prejudice is sufficient if made in the language of the statute, and the facts showing actual bias or prejudice are not required, and, in some cases, not permitted, to be alleged; hence, the affidavit is considered conclusive, the truth of the affidavit filed being not what disqualifies the judge, but the affidavit itself; and there is no discretion to refuse it. In other jurisdictions while differing as to the conclusiveness of the affidavit, it is required that it shall set forth the facts showing bias or prejudice, not mere conclusions; and it is insufficient even in the language of the statute. The facts as stated must be of a character that will show, not only that the bias or prejudice exists, but that it is of a character calculated to impair the judge's impartiality and to sway his judgment. In these latter jurisdictions there is a conflict as to the conclusiveness of the affidavit if it sufficiently sets forth the facts constituting the bias or prejudice. In some of them it is held that such an affidavit is conclusive; but in others, it is held that it is not conclusive and that counter-affidavits may be filed and the truth of the facts made an issue."

Irrespective of the procedure which may be followed by different courts as set forth in the above quotation from C. J., the necessity for filing an affidavit as contended for by the respondents is universally upheld, and also that the affidavit must set forth specific causes, or a specific cause; and, being under oath, constitutes at least some evidence of the truthfulness of the affidavit and the good faith of the affiant.

[6] Many cases are cited in the brief of amici curiæ in support of the petitioners' contention, but they do not reach the vital points involved in this action, and therefore require no citation or analysis in the decision of the cause before us. One suggestion, however, is made in the brief of amici curiæ for the petitioners which may be mentioned at this point, and that is, that if the court considers the section in so far as it limits the powers of the district attorney to file a challenge, that portion of section 170.5, *supra*, may be read out of the section. The limiting part as to the district attorney is a part of the same sentence which grants the right to challenge to other parties, which, of course, absolutely prevents our reading out of the sentence a portion thereof, and coming to the conclusion that the Legislature would have passed any portion of the section unless it included the whole sentence.

[7] On the part of the respondents it is contended that section 170.5, *supra*, violates section 1 of article 3 of the State Constitution. That section provides that the powers of the government of the state of California shall be divided into three separate departments—the legislative, executive and judicial; and no person shall be charged with the exercise of powers properly belonging to one of these departments or shall exercise any functions appertaining to the others, except as in this Constitution expressly directed or permitted.

The section of the Code under consideration does not expressly authorize any one exercising functions, either executive or legislative, to interfere with the functions of the courts, but, as we have heretofore pointed out, the only action of the Legislature has been to abrogate any such function, if it has, and delegate that authority to a private individual who, without reason and arbitrarily might, by a few words, disrupt the ordinary functions of one of the co-ordinate branches of the state government.

Respondents further contend that section 170.5, *supra*, violates section 1 of article 6 of the Constitution, which provides for the vesting of the judicial power in the Senate, sitting as a court of impeachment, in the Supreme Court, District Courts of Appeal, superior courts, and other inferior courts. There seems to be some divergence of opinion as to whether objections raised by a litigant as to the bias, prejudice, etc., of a court is the exercise of a judicial function. Admit, for the purposes of this decision, that the filing of a barren affidavit such as section 170.5, *supra*, allows, is not an exercise of any judicial function, it is, as we have stated, a delegated power and a manifest interference with the right of the duly elected, qualified, and unbiased presiding judge to proceed with the due exercise of judicial functions.

[8] The contention of the respondents that the section is further violative of section 11 of article 1 of the Constitution, and also section 25 of article 4, *supra*, has already been considered and found well taken.

It further appears from the record before us that section 170.5, *supra*, is not a general law, as it does not equally apply to litigants in different courts exercising exactly the same jurisdiction, to wit: In a justice's court having jurisdiction of a civil matter of the value of \$1,000, no such challenge is allowable, while in a municipal court where the matter involved is of the value of just \$1,000 such a challenge is allowable.

[9] We wish again to revert to the section under consideration in so far as it disallows the district attorney to exercise a challenge which is granted to a defendant in a criminal action and adopt the language found in the brief of *amicus curiæ* on behalf of the respondents, whereas the state may or may not be considered a person under the Fourteenth Amendment to the Federal Constitution, providing "that no State shall pass any law denying to any person within its jurisdiction equal protection of the laws, there can be no doubt that the uniform operation of the law would require that it apply to the State and the District Attorney in the same manner that it applies to other litigants"—Citing the case of *State v. Brown*, 8 Okl.Cr. 40, 126 P. 245, Ann.Cas. 1914C, 394, in which the doctrine just stated is upheld.

Many other cases are cited in the learned brief of *amicus curiæ* supporting the

contention of the respondents that section 170.5, *supra*, is ineffective, but we think from what we have said that citation of further cases and their analysis, and the setting forth of all the reasons cited by counsel as to why the section under consideration should be held void, would only unnecessarily lengthen this opinion. We will state, however, that all the points suggested have been carefully considered.

It seems clear to us that, if the foregoing does not show that the empowering upon attorneys and litigants of arbitrary action does not militate not only against the independence of the judiciary as a co-ordinate branch of the government, and also tend to obstruct the orderly administration of justice, we cannot very readily conceive of how such result could be more effectually attained. The rights of all of the parties and of the public as well must be considered instead of simply the arbitrary action of the attorney or litigant who seeks to remove a qualified judge from hearing a particular case. The contention of the respondents is unquestionable that the statute in effect, and the reasonable intent thereof, gives the litigant the power not to have a disqualified judge act, as provided in section 170.5 of the Code of Civil Procedure, but to enable a litigant to set aside a qualified, unbiased, and unprejudiced judge at his own pleasure. That the Legislature may designate causes which, if established in the manner by it provided, shall work a disqualification of a judge, is an entirely different matter from empowering a private citizen, though a litigant, simply by his act, to bar the exercise of judicial functions by a qualified judge. One relates simply to facts and the other to an act, not necessarily or even inferentially, based upon any facts; just simply an act.

Finding no support within reason, or in any decided case, having such a sweeping Code provision, nor in any constitutional section, but, on the contrary, that section 170.5, *supra*, is in conflict with several sections of the State Constitution, it must be held that section 170.5, *supra*, is absolutely void.

The petition for a writ of prohibition is denied; the temporary restraining order heretofore issued herein is vacated and set aside; and the proceedings dismissed.

We concur: PULLEN, P. J.; THOMPSON, J.

23 Cal.App.2d 432

**EMERSON v. BOARD OF TRUSTEES OF
PAULARINO ELEMENTARY SCHOOL
DIST. OF ORANGE COUNTY et al.**

Civ. 1690.

District Court of Appeal, Fourth District,
California.

Nov. 12, 1937.

1. Schools and school districts ⇨144(4)

Statute giving school district trustees the power to fix teachers' salaries permits the trustees to order a reduction of salary of a permanent teacher if reduction is not arbitrary or discriminatory (School Code, § 5.731).

2. Schools and school districts ⇨144(4)

Action of school district trustees in fixing permanent teacher's annual salary at \$1,000 was not arbitrary and unreasonable merely because sufficient funds to pay a larger salary were on hand, since trustees were bound to handle funds economically and make allowance for future expenses and emergencies (School Code, § 5.731).

3. Schools and school districts ⇨144(4)

Reduction of a permanent teacher's salary for the purpose of getting rid of her would be arbitrary and subject to judicial correction.

4. Mandamus ⇨107

Where a permanent teacher had agreed to prior reductions in annual salary whereby salary was reduced from \$1,650 to \$1,200 under conditions that rendered reductions reasonable and necessary, a further reduction to \$1,000 was not conclusively arbitrary and unreasonable, and hence a writ of mandate restoring \$1,200 salary was improper, in absence of evidence that reduction was arbitrary (School Code, § 5.731).

5. Mandamus ⇨107

Court was without jurisdiction to decide and fix a reasonable salary for a permanent school teacher, since such decision was within the discretion of the trustees of the school district (School Code, § 5.731).

6. Schools and school districts ⇨144(4)

That a certain salary was paid a permanent school teacher for the previous year does not necessarily show that it is the reasonable and proper salary for the ensuing year.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Petition for a writ of mandate by Mary L. Emerson against the Board of Trustees of Paularino Elementary School District of Orange County, California and others. From the judgment, the defendants appeal.

Judgment reversed.

W. F. Menton, Dist. Atty., and Preston Turner, Deputy Dist. Atty., both of Santa Ana, for appellants.

Morris Cain, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment ordering a writ of mandate to issue, commanding the trustees of an elementary school to pay a certain salary to a teacher.

The petitioner had taught in this school for some seventeen years, and for some years had been classified as a permanent teacher under the Tenure Law. For two years, beginning in 1928, she was paid an annual salary of \$1,650; the next year she received \$1,550; the next three years she was paid \$1,400 a year; and for the next two years she was paid \$1,200 a year. In May, 1936, she was offered a contract for the year beginning July 1, 1936, her salary being fixed at \$1,000. In August, 1936, the board wrote her a letter stating that she had not signed and returned her contract, that the reduction in her salary was made necessary because of lack of funds, and requesting her to let them know whether she intended to accept the contract and teach during the coming year. She replied that she intended to teach, that she was informed that there was no lack of funds, that she believed the reduction in salary to be arbitrary and unjust, that the salary fixed was not a reasonable one, and that she intended to take such steps as were available to have the same adjusted.

She then filed a petition asking that a writ of mandate issue directing the board to fix her salary at \$1,400 for the ensuing year, "or at such lesser sum as to the court shall seem just and reasonable." At the hearing, evidence was introduced that there was available the sum of \$1,418 in the teacher's salary fund for the school year 1936-1937. On behalf of the board there was testimony that during the school years 1933-34 and 1934-35 the board became indebted to the Santa Ana High School Dis-

trix in the sum of \$846.91 for the tuition for pupils sent to that school; that it was unable to pay this bill during those years; that the same was paid through a special assessment levied during the year 1935-36; that the board was unable to pay the petitioner's salary during the last month of the 1935-36 school year, since to do so would have caused the district to exceed its 5 per cent. debt limitation; that this month's salary had to be paid out of the funds available for the year 1936-37; that the district would be required to send at least two pupils to the Santa Ana High School during the year 1936-37; that the estimated expense thereof would be about \$400; and that this expense could only be paid out of the \$1,418 found available for teachers' salaries. The court found that sufficient funds were available to pay the petitioner a salary of \$1,200 for the year 1936-37, that the attempted reduction in salary from \$1,200 to \$1,000 per year was arbitrary and unjust, that the sum of \$1,200 is a reasonable sum to be fixed as salary for that year, and entered judgment directing the board to issue the necessary warrants and to pay the petitioner a salary of \$1,200 for that year. The petitioner having gone on with her teaching duties, the judgment made provision for making up any deficiencies in the monthly payments already made to her.

A number of questions are raised by the appellants, but the only ones requiring consideration are whether the evidence supports the finding that the reduction in salary was arbitrary and unjust, and whether the court exceeded its jurisdiction in ordering the board to pay a salary of \$1,200 for the year in question.

[1] Under the provisions of the School Code (Section 5.731), the power and duty of fixing salaries for teachers is given to and imposed upon the Board of Trustees of the district. There can be no question that such a board has the power to exercise a reasonable discretion in the matter of fixing salaries and to reduce the salary of a teacher if such reduction is not arbitrary or discriminatory. *Hodge v. Board of Education* (Cal.App.) 70 P.(2d) 1009. No question of discrimination arises here, since the petitioner was the only teacher in this district. In *Abraham v. Sims*, 2 Cal.2d 698, 42 P.2d 1029, 1035, it is said: "The Legislature in this state designed to give teachers, under the defined conditions, a permanency of tenure, but this has, however, been held to carry with it no assurance against change

in salary. That phase of the subject has been so ably discussed in *Fidler v. Board of Trustees*, supra, 112 Cal.App. 296, at pages 301, 305, 296 P. 912, that it is needless to enlarge upon it here. The power of the trustees to raise or reduce the salaries of permanent teachers cannot be doubted, provided it is reasonably exercised and no attempt is made after the beginning of any particular school year to reduce the salaries for that year."

In *Chambers v. Davis*, 131 Cal.App. 500, 22 P.2d 27, 30, the court said: "There can be no doubt the board possesses a reasonable discretion in determining the amount of compensation to be paid to teachers under their jurisdiction. Except for a clear abuse of this discretion the amount of salary which is allowed by the board may not be interfered with by a court."

[2-4] The evidence, although conflicting, would support a finding that sufficient funds were on hand to pay a salary of \$1,200. The fact that funds are available, standing alone, is not sufficient to establish that a lesser salary would be arbitrary and unreasonable. If that be the criterion, the court should have fixed this salary at \$1,418, as there was some evidence that this amount was available. The fact that a district employing one teacher might through fortuitous circumstances happen to have a large amount of money available in a particular year is not sufficient to justify a court in fixing the salary at that amount or in holding that a lesser amount would be unreasonable. The right and power to fix salaries rests with the Board of Trustees, and in exercising a reasonable discretion they must take cognizance of many things. It is not only their duty to handle the public funds economically, but they must anticipate and make allowances for expenses which may reasonably be expected, and for emergencies.

Whether or not a certain salary is arbitrary and unreasonable involves many things other than what funds are available. Without doubt a reduction in salary made for the purpose of getting rid of a teacher who had acquired permanent status would be arbitrary and subject to correction by a court. But the mere fact that a salary is reduced is not in itself conclusive. It may be possible to suppose a case where the nature of the reduction would be such as to disclose in itself that it was unreasonable and arbitrary, but this cannot be said of the one here in question. While there had been

several prior reductions of salary here, the salary finally paid and received had in each instance been agreed to by the petitioner, and it cannot be assumed that any of these reductions was not reasonably made and necessary to meet existing conditions. It appears from the evidence that this district had been unable to pay its bills during the two preceding years, and that an expense for tuition for pupils sent to another district was to be expected. The board was charged with the duty of trying to make the funds available cover the expenses which were reasonably to be anticipated. Where a reduction in salary is not such as to show in itself that it was arbitrarily made or made for a wrongful purpose, there must be some evidence to support a finding that it was arbitrarily made. While the fact that more money is available may have a bearing on the result, such a finding is not sufficient in itself to support the conclusion that the reduction was arbitrary or unreasonable.

[5, 6] Moreover, a court is without jurisdiction to decide what salary is reasonable and fix the same. The fact that a certain salary was paid for the previous year does not necessarily show that it is the reasonable and proper salary for the ensuing year. A discretion rests upon the Board of Trustees which can neither be arbitrarily exercised nor assumed by a court.

The judgment appealed from is reversed.

We concur: MARKS, J.; JENNINGS, J.



23 Cal.App.2d 592

PEOPLE v. SALAZAR.

Cr. 428.

District Court of Appeal, Fourth District,
California.

Nov. 24, 1937.

Automobiles ☞ 355(13)

Evidence, consisting of testimony that marks left by automobiles involved in head-on collision indicated that collision occurred on accused motorist's left side of highway,

testimony of accused and another that collision occurred on accused's right side of highway, and testimony that accused had been drinking, supported conviction of negligent homicide under the Vehicle Code (St. 1935, p. 173, § 500).

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

J. Amador Salazar was convicted of negligent homicide under St. 1935, p. 173, § 500, and he appeals.

Affirmed.

A. C. Finney, of El Centro, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and R. I. French, Deputy Dist. Atty., both of El Centro, for the People.

BARNARD, Presiding Justice.

The defendant was convicted of negligent homicide, under section 500 of the Vehicle Code (St. 1935, p. 173) as a result of an automobile collision which occurred about 11 o'clock p. m. on July 9, 1937, on U. S. highway 99, between El Centro and Heber. This highway runs east and west, was paved to a width of 20 feet and had a white stripe along the center of the pavement. A collision occurred between a Ford coupé driven in an easterly direction by the defendant and a Chevrolet sedan driven in a westerly direction by one Charles Gillett, as a result of which Gillett died. The case was tried before a jury and the defendant has appealed from the judgment and from an order denying a new trial upon the sole ground that the evidence is insufficient to support the verdict and judgment.

Two officers who arrived at the scene shortly after the accident testified that they found the deceased's car on the north side of the highway facing south, and the defendant's car on the south side of the highway, some 10 or 15 feet easterly from the other car, and headed in a north-westerly direction. They also testified that they found oil, tire and other marks on the north half of the pavement; that the pavement was skinned; that they followed the skinned place on the pavement, which led to the appellant's car, a distance of 27 feet; that the engine of the appellant's

car had broken from its frame and the front part thereof was resting on the ground; and that the skinned place on the pavement began at a point 3 feet 4 inches north of the center line, about opposite where the deceased's car was resting, and led continuously to the point where the front end of the engine of appellant's car was resting on the ground.

The appellant contends that the state's case rests entirely upon the conclusion that he is guilty because his car, in some unknown way, made these marks, while the undisputed testimony of his witnesses shows that the collision took place on the south side of the center line of the pavement, where he was rightfully driving. It is argued that in order to sustain a conclusion that the collision took place on the north half of the pavement where the marks began "the court must wholly disregard the undisputed testimony on the part of the defendant and a Mr. Stindt, who was the only witness to the accident, and also disregard the operation of certain natural laws of which the court takes judicial notice."

The appellant testified that he was driving east; that shortly before the accident happened he passed a car going in the same direction; that after passing this car he returned to and continued along his right side of the road at a speed of about 35 miles an hour; that he observed the other car approaching from the opposite direction; that this car appeared to be coming directly toward him; that its headlights were high and very bright; that he was blinded by them so that he could not see where he was going; that he slowed down his car and turned toward the right; and that the crash came and he was knocked unconscious. Mr. Stindt testified that shortly before the accident the appellant's car passed his car going in the same direction at about 35 miles an hour; that after passing him the appellant's car returned to and continued along the right side of the highway; that he did not see the lights of any approaching car; that when he was 500 or 600 feet away he heard a crash and saw the car which had just passed him go up into the air 5 or 6 feet; that he was the first person to arrive at the scene of the accident; and that he found the two cars resting in positions substantially as testified to by the officers. While he testified that he could not say whether the two cars

came together on the north or the south side of the white center line, he also said that the car which went up in the air both went up and came down on the "right side of the pavement," in other words, on the same side.

The appellant concedes that his car made the marks which began 3 feet 4 inches north of the center line of this pavement and led to that car. It is argued, however, that it conclusively appears that this car was struck on the south side of the highway; that when it went up into the air 5 or 6 feet it came down on the north half of the highway, and the loosened engine made the mark which led to the place where the car came to rest; that the Chevrolet was a heavier car; that the appellant's car was struck with great force on its left front corner by the left front end of the Gillett car; that the force of such a blow and the place and manner in which the car was struck would, by operation of natural laws, cause the front end thereof to go over to the left a distance of several feet; and that this accounts for the presence of the appellant's car at the point where its engine apparently began to drag on the pavement.

Assuming that the jury could have accepted appellant's theory as to how his car got over to the north side of this road, it cannot be said that the facts, considered in connection with the operation of natural laws, compel that conclusion. It has been frequently pointed out that what actually occurs in accidents of this nature cannot be conclusively determined from the positions and conditions in which the cars are left and from the application of the laws of physics because of the many elements and uncertainties which necessarily exist. *Nagamatsu v. Roher*, 10 Cal. App.(2d) 752, 53 P.(2d) 174, and cases there cited. In *Hawthorne v. Gunn*, 123 Cal.App. 452, 11 P.(2d) 411, 412, we said: "Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred."

The marks on the pavement north of the center line and leading to appellant's car were not made in some unknown way. The appellant concedes that they were made by his car and it was a question for the jury how that car arrived at the point from which they started. Not only could the jury draw inferences other than those

drawn by the appellant, but there was other important evidence not mentioned by him which supports the jury's conclusion. It appears, without conflict, that there was a tire mark on the soft ground to the north of this highway which led to the rear wheel of the Gillett car. This mark was about 3 feet 6 inches from the north edge of the pavement and extended easterly for some 28 feet to the point where it left the pavement. The only inference possible is that the right side of the Gillett car was some 3 feet to the north of the north edge of the pavement for approximately 28 feet before the collision occurred. In addition to this one witness testified that he smelled liquor on the breath of the appellant at the scene of the accident, another witness testified that he smelled liquor on his breath when he arrived at the hospital, and a doctor testified that he vomited about an hour after he was received at the hospital and that the contents of his stomach had the appearance of wine and smelled like alcohol. A witness testified that the appellant said nothing at the scene of the accident that night except to swear, and an officer testified that on the next day he asked the appellant how the accident happened and he replied: "Well, I don't know exactly how it did happen, I was too drunk to know."

The entire question was one of fact for the jury, the matters argued by the appellant raise no more than a conflict at best, and the evidence is sufficient to sustain the judgment.

The judgment and order are affirmed.

We concur: MARKS, J.; JENNINGS, J.



23 Cal.App.2d 482

HIBERNIA SECURITIES CO. v. MOREY.

Civ. 5815.

District Court of Appeal, Third District,
California.

Nov. 17, 1937.

Rehearing Denied Dec. 17, 1937.

Hearing Denied by Supreme Court
Jan. 13, 1938.

I. Corporations ⇨592

The principal purpose of Oregon statute providing that a corporation should be pro-

claimed dissolved by Governor for failure to file certain annual reports and to pay its license fees for two consecutive years, and containing provision for reinstatement upon payment of delinquent taxes, was to collect corporate taxes and assessments, and Legislature did not intend to penalize creditors or destroy any of their rights (L.Or.L. §§ 6716-6725).

2. Mines and minerals ⇨107

The dissolution of an Oregon mining corporation by Governor under statute for nonpayment of license taxes only forfeited its right to carry on business and did not deprive creditors of right to enforce Oregon judgment against corporation's property in California, and hence purchaser who acquired property by mesne conveyances subsequent to execution sale was entitled to it as against stockholders at time of dissolution (L.Or.L. §§ 6716-6725).

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by the Hibernia Securities Company against M. H. Morey, also known and referred to as Mary H. Morey, widow. From an adverse judgment, plaintiff appeals.

Reversed.

Erwin P. Werner, of Los Angeles, Thomas Maul, of Placerville, and Newlin & Ashburn, George W. Tackabury, Werner & Linder, and Edwin Linder, all of Los Angeles, for appellant.

James Cole, of Portland, Or., and Henry S. Lyon and Robert E. Roberts, both of Placerville, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The Hibernia Securities Company prosecuted this action against respondent, M. H. Morey, to quiet title to certain mining and mineral rights in lands situated in the county of El Dorado. The answer of defendant Morey, in addition to denying any title in plaintiff, averred title in herself to an undivided two-thirds interest in the property by virtue of a certain deed executed by Andrew C. Smith and his wife to defendant in 1932, and further alleged that in 1914 at the time of the dissolution of the Monarch Consolidated Gold Mining Company, an Oregon corporation, it was then the owner in fee of the lands in question and that Smith was, on

that date, the owner of approximately two-thirds of the capital stock of said corporation.

Defendant claims to defend this action in her own behalf and as representative for others who she claims were stockholders of the Monarch Company at the time of its dissolution in 1914.

The facts involved in this case are largely covered by a stipulation from which it appears that prior to January 5, 1914, the fee in the mineral lands herein mentioned was owned by the Monarch Consolidated Gold Mining Company. Thereafter and on May 2, 1918, an action was commenced by one Burg against the Monarch Company, which action was based on a promissory note executed by Monarch Company in favor of Hibernia Savings Bank of Portland, Ore., which note had been assigned by the bank to Burg. The summons and complaint were served on the Monarch Company on the day the action was filed, and on May 29, 1918, judgment was entered in favor of Burg and against the Monarch Company. Thereafter on June 18, 1918, an action was commenced in the superior court of the state of California in the county of El Dorado by Burg against the Monarch Company predicated upon the judgment of the Oregon court. Thereafter judgment was rendered in this, the El Dorado county action, against defendant Monarch Company, and execution issued to enforce said judgment. The sheriff levied upon and thereafter sold at execution sale the mining property herein referred to, and a certificate of sale was issued by the sheriff to Burg, the purchaser at said sale. Thereafter by mesne conveyances the mineral rights were acquired by Hibernia Securities Company, plaintiff herein.

Some time prior to these conveyances and on January 5, 1914, while the Monarch Consolidated Gold Mining Company was the owner of the mining property in question, the corporation was proclaimed dissolved and its articles of incorporation revoked and repealed by proclamation of the Governor of the state of Oregon, pursuant to an act of that state (Laws 1905, c. 172, p. 299), as amended by Laws 1909, page 89, which act was subsequently incorporated in Lord's Oregon Laws as sections 6716-6725 thereof. Briefly section 6717 provided among other things, that for failure to file certain annual reports and to pay its license fees for two consecutive

years a defaulting corporation should be proclaimed dissolved by the Governor, and any person thereafter exercising any of the corporate powers was guilty of a misdemeanor (L.O.L. § 6719); but as set forth in L.O.L. § 6721, such corporation might be reinstated by the Governor at any time as to its corporate franchise upon its paying to the State Treasurer the delinquent assessments.

It is the contention of the defendant that the proclamation of dissolution of the Monarch Company in 1914, without any subsequent reinstatement, rendered nugatory the Oregon judgment against said company in 1918, and that proceedings in California based upon this Oregon judgment were void, and title to the property in question vested in the stockholders of the Monarch Company upon issuance of the Governor's proclamation.

Plaintiff maintains that the Monarch Company was amenable to the service of the process upon it in the suit of the creditor subsequent to the forfeiture of its franchise, and that the Oregon court had jurisdiction to render a valid judgment against the delinquent corporation and subsequent proceedings on that judgment in California were both regular and valid.

The trial court upheld the defendant's contention and found that defendant and all stockholders in the Monarch Company now owned and held the fee-simple title in the property involved, and that plaintiff, claiming under the sheriff's deed from the sheriff of El Dorado county, acquired no rights in the mining property.

It is now the duty of this court to determine the effect to be given to the Oregon statute of 1905 as amended, and in particular whether the forfeiture of the corporate franchise of the Monarch Company by proclamation of the Governor for nonpayment of its license taxes rendered it immune to the action of its creditors whose claims were still enforceable and before being barred by any statute of limitations.

Among other things, section 6717 of Lord's Oregon Laws provides that the Secretary of State shall present to the Governor a list of all corporations which for two years or more next preceding such report have failed to furnish any statement or to pay any license fee required by the laws of the state of Oregon, and that the Governor shall forthwith issue his proclamation declaring such corpora-

tions dissolved and their articles of incorporation revoked and repealed, and the Secretary of State shall indorse on the articles of incorporation that such corporation has been dissolved and its articles revoked and repealed. Section 4 thereof (L.O.L. § 6719) also provides that any person who shall exercise or attempt to exercise any power under the articles of incorporation of any such corporation after the issuance of such proclamation shall be guilty of a misdemeanor. It is also provided in the same act that, if any corporation shall be dissolved in the manner provided, the Governor, by and under the advice of the Attorney General, may at any time upon payment by said corporation to the State Treasurer of certain specified sums be reinstated and restored to all its franchises and privileges, and upon such payment the Secretary of State shall issue his certificate entitling said corporation to resume its business and its franchise. It is upon this reinstatement clause that appellants rely for a reversal, contending that the effect of such proclamation was to suspend activity only of the corporation during the period of its delinquency.

To determine the effect of this statute it is necessary to examine first the interpretation of the Oregon courts of these provisions:

In *Deschutes Co. v. Lara*, 127 Or. 57, 270 P. 913, 917, a corporation had been dissolved for failure to pay its taxes. " * * * The defendant there argued that the necessary consequence of the Governor's proclamation was to take title out of the corporation and vest it in * * * the owner of all the corporation's capital stock * * * ." The court limited its inquiry as to whether a corporation during the period of revocation possessed capacity to serve as a repository of title and as obligor of a debt. The court then proceeded to hold that such dissolution by proclamation did no more than forfeit its right to do business, and it did not extinguish it as a legal entity, saying: "We conclude that, while it was powerless to transact any new business, it possessed capacity to serve as a repository of title and as obligor of the debt, and that, when its corporate functions were revived October 17, 1927, this piece of property remained as one of its assets."

In *Smyth v. Kenwood Land Co.*, 97 Or. 19, 190 P. 962, 967, a stockholder, after

dissolution, brought an action for damages to personal property belonging to the corporation because of its removal and sale by defendant after an alleged default in the sales contract. While the court there does not pass upon the question here before us, by inference it seems to be authority for the contention of appellants herein that the rights of creditors are still enforceable against a corporation whose charter has been revoked.

"Regardless of whatever the rule may have formerly been, it is now a well-established doctrine that the property of a corporation, including rights of contracts and choses in action, upon dissolution of the corporation, become vested in the stockholders, subject to the rights of creditors; and ordinarily, and in the absence of debts, the stockholders, upon dissolution of the corporation, become the owners of its assets. [Citing 5 Thompson on Corporations and various cases] * * *

"For the purposes of the instant case we shall assume, without deciding, that in no event can stockholders of a dissolved corporation prosecute an action like this one, unless at the time the action is brought all the corporate debts have first been paid. * * *

"The uncontradicted testimony is that all the debts of the Westrumite Company have been paid, except the debt, if there is a debt, created by the land sale contract. If the writings concerning the land have not already created a debt, and if on account of what has occurred they cannot in the future create a debt, then it is accurate to say that there are no corporate debts, and that therefore the legal title to the corporate assets passed to the stockholders upon the dissolution of the corporation."

To the same effect is the case of *Service Lumber Co. v. Sumpter Valley Ry. Co.*, 81 Or. 32, 149 P. 531, 152 P. 262, 158 P. 175, holding that upon dissolution by proclamation the property and rights of action of the corporation do not pass to the stockholders until the debts of the corporation have been paid.

Turning to the law of New Jersey, an examination of the cases set forth in the reports of that state shows it is similar in its essentials with the Oregon act here under consideration. The New Jersey act (Act 1905, P.L. p. 508 (4 Comp.St.N.J. 1910, pp. 5293-5295, §§ 512-518), as amended March 11, 1914, P.L. p. 27 (Comp.St.

Supp.N.J.1924, § 208—514), provides that the "Governor shall forthwith issue his proclamation declaring * * * the charters of these corporations are repealed, and all powers conferred by law upon such corporations shall thereafter be deemed inoperative and void." Section 2 (4 Comp.St.1910, p. 5293, § 513).

Section 7 of the New Jersey act (4 Comp.St.1910, p. 5295, § 518) also makes provision for reinstatement and in language identical with provision 6721, Lord's Oregon Laws.

Held v. Crosthwaite (C.C.A.) 260 F. 613, 616, emphasizes that the presence of a corporate reinstatement clause similar to the one here involved dispels the notion that forfeiture by proclamation of the Governor results in the absolute death of the corporation, since reinstatement would in such event amount to an attempt to create a new corporation at the behest of the Governor and would constitute an unlawful usurpation of power vested solely in the Legislature.

The Circuit Court of Appeals, in holding that plaintiff's remedy was against the corporation only, said:

"There is difficulty in reconciling the language of sections 1 and 2 of the act of June 3, 1905, providing for the Governor's proclamation declaring the repeal of charters for nonpayment of taxes for two years, with the language of section 7, providing for a subsequent proclamation reinstating the charter. The question has not been passed upon by the courts of New Jersey.

"We think it clear that the charter may be and by the statute is repealed by the Governor's proclamation without the necessity of any application to the courts. It seems to us equally clear that the Legislature cannot have intended by section 7 that upon payment of taxes by the corporation the Governor should create a new corporation. The Legislature alone can grant corporate franchises, and no intention should be imputed to it to delegate the power to the Governor. Indeed, such a delegation would be invalid. 'Delegatus non potest delegare.' Therefore the second proclamation of reinstatement must be held to relate to the first proclamation of repeal, and the corporation must be regarded as having continuously existed so far as the state is concerned. This is in accordance with the certificate which

the secretary of state is required to issue, entitling the corporation 'to continue its said business and its said franchises.' * * *

"The plain object of the act was the collection of revenue for the state. * * *

"It must be confessed that the language used as to the repealing proclamation is very strong, but unless the provisions for the reinstating proclamation is a nullity it must be held to relate to the repealing proclamation and completely validate the corporation and the acts of persons dealing as its directors and agents from that date. * * *

"It seems to us that the statutes construed as above and applied to the facts in this case leave the plaintiff with a remedy against the corporation only, and that this is a just and fair result."

A like conclusion is found in *Reade v. Broadway Theatre Co.*, 99 N.J.Eq. 282, 132 A. 477.

Turning to the law of California, we find that the California act of 1905 (St. 1905, p. 493) provided for the complete extinction of a corporation as a penalty for its failure to pay the franchise taxes, which is somewhat analogous to the construction here contended for by defendant.

In *Rossi v. Caire* (1916) 174 Cal. 74, 161 P. 1161, 1164, our court said: "The corporation having ceased to exist, it is no longer capable of holding the title or the possession, the property belongs to the persons who were its stockholders at the time it ceased to be a corporation. (*Have-meyer v. Superior Court*, 84 Cal. 327, 362, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192)."

In the later case of *Rossi v. Caire* (1921), 186 Cal. 544, 199 P. 1042, 1044, and after the California law had been amended, our court said:

"The original license tax act (Stats. 1905, p. 493) contained no provision for a revivor of the corporation whose charter was forfeited for failure to pay the tax. * * *

"The status of a corporation whose charter is forfeited under the license tax act referred to is well settled by decisions of this court. The penalty imposed by the act for nonpayment of the license tax prescribed was exceedingly severe, and the consequence doubtless often disastrous. * * * It was not a case simply of sus-

pendent animation, as under the present license tax law, but one of absolute death, and, as was held in *Rossi v. Caire*, 174 Cal. 74, 81, 161 P. 1161, a previous action involving questions arising out of this very forfeiture, the corporation having ceased to exist, it was no longer capable of holding the title to the property formerly belonging to it, or the possession thereof.
* * *

"We would have an entirely different case had there been a statute authorizing remission of forfeiture and rehabilitation of the corporation at the time of the forfeiture of its charter."

Our present license tax law referred to in the case just cited makes general provisions for rehabilitation of forfeited corporate franchises for delinquent corporations upon their payment of back taxes and penalties, after which amendment the California license tax law was rendered similar in effect to the Oregon law here in question.

In *Finch v. Finch*, 68 Cal.App. 72, 228 P. 553, it was held that during the forfeiture or the time that the corporation is denied the right to exercise corporate functions its existence is merely in a state of suspension, and with the compliance of the requirements of the statute it fully regains its original corporate status with the same powers which it possessed prior to the temporary loss of its corporate franchise, and that, upon restoration to corporate existence, the officers who were in office and the respective stockholders who owned the stock prior to the forfeiture resume each his original status.

Likewise in *Talcott Land Co. v. Herisher*, 184 Cal. 748, 195 P. 653, the court held that the revival of the corporation after dissolution for nonpayment of its license tax reinstates the corporation as well as powers, duties, rights, and obligations.

The statutes of Washington, section 3842, Rem.Comp.Stat. (Laws 1907, p. 271), provide that it shall be the duty of the Secretary of State to strike from the records of his office the name of any corporation which shall have neglected for a period of two years to pay its annual license fee, and permits any corporation thereafter organized to use the name stricken.

Section 3843 of Rem.Comp.Stat. provides that any corporation whose name has been

stricken is authorized to apply to the Secretary of State for reinstatement at any time thereafter.

In *Globe Construction Company v. Yost*, 173 Wash. 522, 23 P.2d 892, 894, suit was brought to remove a cloud on the title occasioned by a former mortgage foreclosure. Among other objections plaintiff contended that at the time it was served in the mortgage foreclosure action it had been stricken from the records of the Secretary of State. In considering that contention the court there said: "So long as a corporation may reinstate itself it is not dead, and is, therefore, subject to process and suit," and cited in support of this contention *State ex rel. Bowen v. Superior Court*, 135 Wash. 315, 237 P. 722, 723, and *Haynes v. Central Business Property Co.*, 140 Wash. 596, 598, 249 P. 1057.

In *State ex rel. Bowen v. Superior Court*, supra, the court said: "Under the present statute, there is no such thing as a dissolution of the corporation by the secretary of state. While the name of the relator has been stricken, it still has the right to be reinstated. Unquestionably, under section 3842, Rem.Comp.Stat. the relator would not be permitted to maintain an action, but there is no reason why it may not be sued and defend. So long as it may reinstate itself, it is not dead, but its powers are merely circumscribed."

In Colorado it is provided in section 2317 of Compiled Laws that upon nonpayment of license taxes for five years the Secretary of State shall publish a list of such delinquent corporations and they shall thereupon be deemed "defunct and inoperative and no longer competent to transact business," and further provided for reinstatement upon payment of all delinquent taxes.

Considering the language in this section, the courts of Colorado in *Bokel v. Zitnik*, 93 Colo. 565, 27 P.2d 753, said: "It seems to us, and we hold, that section 2317, supra, was intended, not to effect a dissolution of a corporation coming within its terms, so as to vest in the directors title to its property under section 2295, supra, but merely to suspend its operation while it is in default. *Smith v. Highland Mary Mining M. & P. Co.*, 82 Colo. 288, 259 P. 1025; *Ruth v. Devany*, 84 Colo. 476, 271 P. 623; *Federal Crude Oil Co. v. Yount-Lee Oil Co.* (Tex.Com.App.) 35 S. W.2d 111."

In *Hazard v. Park* (C.C.A.Colo.) 294 F. 40, 42, plaintiffs sought to restrain defendants from obtaining a sheriff's deed under a judgment obtained against the corporation upon the ground that prior to the filing of the foreclosure suit the company had been declared defunct and inoperative on account of failure to file annual reports. Said the court: "This action of declaring the corporation defunct and inoperative was taken by the secretary of state in 1913. * * * Was the action of the secretary of state under the statute, in declaring the corporation defunct, equivalent to a dissolution in the sense that no suit could be instituted against the corporation? This question must be answered in the negative. The evident intent of the Colorado statute is to penalize a corporation for failure to file its reports by prohibiting it from doing business in the state during the period of such failure, for the reason that the statute likewise provides that such suspension may at any time be lifted by filing such reports. * * * Certainly, if a corporation had been dissolved, it could not be resurrected and reinstated as an entity, in such a free and easy manner."

In *Re Double Star Brick Co.* (D.C.Cal.) 210 F. 980, 981, a California corporation had forfeited its franchise for nonpayment of license tax under the California act of 1905. In considering that situation it is there said: "Very clearly the primary, if not the only, purpose of the statute was to take away from defaulting corporations the power to act as such corporations; their privilege to do business is withdrawn as a penalty for their failure to pay the license fee or tax. It certainly was not the intention of the Legislature to impose any penalty upon, or to destroy, the rights of creditors. Were it not for these expressions of the Supreme Court of the state, I should not hesitate to hold that the statute operates simply to render corporations incompetent to transact business." This last sentence is explained by noting that the forfeiture arose under the California act of 1905 which, as pointed out in the two cases of *Rossi v. Caire*, supra, contained no provision for reinstatement, and so had the effect of completely extinguishing the corporation. In subsequent license tax acts such provisions were a part of the statute. It will be recalled that such a provision is also

found in the Oregon statutes under consideration.

The statutes of Ohio, section 5510 of the Ohio Gen.Code, imposed a fine upon "any person or persons who shall exercise * * * any powers * * * under the articles of incorporation * * * after the same are cancelled."

In *Eversman v. Ray Shipman Co.*, 115 Ohio St. 269, 152 N.E. 643, 644, the court considering the various forfeiture statutes, proceeded to hold that construed together the various sections revealed a legislative intention that all power and authority of a corporation was not terminated by a dissolution for nonpayment of taxes. The court in that connection there said: "Section 5510 clearly contemplates that the officers of such corporation may continue to exercise the forbidden powers, privileges, and franchises, and provides a penalty for such exercise. It may, therefore, be inferred that the Legislature recognized a measure of vitality in the corporation, and that it intended to penalize the continued exercise of powers which would be valid, though interfering with the primary purpose which the Legislature had in mind."

[1] It is true, as pointed out by respondent, that the language used as to the repealing proclamation is very strong, "Dissolved, and the articles of incorporation revoked and repealed." Nevertheless we must keep in mind that the statute is a revenue act, the principal purpose being to collect corporate taxes and assessments, and that the same act also contains a right of reinstatement upon the payment of the delinquent tax. We must also keep in mind that we are dealing with rights of creditors who have no interest in the corporation other than to obtain repayment of their claims, and the Legislature certainly did not intend to penalize the creditors or destroy any of their rights.

[2] It would therefore seem that not only good conscience but the statute itself couples the holding that the dissolution of the Monarch Company by the Governor's proclamation had the effect only of forfeiting its right to carry on business, but did not deprive its creditors of their right of action.

Other points are advanced by appellant, but what we have said is sufficient to require a reversal, and no advantage would

be gained by a further discussion of the issues.

The judgment must be reversed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



23 Cal.App.2d 227

HINER v. OLSON et al.

Civ. 5819.

District Court of Appeal, Third District,
California.

Nov. 19, 1937.

Hearing Denied by Supreme Court
Dec. 16, 1937.

1. Evidence ⇐17

The court will take judicial notice of a day of the week from the date as shown by the calendar.

2. Automobiles ⇐244(26)

Evidence conclusively established identity of driver of automobile involved in accident as defendant's salesman who had same name as driver of automobile (Code Civ.Proc. § 1963, subd. 25).



Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

On petition for rehearing.

Original opinion modified and petition denied.

For original opinion, see 72 P.2d 890.

Gilbert H. Jertberg, of Fresno, for appellants.

C. Ray Robinson, James D. Garibaldi, and Willard B. Treadwell, all of Merced, for respondent.

PER CURIAM.

On petition for rehearing of this case, the opinion which appears in (Cal.App.) 72 P.2d 890, is modified by striking out the word "business" appearing in line 28 from the top of page 892 thereof.

[1] The appellants challenge our statement of facts that Olson, who was involved in the accident at Merced, was identified as the same D. A. Olson who was employed as

traveling salesman for the appellants; that certain drug firms in Modesto were their regular customers; that Olson was engaged in selling drugs in the San Joaquin district just prior to the accident; or that he was then returning to his home at Fresno for the week end. Sampson, one of the appellants, testified that D. A. Olson had been their drug salesman for eight years; that he had the exclusive agency in the San Joaquin and Sacramento Valleys; that he averaged about 22 days each month canvassing his district outside of his home city of Fresno; and that they allowed him on that basis \$5 per day in lieu of hotel expenses each day he spent away from his home city. We assume he was on his way to Fresno to spend the week-end because that was his home. He had been in the upper portion of the San Joaquin district and was on his way to Fresno when the accident occurred on the afternoon of October 19, 1934. The calendar shows that day was Friday. A court will take judicial notice of the day of the week from the date as shown by the calendar.

The record shows Sampson knew they had two drug customers at Merced. Regarding the Maze Drug Store at Merced, he testified:

"Q. Do you know whether there was an account there [at the Maze Drug Store] that Mr. Olson called upon from time to time? A. Yes, he called upon them from time to time. * * *

"Q. You know the Valley Drug Store at Merced and their account? A. Yes sir.

"Q. Mr. Olson called upon them, did he not? A. Yes sir."

[2] The identity of Olson who was involved in the accident as the salesman who worked for the appellants is conclusively established. At the time of the accident he handed his card to Mr. Bunnell. It contained the name of Olson. Bunnell also wrote the number of Olson's automobile on that card and handed it to Mrs. Irma Keil, the plaintiff's daughter. Mrs. Keil testified: "Mr. Bunnell asked him his name and he said he was D. A. Olson of Fresno, that he was employed by a drug company." Hubbard, a traffic officer, ascertained from the state motor vehicle department that Olson's automobile number 4 L 5526 belonged to David A. Olson of Fresno. The character of the car was identical. It was a Buick. The residence was the same. Hub-

bard also got his name from letters which Olson carried in his pocket and from his driver's license. Other evidence confirms the identity of Olson as the same man who worked for the appellants. We have no doubt of that fact. The identity of persons from the identity of their names is presumed. Section 1963, subd. 25, Code Civ. Proc.

With the modification of the opinion above suggested, the petition for a rehearing is denied.



23 Cal.App.2d 596

**BANK OF AMERICA NAT. TRUST &
SAVINGS ASS'N v. HADDAN et al.**

Civ. 2145.

District Court of Appeal, Fourth District,
California.

Nov. 24, 1937.

Appeal and error ⇐787

Where notice of appeal had been filed, bill of exceptions had not been settled, transcript had not been prepared, statutory period within which record on appeal could be prepared and filed had expired, and trial court had made order terminating proceedings for procuring transcript on appeal and dismissing application for transcript, appeal was required to be dismissed (Code Civ. Proc. § 650, as amended by St.1935, p. 1956; § 953a).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by the Bank of America National Trust & Savings Association against Myrtle G. Haddan and another. From an adverse judgment, defendants appeal.

Appeal dismissed.

Harry W. Horton, of El Centro, and W. I. Wilson, of Brawley, for appellants.

Hickcox & Provence, of El Centro, for respondent.

JENNINGS, Justice.

This motion by respondent to dismiss the appeal herein for appellants' failure to file a transcript of the record within the prescribed time is supported by the certificate of the county clerk of the county wherein the action was tried. From this certificate the following uncontradicted facts appear: Notice of appeal was filed on June 11, 1936. No bill of exceptions has been settled as provided by section 650 of the Code of Civil Procedure (as amended by St.1935, p. 1956). No transcript has been prepared in accordance with the provisions of section 953a of the Code of Civil Procedure. The statutory period within which a record on appeal may be prepared and filed under either of the methods provided by law for perfecting an appeal has expired. On October 18, 1937, the trial court, on motion of respondent, made its order terminating proceedings for procuring a transcript on appeal and dismissing appellants' application for such transcript.

The motion for dismissal is therefore proper and must be granted. *Hunter v. Paxton*, 136 Cal.App. 332, 28 P.(2d) 1075; *Ciani v. Dubuque F. & M. Ins. Co.*, 1 Cal.App.(2d) 379, 36 P.(2d) 658.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

10 Cal.2d 232

HARTMAN RANCH CO. v. ASSOCIATED OIL CO.**L. A. 14980.**

Supreme Court of California.

Nov. 26, 1937.

Rehearing Denied Dec. 23, 1937.

1. Mines and minerals ⇨78(1)

In the absence of express provision in an oil lease, covenants will be implied requiring lessee to use reasonable diligence in the exploration and discovery of oil, and thereafter in the development of the oil lease, and protection of leasehold from drainage through wells on adjoining land.

2. Mines and minerals ⇨78(1)

Where express covenants in an oil lease do not cover completely all phases of the lessee's obligation in regard to exploration, development, and protection, implied covenants may coexist with express covenants as long as the implied covenants do not conflict with the express covenants.

3. Mines and minerals ⇨78(1)

In the absence of a clear expression of intent, express covenants in an oil and gas lease as to development do not relieve the lessee from an implied covenant to drill additional wells to protect from drainage.

4. Mines and minerals ⇨78(1)

An oil and gas lease which expressly provided for the drilling of 10 wells contained an implied covenant that lessee would protect the leasehold from drainage caused by lessee's operations on adjoining land.

5. Covenants ⇨84

Covenants running with the land bind only those who acquire the whole estate of the covenantor in some part of the property (Civ.Code, §§ 822, 1465).

6. Landlord and tenant ⇨80(3)

A sublessee is liable only to the sublessor, since he does not acquire the whole estate but only a portion of the unexpired term (Civ.Code, §§ 822, 1465).

7. Landlord and tenant ⇨79(1)

The distinction between an "assignment" and a "sublease" is that an assignment transfers the entire unexpired term.

[Ed. Note.—For other definitions of "Assignment" and "Sublease," see Words & Phrases.]

8. Landlord and tenant ⇨79(1)

A transferor's reservation of a right of re-entry for breach of conditions creates a sublease, because of his contingent reversionary interest, rather than an assignment of the whole of the unexpired term.

9. Landlord and tenant ⇨79(2)

The assignee of a lease who is in possession is liable to original lessor for breach of conditions by virtue of privity of estate, but, if he is no longer in possession, he may become liable by virtue of a contract of assumption.

10. Contracts ⇨187(3)

Under statute providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it, a creditor beneficiary is entitled to enforce a contract so made, but those who are only incidentally benefited are excluded (Civ.Code, § 1559).

11. Contracts ⇨187(3)

A person is entitled to enforce a contract under which he is entitled to a benefit, although he is not a party thereto, as a "creditor beneficiary," if no intention to make a gift appears from the terms of the promise, and performance of the promise will satisfy a duty of the promisee to the beneficiary, and it is unnecessary that the obligation of the promisee be for the payment of a money debt only (Civ.Code, § 1559).

[Ed. Note.—For other definitions of "Creditor," see Words & Phrases.]

12. Landlord and tenant ⇨79(2), 80(3)

The lessor has a right of action as a "creditor beneficiary" against a sublessee or an assignee of the lease who has agreed with the original lessee to assume the parent lease, for a breach of the terms of the parent lease, notwithstanding lessor is not a party to the contract of assumption (Civ. Code, § 1559).

13. Contracts ⇨187(3)

One may sue on a contract to which he is not a party as a creditor beneficiary, although the main purpose of the promisee is not to confer a benefit on the third party beneficiary but to secure the discharge of his debt or performance of his duty to such third party (Civ.Code, § 1559).

14. Mines and minerals ⇨74

Lessor was not precluded from suing sublessee who had assumed obligations of the parent lease, as a third party beneficiary, because lessee retained an interest in continuance of parent lease by reason of the royalty received by lessee.

15. Contracts ⇨187(1)

A contract need not be exclusively for the benefit of a third party beneficiary in order to give him a right thereon.

16. Judgment ⇨684**Mines and minerals** ⇨74

Sublessee could not avoid liability to lessor as third party beneficiary for breach of terms of parent oil and gas lease which sublessee had assumed, on ground that it might be held twice for the same obligation, since recovery by lessor from sublessee would bar action for such amount by lessee against sublessee.

17. Pleading ⇨403(3)

In lessor's action against sublessee to recover for oil drained from the leased premises through operations of sublessee on adjoining land, lessor's failure to plead sublessee's express promise of assumption of parent lease was not ground for reversal where sublessee incorporated such promise in his answer and cross-complaint and prayed that the court declare and determine the rights of the parties thereunder.

18. Appeal and error ⇨882(12)

In lessor's action against sublessee to recover for oil drained from the leased premises through operations of the sublessee on adjoining land, sublessee's request for instruction which court gave, stating that lessor was precluded by limitation from claiming damages occurring prior to four years before commencement of action, precluded sublessee from subsequently averring that damages incurred subsequent to that time were barred by limitations (Code Civ.Proc. § 337, subd. 1).

19. Appeal and error ⇨882(12)

A party may not complain of instructions given at his request.

20. Appeal and error ⇨176

Defendant is precluded from raising defense of limitations on appeal by his waiver of such defense in trial court.

21. New trial ⇨10

Where only instruction requested by defendants on subject of limitation of actions

constitutes a waiver of the plea, and such instruction is given, the defense cannot be reinstated thereafter on motion for new trial.

22. Mines and minerals ⇨78(1)

Lessee would be required to drill additional wells to protect leased premises from drainage resulting from lessee's operations on adjoining land only if such wells would be paying wells which could be operated at a reasonable profit to the lessee.

23. Damages ⇨6

A lessee or sublessee cannot escape liability for breach of an express or implied covenant to protect leased premises from drainage caused by such lessee or sublessee's operations on adjoining land because of the difficulty of exact measurement of damages, since an exact estimate of drainage is impossible.

24. Appeal and error ⇨996, 1002

Where the evidence is conflicting or conflicting inferences may be drawn from the testimony, the jury's decision is binding on the Supreme Court.

25. Appeal and error ⇨1002

In lessor's action against sublessee to recover for oil drained from the leased premises as alleged result of sublessee's operations on adjoining land, conflicting testimony respecting drainage authorized refusal to disturb verdict for lessor for alleged insufficiency of evidence.

26. Mines and minerals ⇨78(7)

In lessor's action against sublessee to recover for oil drained from leased premises as result of sublessee's operations on adjoining land, evidence respecting production from premises above opposite side of allegedly symmetrical anticline and respecting relative saturation of such two areas held to sustain verdict for \$593,700.

27. Landlord and tenant ⇨80(1)

An act which constitutes ground for forfeiture of a parent lease may be committed by a sublessee as well as by the lessee, but, in an action wherein it is to be determined that the sublessee has committed an act forfeiting the parent lease, the lessees who have given the sublease are necessary parties (Code Civ.Proc. § 389).

28. Parties ⇨18

A person is an indispensable party when the judgment to be rendered necessarily must affect his rights (Code Civ.Proc. § 389).

29. Appeal and error ⇨187(3)

The objection that an indispensable party has been omitted may be raised at any time by the trial or appellate court on its own motion (Code Civ.Proc. § 389).

30. Parties ⇨18

The requirement that indispensable parties be before the court is mandatory (Code Civ.Proc. § 389).

31. Appeal and error ⇨882(4)

In lessor's action against sublessee to recover damages caused by sublessee's drainage of oil from leased premises through operations on adjoining land, limitation of sublessee's objection in trial court to nonjoinder of lessees on ground that it had subleased only a portion of the devised premises from the original lessee did not bar sublessee from raising the objection of nonjoinder of indispensable parties on appeal (Code Civ.Proc. § 389).

32. Mines and minerals ⇨78(7)

Lessees of oil lease were indispensable parties to an action by lessor to forfeit the parent lease, although not indispensable to an action against sublessee to recover damages for drainage caused by sublessee's operations on adjoining land, based on sublessee's assumption of the obligations of the parent lease (Code Civ.Proc. § 389).

In Bank.

Appeal from Superior Court, Ventura County; H. G. Ames, Judge.

Action by the Hartman Ranch Company against the Associated Oil Company. Judgment for plaintiff, and defendant appeals.

Affirmed in part and reversed in part.

Prior opinion, 55 P.2d 1280.

Humphrey, Searls, Doyle & MacMillan and Robert M. Searls, all of San Francisco, Harrison Guio, of Los Angeles, Sheridan, Orr, Drapeau & Gardner, of Ventura, and Sloss, Turner & Finney and Sloss & Turner, all of San Francisco (William F. Humphrey and Sloss & Turner, all of San Francisco, of counsel), for appellant.

Andrews & Andrews, Finlayson, Bennett & Morrow, and Jerry H. Powell, all of Los Angeles, amici curiae.

John W. Preston, of Los Angeles, James C. Hollingsworth, of Ventura, and Clarke

& Bowker, of Los Angeles, for respondent.

George P. Adams, of Los Angeles, Philip S. Dickinson, of Whittier, and Hill, Morgan & Bledsoe, A. J. Hill, and K. K. Wright, all of Los Angeles, amici curiae.

PER CURIAM.

Plaintiff, Hartman Ranch Company, is the owner of land subject to an oil and gas lease, which provides for a one-eighth royalty to the lessor on all oil and other substances produced. Said lease was executed on October 18, 1913, to Joseph B. Dabney as lessee. Lloyd, Miley, and Buley thereafter became co-owners of the lease with Dabney. Defendant, Associated Oil Company, is in possession of said land, either as an assignee or sublessee through the aforesaid parties, and is producing oil therefrom. Said defendant is a sublessee of the land adjoining the property of plaintiff on the south. The contention of plaintiff is that the defendant by active and intensive drilling operations on this southern tract, referred to as the Lloyd lease, is draining oil from the Hartman property. Plaintiff contends that the failure of the defendant to drill additional wells on the Hartman property constitutes a breach of an implied covenant in the Hartman lease to protect the lands from drainage. Plaintiff sued to recover lessor's royalty lost through the alleged drainage. It also prayed for forfeiture of the lease for the alleged breach of said implied covenant.

The jury returned a verdict for plaintiff in the sum of \$593,700 damages for loss of royalty for the 4-year period prior to March 7, 1933, when this action was filed. Upon the equitable issue of forfeiture the trial court made findings and entered a conditional decree for forfeiture, which will be described hereinafter.

The main contentions of defendant upon this appeal are: (1) That the parent lease upon which this action is brought makes express provision for the number of wells to be drilled, with which provision defendant has fully complied, and this express provision negatives the existence of an implied covenant to drill additional wells to protect from drainage; (2) that defendant is a sublessee and as such is not subject to an action by the original lessor for breach of covenants of the parent lease; (3) that the evidence is insufficient as a

matter of law to establish either the fact of drainage or the amount thereof.

We shall consider first the contention that the provisions of the express covenant negative an implied covenant to protect against drainage. The Hartman lease was for a term of 20 years from October 18, 1913, and as much longer as the production of oil and other substances might be profitable. Within 90 days after completion of a well on the Lloyd property to the south, which well was required to be started by January 20, 1914, the lessee was required to start drilling a well on the Hartman property, and to drill a well "each year thereafter until 10 wells have been drilled in all." On October 13, 1919, an instrument was executed which provided that the lessee should be permitted to drill each well to completion or abandonment before commencing work on a subsequent well, and within 90 days after either the completion or the abandonment of a well the lessee should commence work on the next well, "and in this manner proceed to drill the ten (10) wells as in said lease required * * * provided that the lessees shall have the right to drill more than one well per year or more than ten wells in all if in the lessee's judgment the drilling is justified by the production obtained and the area of land to be drilled."

In 1916 Dabney, the original lessee, and Lloyd, Miley, and Buley, who had become co-owners with Dabney of the Hartman lease, executed a sublease to the Shell Oil Company. In 1924 this company surrendered its sublease on the ground that the property could not be profitably drilled, but retained Hartman wells 1 and 2, drilled by it. These 2 wells were surrendered in October, 1925. On January 14, 1925, an agreement was executed by the lessor and Dabney, Lloyd, Miley, and Buley, which gave said lessees until April 1, 1926, to commence drilling of the third well. The sum of \$10,000 was paid to the lessor for this extension.

On January 20, 1925, Dabney and his associates executed the instrument under which defendant, Associated Oil Company, is now in possession of the Hartman property. It drilled Hartman 3 to completion in June, 1926, and drilled a second well in 1926. It drilled 3 wells in 1927, 1 in 1928, 4 in 1929, 1 in 1931, and commenced a twelfth well just after the instant action was filed. The express covenant in the lease provided for only 10 wells.

[1,2] The present action is upon the parent Hartman lease, in which, plaintiff contends, the law will imply a covenant to drill sufficient wells to protect from drainage, notwithstanding the provision of the express covenant as to 10 wells. In the absence of express provision it is well settled that covenants will be implied to use reasonable diligence in the exploration and discovery of oil, and thereafter in the development of the oil lease, and protection from drainage through wells on adjoining lands. *Brewster v. Lanyon Zinc Co.* (C.C.A.) 140 F. 801; *Jones v. Interstate Oil Corp.*, 115 Cal.App. 302, 1 P.2d 1051; *Fallis v. Julian Petroleum Co.*, 108 Cal.App. 559, 565, 292 P. 168, and other cases cited *infra*; notes, 60 A.L.R. 950; 19 A.L.R. 437. Where express covenants do not cover completely all phases of the lessee's obligation in regard to exploration, development, and protection, implied covenants may coexist with express covenants. Since the consideration for such leases is entirely or in large part the oil royalty payments to be made to the lessor, such covenants must be implied to protect the lessor and carry out the purpose of the lease. It is agreed, of course, that implied covenants will not be raised which are in conflict with express covenants. Respondent herein contends that the covenant as to 10 wells relates to development in the absence of drainage, but does not define the lessee's obligation of protection in the event of drainage; that is, in the absence of drainage, the lessee was not required to drill more than 10 successive wells, even though a larger number, or the same number drilled in a shorter time, would secure a greater immediate output.

In *Texas Company v. Ramsower* (Tex. Com.App.) 7 S.W.2d 872, an express covenant of the lease provided that the lessee should commence a well within a year or pay \$200 annually to defer commencement. The court held that this stipulation did not relate to the covenant implied by way of addition to protect from drainage. Payment of the delay rental would not relieve from the obligation to protect against drainage. The two covenants, the one express, the other implied, related to different subjects. See, also, *Blair v. Clear Creek & Gas Co.*, 148 Ark. 301, 230 S.W. 286, 19 A.L.R. 430; *Merrill, Covenants Implied in Oil and Gas Leases*, p. 171, § 63; p. 180, § 71.

In *Hughes v. Busseyville Oil & Gas Co.*, 180 Ky. 545, 203 S.W. 515, where the express covenant apparently required that a well be drilled within 2 years, the court held that after said period had elapsed and the well had been drilled there was no obligation to drill other wells in so far as development was concerned, but that said express covenant did not relate to drainage; that it would be a manifest injustice to the lessor if the lessees were permitted to stand upon the terms of the contract and at the same time destroy its substance by permanently taking through operations on adjoining land the income which the lessor had the right to enjoy.

In *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.*, 48 Tex.Civ.App. 555, 107 S.W. 609, where the lease contained no express covenants as to the number of wells, but after one large producing well was in operation the parties entered into an agreement by reason of marketing conditions limiting the output of the leased property to one-sixth of the capacity of the well already drilled (20,000 barrels per month), it was held that, "if it became necessary after the execution of this contract in order to protect the lease from drainage to take more than 20,000 barrels per month from this well, or to sink other wells, said contract did not relieve appellant of such duty."

In *Jackson v. Texas Co.* (C.C.A.) 75 F. 2d 549, 550, the covenant was contained in a deed whereby the grantor covenantor reserved to itself all oil rights in land deeded to plaintiff. It provided that the grantor "shall never be under any obligation to develop said land for minerals," but if at any time it did produce minerals in paying quantities it should pay the grantee a royalty. The court held that a successor of the grantor covenantor was under a duty to protect the land from drainage through wells on adjacent land operated by such successor. The express covenant as to no development and the implied covenant as to protection from drainage are not conflicting, but may exist together.

The cases of *Stanley v. United Fuel Co.*, 78 W.Va. 793, 90 S.E. 344, and *Carper v. United Fuel & Gas Co.*, 78 W.Va. 433, 89 S.E. 12, L.R.A.1917A, 171, may also be noted. In said cases it was held that, although the lease contained a provision that the lessee might delay drilling a well upon payment of delay rental, there was an implied condition that if the lessor

demand the drilling of offset wells to protect from drainage the lessee should drill such wells.

[3] The above cases all apply the principle for which plaintiff contends herein—that in the absence of a clear expression of intent, express covenants as to development do not relieve the lessee from an implied covenant to drill additional wells to protect from drainage. Not many cases on the subject of implied covenants in oil leases are to be found in this state. In *Acme Oil & Mining Co. v. Williams*, 140 Cal. 681, 74 P. 296, and *Jones v. Interstate Oil Corporation*, 115 Cal.App. 302, 1 P.2d 1051, the general doctrine of implied covenants was given recognition. In *Becker v. Submarine Oil Co.*, 55 Cal.App. 698, 204 P. 245, the lease contained a provision that the lessee should complete 3 wells within 90 days, and 10 wells within one year. The lessee completed 10 wells, and thereafter for 10 years did not drill any additional wells. The court held that there was no implied covenant to drill additional wells. But there is no intimation in the opinion that drainage was alleged, and the court did not consider whether the express covenant would be the sole measure of the obligation of the parties had drainage existed. Furthermore, as an alternative ground of decision, the court held that, assuming the existence of an implied covenant to drill such additional wells as reasonable diligence required, the evidence did not indicate that in the exercise of reasonable diligence further wells should have been drilled, and hence would not justify a finding of breach of any implied covenant.

[4] In the instant case the drainage of the Hartman property in possession of defendant, Associated Oil Company, is alleged to arise from the operations of said defendant on the adjoining Lloyd property to the south. We need not decide herein whether the express covenant requiring 10 wells would exclude an implied covenant generally to drill further wells to protect from drainage, due to drilling by other operators than defendant. It certainly should not be held to have been within the contemplation of the parties that one who is in possession of the Hartman leasehold, and who, as we shall hereinafter discuss, has assumed the obligations of the Hartman lease, should by its own affirmative operations on adjoining land drain oil from beneath the Hartman property. The express covenant cannot be construed as an

authorization for so doing. In the following cases the lessee was also the lessee of adjoining land: *Blair v. Clear Creek Oil & Gas Co.*, supra; *Jackson v. Texas Co.*, supra; *Culbertson v. Iola Portland Cement Co.*, 87 Kan. 529, 125 P. 81, Ann.Cas.1914A, 610; *Kleppner v. Lemon*, 176 Pa. 502, 35 A. 109.

We conclude on this branch of the case that in the circumstances shown there was an implied covenant in the Hartman lease requiring protection from drainage through operations on adjoining land by the party in possession of the Hartman leasehold.

[5,6] This brings us to consideration of the question whether defendant, Associated Oil Company, is liable in damages for breach of said covenant. Defendant contends that as a sublessee it is not liable to the original lessor in damages for breach of covenants in the parent lease. This doctrine as to sublessees is well settled. 1 *Tiffany, Landlord and Tenant*, p. 1000, 1133; *Taylor, Landlord and Tenant* (9th Ed.) § 16, § 426; 15 *Cal.Jur.* 766; *McNamer Realty Co. v. Sunburst Oil & Gas Co.*, 76 Mont. 332, 247 P. 166, 171. It is an application of the rule, embodied in section 1465, Civil Code, that covenants running with the land bind only those who acquire the whole estate of the covenantor in some part of the property. See, also, section 822, Civ.Code. A sublessee is liable only to his own lessor, that is, the sublessor, since he does not acquire the whole estate, but only a portion of the unexpired term.

Respondent disputes appellant's contention that the instrument under which it holds is a sublease, rather than an assignment. Respondent further contends that, if said instrument is a sublease, appellant is liable to it by virtue of appellant's express promise in the sublease assuming the parent lease.

[7] The generally stated distinction between an assignment and a sublease is that an assignment transfers the entire unexpired term. In the instant case the original lease was for a term of 20 years from October 18, 1913, and as much longer as the production of oil and other hydrocarbon substances should be profitable. The term of the instrument under which the defendant holds is similarly described. However, the instrument under which defendant is in possession provided for a one-fifth royalty, while the original lease provided for

a one-eighth royalty. The one-fifth royalty was to be paid by defendant to Dabney (original lessee) and his associates, and the one-eighth was to be deducted therefrom by them and turned over to the parent lessor. The instrument under which defendant is in possession also gave Dabney and his associates a right of re-entry for breach of any stipulation therein.

[8] By virtue of our decision in *Barkhaus v. Producers' Fruit Company*, 192 Cal. 200, 219 P. 435, followed in *Kendis v. Cohn*, 90 Cal.App. 41, 58, 265 P. 844, *Backus v. Duffy*, 103 Cal.App. 775, 284 P. 954, and *Webb v. Jones*, 88 Cal.App. 20, 27, 263 P. 538, we are committed to the so-called Massachusetts rule that where the transferor reserves the right of re-entry for breach of conditions he has a "contingent reversionary interest" which prevents his transfer from operating as an assignment of the whole of the unexpired term. Instead, a sublease arises. *Dunlap v. Bullard*, 131 Mass. 161, 162; *Davis v. Vidal*, 105 Tex. 444, 151 S.W. 290, 42 L.R.A.(N.S.) 1084; *Roberson v. Pioneer Gas Co.*, 173 La. 313, 314, 137 So. 46, 82 A.L.R. 1264, page 1268; *Smith v. Sun Oil Co.*, 165 La. 907, 116 So. 379; *Johnson v. Moody*, 168 La. 799, 123 So. 330; *Saling v. Flesch*, 85 Mont. 106, 277 P. 612. The last four citations involved oil leases.

[9] But in the instant case the sublease to defendant contained an express promise whereby defendant assumed the parent Hartman lease. The promise of assumption is broad and unequivocal. It provides: "Said lessee [Associated Oil Company] hereby expressly assumes and agrees to perform all the obligations and covenants provided for in said parent lease and said modification thereof to be performed by the lessee in said parent lease or said modifications, provided further that nothing herein shall deprive the lessee of the right to surrender this lease and relieve itself of its obligations hereunder." Defendant contends that under certain decisions in this state the parent lessor may sue the sublessee on a contract of assumption only when the parent lessor is a party to it. In the case herein the above promise of assumption was contained in the sublease, to which the plaintiff Hartman Ranch Company, as parent lessor, was not a party.

Most of the cases considering the effect of express contracts of assumption involve assignments, rather than subleases. An as-

signee in possession is liable to the parent lessor by virtue of privity of estate (covenants running with the land), and it is not ordinarily necessary to consider whether by virtue of an agreement of assumption there is also privity of contract between them. But, where the assignee is no longer in possession, the privity of estate is terminated (*Treff v. Gulko*, 214 Cal. 591, 7 P. 2d 697), and if he is liable to the lessor it is by virtue of his contract of assumption. Since as to both sublessee in possession and the assignee who has terminated his possession there is no privity of estate with the lessor, cases involving an assignee who has assumed the parent lease, but is no longer in possession, will indicate the rule applicable also to sublessees who assume the parent lease.

[10,11] Respondent contends that the original lessor is a creditor beneficiary of a promise made by the sublessee with his sublessor to assume the covenants of the parent lease. Respondent also urges that an action by the lessor should lie on a covenant of assumption contained in a sublease in like manner as a grantee of a mortgagor, where such grantee assumes the mortgage, is subject to action by the mortgagee.

Section 1559, Civil Code, provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Creditor beneficiaries have been recognized as coming within section 1559, supra, the effect of which is to exclude those who are only "incidentally benefited." *Calhoun v. Downs*, 211 Cal. 766, 297 P. 548; *Washer v. Independent M. & D. Co.*, 142 Cal. 702, 76 P. 654; *Montgomery v. Dorn*, 25 Cal.App. 666, 145 P. 148; *Malone v. Crescent City M. & T. Co.*, 77 Cal. 38, 18 P. 858; *Whitney v. Am. Ins. Co.*, 127 Cal. 464, 59 P. 897; *Flint v. Cadenasso*, 64 Cal. 83, 28 P. 62; *Northup v. Altadena, etc., Syndicate*, 6 Cal.App. 101, 91 P. 422; *Sierra Paper Co. v. Mesmer*, 45 Cal.App. 667, 188 P. 605; *Sherwood v. Gill & Lutz*, 36 Cal.App. 707, 173 P. 171. "A person is a creditor beneficiary if no intention to make a gift appears from the terms of the promise, and performance of the promise will satisfy a duty of the promisee to the beneficiary." 2 *Williston on Contracts* (Rev.Ed.) p. 1042; see, also, *Restatement of Contracts*, § 133 (1) (b). The obligation of the promisee, which the promisor agrees to perform, need not be for the pay-

ment of a money debt only. *D. Ghiradelli v. Hunsicker*, 164 Cal. 355, 128 P. 1041.

[12] The promisee of an assignee of a lease or of a sublessee, agreeing with the original lessee to assume the parent lease, is plainly of this type. The lessee is under a duty to his lessor to perform the covenants of the lease, express and implied. By assuming the lease the assignee or sublessee binds himself to perform these covenants. The original lessor, although not a party to the contract of assumption, is in the position of a creditor beneficiary in relation thereto, and as such has a direct right of action against the party assuming.

[13] It is recognized that in contracts of the creditor beneficiary type the main purpose of the promisee is not to confer a benefit on the third party beneficiary, but to secure the discharge of his debt or performance of his duty to the third party. 2 *Williston on Contracts*, (Rev.Ed.) pp. 1046, 1056, 1103; *Calhoun v. Downs*, 211 Cal. 766, 297 P. 548.

Several decisions in this state contain statements that whether or not the parent lessor is a party to a contract of assumption he is nevertheless entitled to maintain an action thereon against the assignee (or sublessee) as on a contract of the third party beneficiary type. *Chase v. Oehlke*, 43 Cal.App. 435, 438, 185 P. 425; *Lopizich v. Salter*, 45 Cal.App. 446, 449, 187 P. 1075; *Bank of America National Trust & Savings Association v. Moore*, 18 Cal.App.2d 522, 64 P.2d 460; *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, 569, 194 P. 1024. It has also been declared that an assignee of a vendee in a contract of sale who assumes the contract may be held liable at the suit of the vendor. *Barberich v. Pooshichian*, 59 Cal.App. 507, 211 P. 236. The cases which allow the mortgagee to sue the grantee of a mortgagor assuming the mortgage debt are generally decided with reference to an equitable subrogation theory, rather than with use of third party beneficiary terminology. *Hopkins v. Warner*, 109 Cal. 133, 41 P. 868; *Williams v. Naftzger*, 103 Cal. 438, 440, 37 P. 411. But that the two doctrines have been more or less assimilated to each other is indicated in certain decisions: *Case v. Egan*, 57 Cal. App. 453, 455, 207 P. 388, the implication being in this case that, if the grantor had been personally liable, the mortgagee would have been a creditor beneficiary; *Mottashed v. Central & Pacific Imp. Corp.*, 8 Cal.App.2d 256, 47 P.2d 525, 529.

Appellant contends that the statements referred to above, to the effect that the lessor has a right of action on a contract of assumption, although not a party thereto, were dicta, since in those cases the lessor was in fact a party to the promise of assumption. The statements on which appellant relies as establishing a contrary rule were also unnecessary to the decisions. These statements have their origin in the early case of *Bonetti v. Treat*, 91 Cal. 223, 229, 27 P. 612, 14 L.R.A. 151, quoted in *Baker v. J. Maier Zobelein Brewery*, 140 Cal. 530, 534, 74 P. 22. In neither case was the declaration as to the effect of a promise of assumption necessary to the decision, since in both the assignee was in possession, and hence liable to the original lessor by virtue of privity of estate in the absence of any promise to assume the parent lease. The same comment may be made as to the case of *Treff v. Gulko*, 214 Cal. 591, 600, 7 P.2d 697, where the statement as to the effect of a contract of assumption was dicta for the reason that the assignee had not assumed the parent lease. Probably this was also the situation in *Bush v. Bastian*, 112 Cal. App. 644, 646, 297 P. 976.

We find no binding precedents in our decisions, and in this situation we are of the view that the better rule is that it is not necessary that the lessor be a party to the contract of assumption in order to sue the assignee or sublessee thereon.

In the instant case the original lessee was Joseph B. Dabney. By instruments described in defendant's answer as deeds, Dabney transferred an undivided cotenancy interest in the lease to Ralph B. Lloyd, and Dabney and Lloyd thereafter transferred cotenancy interests to E. J. Miley and A. M. Buley. These four men as colessees executed the sublease to defendant, Associated Oil Company. There is no suggestion that these transfers of interests in the lease to Lloyd, Miley, and Buley were not for the full unexpired term of the lease. In so far as duration of estate is concerned, Lloyd, Miley, and Buley acquired an interest in the "whole estate" of the lessee, Dabney, and this characterizes them as assignees, rather than sublessees. Said four colessees, in possession through defendant as sublessee, are liable to plaintiff lessor upon the covenants of the Hartman lease by virtue of the privity of estate existing between them and the lessor. By virtue of the express agreement made

with said four colessees assuming the covenants of the parent lease, defendant as sublessee is liable directly to plaintiff. It may be that defendant would be liable to plaintiff lessor on the contract of assumption made with Dabney, Lloyd, Miley, and Buley, even though only Dabney were liable to plaintiff on the lease. *Washer v. Ind. M. & D. Co.*, 142 Cal. 702, 707, 76 P. 654.

[14, 15] In the instant case Dabney and his associates by reason of the reservation of a one-fifth royalty (the royalty under the original lease being one-eighth) have an interest in the continuance of the parent lease and the performance of its covenants beyond the mere discharge of their obligation to the parent lessor. Under the sublease the one-fifth royalty was to be paid to the sublessors, who were to pay the one-eighth to the parent lessor. But it is not necessary that a contract be exclusively for the benefit of a third party to give him a right thereon. *Stanton v. Santa Ana Sugar Co.*, 84 Cal.App. 206, 209, 257 P. 907; *Miles v. Miles*, 77 Cal.App. 219, 228, 246 P. 143; *Le Ballister v. Redwood Theatres, Inc.*, 1 Cal.App.2d 447, 36 P.2d 827; *Montgomery v. Dorn*, 25 Cal.App. 666, 145 P. 148.

[16] Appellant suggests that if it is liable in an action by the lessor it may be held twice for the same obligation, since it is also liable to its promisees with whom the contract of assumption was made. This danger is not real. The rules pertaining to third party beneficiary contracts avoid such a result and will protect appellant. 2 *Williston on Contracts* (Rev.Ed.) § 392, p. 1131; § 394, p. 1136; see, also, section 141 (1), *Restatement of Contracts*. The recovery of damages by plaintiff herein in the amount of one-eighth royalty on the oil and gas lost through drainage and depletion will bar an action for said one-eighth by the sublessors, Dabney and his three associates.

Although our decision herein rests on the express promise of assumption by the sublessee, we are not to be understood as laying down a rule that in the absence of such a promise the lessor may not recover from a sublessee in possession the lessor's royalty percentage on oil produced from the leased premises, or on oil drained from the leased premises through operations of said sublessee on adjoining land. Under an ordinary lease the lessor cannot sue a sublessee for money rental. *City Investment*

Co. v. Pringle, 73 Cal.App. 782, 788, 239 P. 302. But where rent or royalty under an oil lease is a percentage of the oil produced, or the proceeds therefrom, it would seem, in line with certain decisions involving other royalty problems, that the lessor has a definite property right in specific property, in the royalty percentage of oil produced from the leased property or the proceeds therefrom, and that the lessee by executing a sublease rather than an assignment cannot defeat the lessor's direct right against the party by whom the oil has been produced from the leased premises. See *Schiffman v. Richfield Oil Co.* (Cal.Sup.) 64 P.2d 1081. It would be but a step to hold that the lessor, upon breach of a covenant to protect against drainage, may sue the sublessee to recover his lessor's percentage upon oil not removed through wells on the leased premises, but drained from said premises by the sublessee through his wells on adjoining land.

[17] Defendant makes the further point that plaintiff cannot recover on defendant's express promise of assumption for the reason that plaintiff did not plead it, nor allege that it was made for its benefit. *Erickson v. Rhee*, 181 Cal. 562, 565, 185 P. 847. The complaint stated a cause of action based on the theory that defendant was an assignee of the lease. It alleged that defendant was "the owner and holder of said Hartman lease." Exhibit B of the complaint, which was a copy of the brief recorded memorandum of the instrument under which defendant entered, did not reveal the provisions of the full instrument which marked it as a sublease. The defendant annexed the full agreement to its answer and cross-complaint. Plaintiff then learned its contents, but it did not amend its complaint. The case was tried on the theory that a sublessee would be liable for breaches of the parent lease committed during his exclusive possession. Certain instructions submitted by the defendant itself and given by the court clearly assumed this liability, among them the following: "In considering the respective rights and obligations of the parties to this suit, you are to bear in mind, as I stated, that they are governed by the provisions of the written instruments, namely the lease from Katherine Hartman to Joseph B. Dabney, the sublease from Joseph B. Dabney and his associates to Associated Oil Company, and such other written agreements between Associated Oil Company

and the plaintiff as have been introduced in evidence at this trial. * * * In order that the plaintiff may recover in this case, it is essential that it first prove some breach on the part of the defendant, Associated Oil Company, of its obligations toward the plaintiff under these agreements. I mention these two leases because, having taken a sublease of the entire property from the original lessees of Katherine Hartman, Associated Oil Company has assumed the obligation of fulfilling toward plaintiff all of the duties which devolved upon Katherine Hartman's original lessee. * * *

Neither the answer nor demurrer set up the defense that as a sublessee the defendant could not be sued by the original lessor. Paragraphs II and X (c) of the demurrer do not make this point. Under the law we now hold that plaintiff was entitled to judgment by reason of the express promise of assumption made by defendant. While plaintiff did not amend its complaint to allege said promise, defendant incorporated in its answer and cross-complaint a copy of the full agreement of subleasing, containing the promise of assumption. Defendant alleged that a controversy existed as to the respective rights and duties of plaintiff and defendant thereunder, and prayed that the court declare and determine such rights and duties. In this situation the judgment will not be reversed because plaintiff did not amend its complaint to set up the promise of assumption.

[18, 19] As a special ground of defense appellant averred that respondent's action for damages was barred by the statute of limitations. Plaintiff sought recovery of damages for oil and gas drainage and depletion occurring with 4 years next preceding the filing of the complaint. The theory of plaintiff was that as the action was brought for breach of an implied covenant in the written lease, the 4-year period for actions on written instruments applied. Section 337, subd. 1, Code Civ.Proc. Defendant contends that, since under the testimony of plaintiff's witnesses additional wells should have been drilled as early as 1926 or 1927, the 4-year period commenced to run at that time, and action brought in March, 1933, was too late. We need not decide the problems inherent in this contention, for defendant must be deemed to have consented in so far as the statute of limitations is concerned to the plaintiff's recovery of the loss due to drainage and depletion during the 4-year

period preceding action filed. Defendant requested and the court gave the following instruction: "This action was commenced on the 7th day of March, 1933. It purports to be an action for breach of the alleged implied covenant to protect plaintiff's lands against alleged drainage. As this implied covenant arises, if at all, by terms of a written instrument, I instruct you that the plaintiff is precluded by the statute of limitations from claiming any damages for alleged breaches occurring prior to four years before the commencement of the action—that is to say, four years prior to March 7, 1933. In computing the amount of damages, if you find any were suffered by plaintiff, you will therefore ignore all claims for damages alleged to have been suffered prior to March 7, 1929."

Said instruction constitutes a clear recognition that damages suffered after March 7, 1929, were not barred by the statute of limitations. The defendant requested no other instructions bearing on the statute. A party may not complain of instructions given at his request. *Yolo Water & Power Co. v. Hudson*, 182 Cal. 48, 186 P. 772; *Gray v. Ellis*, 164 Cal. 481, 129 P. 791; *Hughes v. Pacific Electric Ry. Co.*, 58 Cal. App. 375, 208 P. 335; *Bloomberg v. Laventhal*, 179 Cal. 616, 178 P. 496; 24 Cal. Jur. 870; 2 Cal. Jur. 848; 2 New Cal. Dig. 623.

[20, 21] Defendant made both a motion for a directed verdict and for judgment notwithstanding the verdict. In neither did it urge the statute of limitations. Having waived the defense in the trial court, defendant cannot renew it on appeal. It is suggested in one of the briefs that defendant urged the defense on its motion for new trial. The record on appeal herein, which contains the notice of motion for a new trial, and the order of denial, does not show any reference to the statute of limitations. If the statute was in fact urged in the argument on the motion, defendant could not thereby nullify its prior conduct constituting a waiver. Whatever may be the rule where the plea of the statute is raised by the answer, but no instruction is requested or given on said plea (*Jones v. Goldtree Bros. Co.*, 142 Cal. 383, 387, 77 P. 939; *Castagnino v. Balletta*, 82 Cal. 250, 23 P. 127), where the only instruction requested by the defendant on the subject constitutes a waiver of the plea, and said instruction is given, the defense cannot be reinstated thereafter on motion for new trial.

[22] This brings us to the third of the appellant's three main contentions—that the evidence is insufficient as a matter of law to establish either the fact of drainage or the amount thereof.

The Hartman lease is located in the Ventura avenue oil field, near the city of Ventura, Ventura county. The formation from which oil is produced in this field is anticlinal in nature; that is, the structure has two sloping flanks which meet at a crest. The top line or ridge of the structure is known as the axis of the anticline. Wells are drilled on each flank of the structure. Beneath the surface there is a well-defined body of shale known as the Gosnell shale, which extends throughout the field, and is referred to as a marker. The ridge or axis of the base of this shale marker, as located through drilling records of wells in the field, is approximately 3,000 feet below sea level in the vicinity of the Hartman and Lloyd leases. The north and south slopes of the shale body, with the ridge or crest running east and west, descend from said ridge to increasing depths below sea level. Hereinafter, when the stratigraphic penetration of a well is referred to, depth below the base of the Gosnell shale is meant. A reference to depth is to total depth.

The property embraced in the Hartman lease, consisting of 147.58 acres, is located on the north flank, the southern boundary being some distance north of the subsurface axis at the base of Gosnell shale. The Lloyd lease, which adjoins the south boundary of the Hartman lease, commences on its northerly boundary north of the subsurface axis, and extends over the crest or ridge and down the south flank. It contains 1,425 acres, a portion of which lies beyond the productive limits of the oil field. The productive portion of the lease contains about 430 acres. Said Lloyd lease extends further in an easterly direction than the Hartman lease, and hence lies south of the north flank of the McGonigle lease, as well as south of the Hartman lease. Defendant, Associated Oil Company, also holds the McGonigle lease, and a lease upon land to the east of its own Lloyd lease, which easterly lease is referred to as the Ventura Land & Water Company lease. Thus the defendant is the lessee of approximately the eastern half of the Ventura avenue field, upon both its north and south flanks.

The defendant first acquired its sublease on the Hartman property on January 20, 1925. In October, 1925, Hartman wells

1 and 2, drilled by the Shell Oil Company, were surrendered to the sublessors, and this area added to defendant's sublease. Under the parent lease as extended, and under its sublease, defendant was not required to commence drilling a well until April 1, 1926. It started before that date and on June 18, 1926, completed Hartman 3. Thereafter it completed ten other wells, as follows: 1926, 1 well in addition to Hartman 3; 1927, 3 wells; 1928, 1 well; 1929, 4 wells; 1930, no wells; 1931, 1 well. After commencement of the instant action it started another well, Hartman 14, for which the work order had been given in November, 1932.

All wells except Hartman 11 are located in a line along the south side of the Hartman property at a distance of about 200 feet north of south boundary and are described as first line wells. Hartman 11, farther north, is a second line well. Hartman 20 and 19, also located upon the second line, were abandoned before completion after drilling to the respective depths of 1,500 and 100 feet. A derrick was placed upon a second line location for Hartman 27, but no drilling done. According to defendant's witness Jenkins, chief of the production division of the Associated Oil Company, these wells were not completed because the defendant company did not believe they would pay out.

The defendant company became sublessee of the Lloyd lease on February 24, 1920. By January, 1925, when it acquired the Hartman lease, it had already completed 8 wells on the Lloyd lease and produced therefrom 6,200,000 barrels of oil. Most of this production was from above 5,000 feet in depth. These wells were small producers compared with the later deeper Lloyd wells made possible through great improvements in drilling equipment. Lloyd wells 9A, 16, and 15, completed in 1925 below 5,000 feet in depth, were the deeper Lloyd wells which were regarded as revealing the immense potentialities of the Ventura avenue field. Between January, 1925, and March, 1933, defendant company completed seventy wells on the Lloyd lease, as compared with eleven for the Hartman lease.

The Lloyd lease, however, covers a much greater area. For this reason the plaintiff's expert witnesses selected for comparison with the Hartman lease an area on the Lloyd lease of comparable size and location on the south flank, at approximately the same distance from the axis or crest as the Hartman lease on the north flank is distant from said

crest. On this comparable area on the Lloyd lease 23 wells were completed as compared with 11 on the Hartman lease. The location of all wells in the field is indicated on plaintiff's Exhibit 215.

It was the opinion of plaintiff's expert witnesses that the unequal drilling program on the Hartman lease must inevitably have resulted in drainage from the Hartman property to the Lloyd lease. From the date of the first production on the Hartman lease in June, 1926, to January 1, 1933, the Hartman lease produced 3,727,537 barrels of oil. The entire Lloyd lease produced 41,721,567 barrels up to January 1, 1933. During the 4-year period between March 1, 1929, and March 1, 1933, the production figures were: Hartman lease, 2,269,087 barrels of oil; Lloyd area of 23 wells, 9,036,493 barrels; entire Lloyd lease, approximately 20,000,000 barrels.

No claim is made that the productive period of the field is approaching an end. According to defendant's witness Hertel, his estimate was that the entire Ventura avenue field would produce more than twice as much as it had produced from the inception of production up to January 1, 1933.

The defendant company since it became sublessee of the Hartman property in 1925 has paid royalty on oil produced from the Hartman property on the one-fifth basis provided in its sublease in the amount of \$1,-154,216.60. Of this sum plaintiff and its predecessor, Katherine Hartman, had received almost \$800,000 and the sublessors more than \$300,000. Of the 11 Hartman wells drilled to completion, Hartman 3, 15, and 16, drilled in 1926, 1931, and 1929, respectively, had not paid out at the time of trial in November, 1933.

Since the lessor receives its royalty percentage on the gross oil produced (excepting only oil, gas, and water used on the property), without deduction for operating expenses, a conflict of interest may arise between lessor and lessee as to whether additional wells should be drilled. The court herein protected the defendant lessee in this matter by its instructions to the jury that said defendant Associated Oil Company was only required to drill additional wells to protect from drainage if said wells would be paying wells which could be operated at a reasonable profit to defendant.

[23] Plaintiff contends that defendant's heavy drilling program on the Lloyd lease to the south was induced in part by the pro-

visions of the sublease under which it held said property. The term was to end on October 31, 1933. Thereafter the lessee could continue to operate wells already drilled, but could drill no new wells. The Hartman lease was for 20 years and as much longer as production should be profitable, and contained no limitation as to drilling new wells. Paragraph 14 of the Lloyd sublease required the sublessee to operate "so as to secure a maximum production." However, paragraph 13 fixed the number of wells which the sublessee should drill each year at two.

Defendant's witnesses testified that the company did not undertake a more extensive drilling program on the Hartman lease due to the belief of its officers, induced by the relatively poor showing of the Hartman first line wells, that at no time would a second or third line of wells back of the first line have paid out. Defendant's witness Folsom testified that in his opinion the line of Hartman wells marked the limits of production on the north flank. Nevertheless defendant was unwilling at the time of trial to relinquish the northern part of the Hartman lease, retaining the wells already drilled by it. It desired to retain this un-drilled area on the chance that deep well tests might establish a productive zone at greater depths, and also as a protection against possible "whip-stocking," or slant drilling, by another operator into the drilled portion of the Hartman lease.

Plaintiff's witnesses Gillan, Soper, and Herold, who estimated the amount of drainage and loss during the 4-year period, were of the view that if the two leases had been equally and simultaneously drilled the Hartman lease and the 23-well area of the Lloyd lease would have produced equally. This conclusion is necessarily based on the premise of equal impregnation of oil and equality of other conditions affecting production. The assumption of equality of conditions made by plaintiff's expert witnesses was, in turn, based on their opinion that the anticline was structurally symmetrical, that is, the north and south flanks had the same angle of slope. An anticline on which one flank descends from the crest line at a steep angle, and the other flank has a gentler slope, is symmetrical.

It may well be said at this point that an exact knowledge of subsurface conditions or an exact estimate of drainage is in the nature of things impossible, and that, if there has been a breach of an express or

implied covenant to protect from drainage, the lessee or sublessee cannot escape liability for his wrongful act by reason of the difficulty of exact measurement of damages. *McConnell v. Corona City Water Co.*, 149 Cal. 60, 64, 67, 85 P. 929, 8 L.R.A.(N.S.) 1171; *Northern Light Min. Co. v. Blue Goose Min. Co.*, 25 Cal.App. 282, 293, 294, 143 P. 540; *Blair v. Clear Creek Oil & Gas Co.*, 148 Ark. 301, 230 S.W. 286, 19 A.L.R. 430; *Daughetee v. Ohio Oil Co.*, 263 Ill. 518, 105 N.E. 308; *Meyers v. Texas Co.*, 6 Cal.2d 610, 616, 59 P.2d 132; 17 Cor.Jur. 756, 757.

[24] Defendant emphasizes its knowledge of the rule that in cases of conflicting evidence, or conflicting inferences to be drawn from testimony, the decision of the jury and trial court is binding on this court as an appellate tribunal. But defendant contends that whereas plaintiff's witnesses have merely assumed symmetry of the anticline, and from that assumption inferred equal impregnation of the two flanks as the foundation for their subsequent conclusions, the defendant's evidence demonstrates as a matter of law that there is inequality of impregnation as between the two flanks, the south flank being much more productive. Defendant suggests that, if the two flanks were originally unequally impregnated with oil, then inequality of production is no indication either of the fact of drainage or of the amount thereof, and plaintiff has failed to prove these two essentials of its case. Respondent's witnesses, however, emphasized not only the inequality in the amount of oil produced, but the inequality of drilling operations. As to the fact of drainage, as distinguished from the amount thereof, it is entirely consistent with the testimony of plaintiff's expert witnesses that great inequality of drilling operations would cause drainage from a less heavily saturated area to a more productive area.

[25] Appellant also contends that a consideration of the pressures registered on the Hartman and Lloyd leases indicated that pressures on the Hartman lease are lower than on the Lloyd lease, and this demonstrates as a matter of law that there could not be drainage from the Hartman to the Lloyd area. The drilling of a well creates an area of low pressure, causes gas to be released from solution in the oil and to move toward the well from all directions, bringing oil with it. It is the differential in pressure between the bottom of the well and points back of it which causes the gas and

oil to move. Both parties are agreed that it is reservoir or bottom of the hole pressures which should be compared. However, such pressures were not registered by defendant on the Hartman or Lloyd leases. Casing-head pressures, that is pressures registered by a gauge at the head of the casing, were recorded. Appellant contends that through a study of casing-head pressures and certain other factors it can be determined that the reservoir pressures must be lower on the Hartman lease than on the Lloyd, and hence drainage could not take place from the Hartman area to the Lloyd, since oil moves in the direction of lower pressure. Respondent has reached a contrary conclusion through its analysis of certain undisputed figures.

The study of casing-head pressures and certain other factors made by appellant and respondent in their briefs with a view to demonstrating the relative reservoir or bottom of the hole pressures as between the two leases was not developed by the expert witnesses for either side during the trial. As an appellate court, nonexpert in the science of petroleum geology, a reading of the record does not supply us with the information sufficient to evaluate either the appellant's or respondent's deductions as to comparative reservoir pressures between the two leases. We cannot say that the study of pressures made in the briefs demonstrates whether the reservoir pressures are higher on the Hartman or on the Lloyd lease, or that said study either proves or disproves drainage from the Hartman tract to the Lloyd.

Defendant's witnesses assigned various reasons for their belief that drainage had not taken place. Defendant's witness Folsom was of the opinion that the eleven Hartman south line wells would prevent passage of oil and gas from the north part of the Hartman lease into the Lloyd lease. The portion of the Lloyd lease which lies immediately south of the Hartman lease was drilled more lightly than the Hartman lease, and produced less oil and gas. This was because that portion of the Lloyd lease was close to the axis of the structure, and witnesses for both parties testified that it was good practice to drill the axis area lightly, thereby conserving the so-called "gas cap" at the crest in order to obtain a greater production through movement of this gas into the flanks. Since the 11 Hartman wells created areas of low pressure,

this witness was of the view that the oil on the undrilled portion of the Hartman lease would not "by-pass" these points of low pressure into the lightly drilled Lloyd area at the crest and from there into the heavily drilled Lloyd area, which, it is claimed, drained the Hartman property. But plaintiff's expert witness Gillan testified that the "tremendous pull" due to the large number of wells on the south flank "dragged the oil right past the Hartman wells" and into the Lloyd tract.

Defendant's witness Uren and its witness Dodge testified, in support of their conclusion that there had been no drainage, that although there is a gradual growth in the area of influence of a well, eventually a point will be reached where the expulsive forces and certain retentive forces neutralize each other, and the growth of the area of drainage influence is then arrested.

As to the fact of drainage, the record is in a state of conflict. We conclude that the defendant has not as a matter of law negatived the existence of drainage. The jury by its verdict for plaintiff on conflicting evidence concluded that there had been drainage.

[26] This brings us to the question of the sufficiency of the evidence to support a judgment in the amount fixed by the jury's verdict. The loss, according to plaintiff's witnesses Soper, Herold, and Gillan was the difference between what the Hartman lease actually produced and what it would have produced if it had been drilled equally with the 23-well Lloyd area. The Hartman lease produced 2,269,087 barrels of oil between March 1, 1929, and March 1, 1933. The south flank 23-well area of the Lloyd lease, comparable in size and location, produced 9,036,493 barrels. The difference is 6,767,406 barrels, and according to said witnesses this difference represented the loss to the Hartman property for the 4-year period. The one-eighth royalty due the parent lessor upon 6,767,406 barrels of oil and upon the lessor's interest in the gas produced amounts to \$1,247,220. Allowing for discrepancies and possibility of error in calculation, Soper fixed the damages suffered by plaintiff at a minimum of \$1,200,000, a maximum of \$1,300,000, while Herold gave as a rough estimate \$1,120,000.

The witness Gillan for plaintiff estimated damages by a slightly different method at between \$1,100,000 and \$1,217,000, but his

method also involved the assumption that the Hartman lease if equally and simultaneously drilled with the 23-well area of the Lloyd lease would have produced what the Lloyd area actually produced with drainage from the Hartman property.

The 23-well Lloyd area produced 9,036,493 barrels in the 4-year period, this production including oil claimed by plaintiff to have been drained from the Hartman property. It was the theory of plaintiff's witnesses that if 23 wells had been drilled on the Hartman, both it and the 23-well Lloyd area would have produced 9,036,493 barrels. How can it be, defendant asks, that when the 23-well Lloyd area produced 9,036,493 barrels with the unequal drilling and with drainage from the Hartman property, that if 23 wells had been drilled on each tract and there had been no drainage, both tracts would have produced 9,036,493 barrels? Appellant's counsel in the cross-examination of the plaintiff's witness Soper suggested that to ascertain the production which each area would have had with coequal drilling the figure of 9,036,493 barrels actually produced on the Lloyd 23-well area should be added to the 2,269,087 barrels actually produced on the Hartman lease, and the total divided by two, giving 5,652,790 barrels as the hypothetical production of each area upon coequal drilling, with a loss of 3,383,703 barrels to the Hartman lease. (Difference between 5,652,790 and 2,269,087.) This is just one-half the loss as figured by plaintiff's expert witnesses with use of the figure of 9,036,493 barrels as the production which the Hartman lease would have had with equal drilling. The verdict of the jury was for \$593,700, slightly more than one-half of the lowest estimate of damages fixed by plaintiff's experts and less than one-half of the maximum estimate of said witnesses. This figure is well within the amount which would arise from a loss of 3,383,703 barrels, as suggested by appellant.

The above discussion has been based on an acceptance of the proposition that the north flank Hartman lease and the south flank Lloyd lease are areas of approximately equal impregnation. Otherwise the foundation upon which rests the only evidence as to the amount of drainage is removed, for if the areas are not equally impregnated they could not have produced the same amounts had they been equally drilled. No witness even attempted to suggest any method for estimating drainage as be-

tween two areas of unequal natural productivity. A formula adapted to calculating drainage as between two coequal areas—that each area if equally drilled would have produced the same amount—is obviously not appropriate for determination of drainage problems as between two areas of unequal saturation.

Plaintiff's expert witnesses admittedly assumed equal impregnation and uniformity of other conditions affecting the productivity of oil. This assumption was based on the premise that the anticline was structurally symmetrical at the producing horizons below the Gosnell shale, that is, that each flank had the same angle of slope. This conclusion as to subsurface symmetry the plaintiff's witnesses based on the subsurface contour map of the base of the Gosnell shale, Exhibit 215 herein. Said map was prepared in 1932 from data obtained from production records of defendant company by defendant's employee Hertel. It has been published in technical journals as the subsurface contour map of the Ventura avenue oil field.

Since no witness for plaintiff gave it as his opinion that equality of impregnation could be assumed except in the case of a symmetrical anticline, defendant has sought to establish that notwithstanding the comparative symmetry shown by Exhibit 215 the anticline is nevertheless asymmetrical below the surface at the producing horizons. On this appeal defendant contends that the evidence introduced by it demonstrates as a matter of law that the anticline is asymmetrical. Defendant further contends that irrespective of structural symmetry or asymmetry, that is, angle of slope of the flanks, it has demonstrated as a matter of law that the two flanks are not equally impregnated, but are areas of unequal natural productivity; that is, notwithstanding the anticline is structurally symmetrical, the impregnation of the two flanks may be unequal. Plaintiff's experts merely stated that in the absence of evidence to the contrary it must be assumed that impregnation of both flanks of the symmetrical anticline is equal. Defendant contends that it has introduced evidence to the contrary, which as a matter of law proves in this case that the impregnation and productivity is unequal.

Thus defendant's proof and its contentions in its briefs on this appeal are directed on this phase of the case to two proposi-

tions: (1) That the anticline is not symmetrical; (2) that regardless of symmetry the north and south flank are unequally saturated with oil, the south flank being much more productive than the north.

We shall consider first the matter of symmetry. Plaintiff states in its briefs that its contention is one of relative symmetry. Exact symmetry does not exist in a state of nature. Computations of underground drainage necessarily must be estimates, and although there is some deviation from exact symmetry it is nevertheless proper to make an estimate of drainage based on symmetry. Plaintiff's conclusion that the anticline was symmetrical is based on the subsurface contour map, Exhibit 215, prepared by defendant's employee Hertel, and used generally as the subsurface contour map of this field. Hertel, upon the trial, testified that the contour lines drawn on said map on the north flank north of the 3,700-foot contour were drawn with few points of control, since there were few wells north of that contour, and that as wells were subsequently drilled on the north the contour lines were found to have been improperly placed. A substantial part of the Hartman lease lies north of the 3,700-foot contour.

Defendant's witnesses also testified that an examination of well cores indicated a much steeper dip in the producing horizons on the north than on the south. Plaintiff's witnesses were of the view that well cores furnished an inadequate basis for determining the dip of the structure, due to difficulty of obtaining "oriented" cores, that is, cores in which the direction, as well as angle of dip, was known. Defendant's witnesses stated that the direction of the core samples presented no problem, but could be ascertained merely from knowledge of which side of the flank the core was taken from.

Plaintiff's witness Soper prepared cross-sections of the field from the subsurface contour map, Exhibit 215, designed to prove that at greater depths below the Gosnell shale from which production was being obtained the tendency of the structure was to become increasingly symmetrical. But defendant's witness Folsom by a different method prepared subsurface cross-sections from measurements of dips taken at the surface, which in the opinion of said witness, proved asymmetry at producing depths.

It is apparent from recital of the above matters that the evidence as to symmetry is sharply conflicting. It cannot be said as a matter of law that defendant's evidence conclusively establishes asymmetry.

This brings us to point 2: That regardless of symmetry the north and south flank are unequally impregnated with oil. The defendant has sought to demonstrate the unequal impregnation and productivity of the two flanks through a consideration of uncontradicted drilling and production records of the Hartman and Lloyd leases, and certain other leases in the field. Defendant contends that the manner in which other operators in the field have located wells indicates unequal impregnation of the two flanks. Throughout the field the north flank has very few wells as compared with the number on the south flank, and the north flank wells are relatively light producers. In the event of equal impregnation of both flanks it seems unlikely that all lessees, while drilling the south flank heavily, would have failed to drill the north flank equally and thereby treat all north flank lessors unfairly. Defendant further contends: (1) That the gray sands found in a number of Hartman wells at depths found to contain oil bearing sands on the Lloyd lease negative equality of impregnation as between the north and south flank; (2) that a comparison of the figures for the initial production, that is, the first day's production, of the Hartman and Lloyd wells demonstrates unequal productivity; (3) that the records of north flank wells Magenheimer 1A and Petroleum Securities 1 demonstrate the unequal impregnation of the two flanks.

Plaintiff's experts through their study of the field were aware of the facts upon which defendant relies as establishing inequality of impregnation between the two flanks as a matter of law. If said facts did not lead these experts to conclude that the field was asymmetrical and unequally impregnated to such an extent that estimates of drainage based on equal productivity were invalid, we are of the view that as an appellate court we cannot conclude that substantial inequality of impregnation is established without invading the province of the jury and trial court.

In addition to the above facts appearing from drilling records, defendant relies to establish inequality of impregnation on certain laboratory tests which it procured to

be made to determine relative porosity as between the two flanks. According to defendant, these tests demonstrate that the porosity of the south flank exceeds that of the north. A more porous sand has more space within which to contain oil and generally will be more productive than a more compact sand. The testimony of plaintiff's experts was that the tests made from a few samples by defendant's witnesses were not a reliable index of the comparative porosity of the north and south flank areas as a whole. This testimony conflicts with the opinion of defendant's experts that the samples were truly representative and provided a reliable, scientific index of comparative porosity as between the two flanks. The jury resolved this conflict in favor of plaintiff. The judgment for damages must be affirmed.

[27, 28] Plaintiff not only prayed for money damages for the 4-year period preceding action filed, but also for forfeiture of the lease by reason of defendant's failure to protect against drainage. As to this equitable side of the case, the court submitted an advisory special interrogatory to the jury as to whether there had been drainage. The jury returned an affirmative answer. The court thereupon made findings and rendered a decree to the effect that it is the duty of defendant to proceed diligently to protect plaintiff's land from drainage; that if defendant fails to protect plaintiff's land from drainage it shall forfeit the lease; that if defendant determines that it is no longer profitable to continue drilling operations on said Hartman lease it shall have the option to abandon said lease or any part thereof; that in the event of either voluntary abandonment or forfeiture the defendant should be entitled to retain all wells theretofore drilled, together with a protective area around each well. The decree further provided that the court reserved all right and jurisdiction at any time thereafter, upon reasonable notice to determine the sufficiency of compliance by defendant, Associated Oil Company, with the terms and conditions of the judgment.

We are of the view that the conditional decree for forfeiture cannot be sustained for the reason that the owners and holders of the parent lease have not been made parties to this action. Defendant, as we held earlier in this opinion, is a sublessee. Acts which constitute grounds for forfeiture of a parent lease may be committed through a sublessee as well as by the own-

er and holder of the parent lease. But in an action wherein it is to be determined that the sublessee has committed acts which forfeit the parent lease, the sublessors, who are the owners and holders of such lease, should be parties.

A person is an indispensable party when the judgment to be rendered necessarily must affect his rights. Section 389, Code Civ.Proc.; *Ambassador Petroleum Co. v. Superior Court*, 208 Cal. 667, 673, 284 P. 445; *Waterman v. Canal-Louisiana Bank Co.*, 215 U.S. 33, 39, 30 S.Ct. 10, 54 L.Ed. 80; *Shields v. Barrow*, 17 How. 130, 139, 15 L.Ed. 158. In the instant case the court and jury have determined upon conflicting evidence that drainage exists, and the court has rendered a conditional decree for forfeiture. Upon forfeiture of the parent lease, the sublease, which depends thereon, will fall. If the adjudication of cause for forfeiture, and any decree of forfeiture which may be entered pursuant thereto are binding upon the owners and holders of the parent lease, that is, the sublessors, then said sublessors are deprived of the parent lease and of the sublease in an action to which they are not parties, and in which the evidence that gave cause for forfeiture is conflicting. Such an adjudication necessarily affects their valuable rights.

It cannot be said that the adjudication for a forfeiture will be binding only as between parent lessor and sublessee, and that the rights of the lessees sublessors may be saved. Under the decree of forfeiture it would be the duty of the sublessee to surrender possession to the parent lessor. Such a surrender would result in the sublessors losing their tenant, the sublessee, and in termination of the parent lease under which they have rights as lessees.

We have found no decision in this or in other states which involves the exact situation of the instant case, but there are a number of decisions from other jurisdictions which indicate the proper rule in the instant case. We may cite *American Trust & Savings Bank of Albuquerque v. Scobee*, 29 N.M. 436, 224 P. 788; *Pyle v. Henderson*, 55 W.Va. 122, 46 S.E. 791; *Vincent Oil Co. v. Gulf Refining Co. (C.C.A.)* 195 F. 434; *Moore v. Jennings*, 47 W.Va. 181, 34 S.E. 793; *Steelsmith v. Fisher Oil Co.*, 47 W.Va. 391, 35 S.E. 15; *South Penn Oil Co. v. Miller (C.C.A.)* 175 F. 729; *McConnell v. Dennis (C.C.A.)* 153 F. 547, 549; *United Fuel Gas Co. v. Morley Oil & Gas Co.*, 101 W.Va. 73, 131 S.E. 713.

In *McConnell v. Dennis*, supra, the Circuit Court of Appeals had before it a case in which the owner of land, Amanda Miller, executed a deed to McCready. Thereafter Amanda Miller executed an oil lease to Dennis and others, plaintiffs in the action. McCready, the prior grantee of Miller, also executed an oil lease. Her lessee, McConnell, was named as defendant in an action brought by Dennis and others, lessees of Miller, to restrain McConnell from asserting any rights under his lease from McCready. It was held that McCready was an indispensable party to the action. The court said:

"The bill was solely for injunctive relief to restrain McConnell, the lessee, from drilling, boring, or conducting mining operations on the premises for the production of oil or gas. The decree * * * permanently enjoined McConnell from asserting any right, title, claim, or interest thereon, or from in any manner interfering with complainants in the exercise of the exclusive rights so confirmed in them. Nothing could more effectually extinguish Abba Clair McCready's rights secured by the lease than such a decree. Obedience to its command by McConnell necessarily put a stop to her royalties in kind and in money and the enjoyment of the other privileges secured to her by her lease and contract with McConnell. * * *

"No objection appears to have been made below to the court's proceeding to a decree in the absence of Abba Clair McCready; but that is unimportant. The case is now here on appeal for a hearing de novo, and we cannot avoid considering the question whether the parties are sufficient to warrant a decree granting any relief."

The decision in *Ambassador Petroleum Co. v. Superior Court*, 208 Cal. 667, 284 P. 445, 448, does not govern the instant case as to this matter. That case involved a proceeding by the state to enjoin defendants, who were forty-two operators in the Santa Fe Springs oil field, from unreasonable waste of natural gas. The action was brought under the authority of a statute enacted for the protection of the natural resources of petroleum and gas from waste and destruction through improper operations in production. Stats. 1915, p. 1404, as amended Stats. 1929, p. 923.

The parties defendant in said proceeding made application for a writ of prohibition to this court to restrain further proceedings

until the owners and lessors of the land should be joined as defendants. Said owners received royalty upon oil produced by the operators. Our opinion indicates that the lessor owners would be bound by any curtailment decree rendered against the lessees in the action to abate a statutory nuisance. But said opinion expressly recognized that a different rule would be applied in private disputes, such as that before us. The opinion says: "Many cases are cited by the petitioners wherein the court has found that certain absent parties were indispensable and has refused to proceed without their presence, or where the court has threatened to proceed in their absence and been prohibited from so doing until they are brought in. These cases need not be discussed in detail. Generally, it may be said that they involve disputes between private owners or lessees or rival claimants of oil or gas wells or property, or involve conflicting claims of the parties in their private capacities. When the action is one to enjoin the continuance of or to abate a nuisance, a different rule has been applied."

[29-31] The objection that an indispensable party has been omitted may be raised at any time by the trial or appellate court of its own motion if the parties fail to make the objection. The requirement that indispensable parties be before the court is mandatory. *Title Guarantee & Trust Co. v. Henry*, 208 Cal. 185, 191, 280 P. 959; *Ambassador Pet. Co. v. Superior Court*, supra; *O'Connor v. Irvine*, 74 Cal. 435, 16 P. 236; *Solomon v. Redona*, 52 Cal. App. 300, 198 P. 643. In paragraph VIII of its demurrer defendant urged only that there was a defect of parties for the reason that the defendant, Associated Oil Company, had subleased only a portion of the demised premises from the original lessees, and none of said original lessees were made parties. This specification had reference to the fact that the sublease had originally excluded the area surrounding the 2 wells retained by the Shell Oil Company. But this land was later added to the sublease before bringing of this action upon its surrender by the Shell Oil Company. Under the above decisions, however, the failure of the defendant to place its objection to the nonjoinder of the lessees on broader grounds did not bar it from raising the objection of nonjoinder of indispensable parties on appeal.

[32] Our conclusion that the lessees sublessors are indispensable parties to an action to forfeit the parent lease does not mean that they are indispensable parties to an action to recover damages for drainage against the sublessee based on its promise assuming the obligations of the parent lease. The sublessors have no beneficial interest in the damages based on the one-eighth percentage recovered by the parent lessor against the sublessee.

The judgment for damages is affirmed. The portion of the judgment relating to forfeiture is reversed.



10 Cal.2d 223

PEOPLE v. CANCINO.

Cr. 4129.

Supreme Court of California.

Nov. 26, 1937.

1. Homicide ☞308(1)

In prosecution for murder, instructions embodying abstract definitions of second degree murder, slightly amplifying statutory definition, were sufficient, though instructions offered by defendant and refused were more elaborate and would perhaps have given jury a clearer understanding of the law (Pen.Code, §§ 187-189).

2. Criminal law ☞796

In death penalty cases, and in every case where punishment is divided into degrees and subject to jury's discretion, court should instruct jurors that if they entertain reasonable doubt concerning punishment they must impose lesser punishment (Pen. Code, § 190).

3. Homicide ☞311

In prosecution for murder, instruction held sufficient to inform jury that it had discretion of relieving defendant of death penalty (Pen.Code, § 190).

4. Homicide ☞309(3)

In prosecution for murder, where evidence incontrovertibly showed murder in first degree, defendant was not entitled to instruction on manslaughter, notwithstanding instruction given on shifting of burden of proving circumstances of mitigation, and

testimony that defendant had lost control of himself when killing occurred (Pen.Code, §§ 187-189, 1096, 1105).

5. Homicide ☞253(1)

Evidence of circumstances under which defendant killed former mistress held to authorize conviction of murder of first degree, notwithstanding testimony tending to show heat of passion caused by jealousy (Pen. Code, §§ 187-189).

6. Homicide ☞330

On appeal from conviction of first degree murder wherein jury did not impose life imprisonment, reviewing court must assume that jury considered evidence in determining whether killing was result of sudden heat of passion, and that jury determined that there was no sufficient reason to relieve defendant of death penalty or reduce crime to second degree murder (Pen.Code, §§ 187-189).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Francisco Cancino was convicted of murder of the first degree, and he appeals. Affirmed.

Frederic H. Vercoe, Public Defender, and John J. Hill, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John O. Palstine, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott and Arthur Veitch, Deputy District Attys., all of Los Angeles, for the People.

SEAWELL, Justice.

The defendant was duly convicted in the superior court of the county of Los Angeles of murder of the first degree. The information filed against him charged him with having, on or about March 17, 1937, in said county, murdered one Mrs. Olga Valle. The jury having refused to exercise its discretion in his favor, as it was empowered to do by the provisions of section 190, Penal Code, and relieve the defendant of the infliction of the extreme penalty of the law, the court in obedience to the command of the law adjudged that, as the penalty for his crime, he should suffer death, as provided by law.

The appeal is presented by the public defender from the order denying defendant's

motion for a new trial, and from the judgment thus pronounced and entered against him.

The crime is the outgrowth of the sordid life led by all of the parties who were in anywise linked to it. We have read the entire transcript of the testimony taken at the trial which exceeds two hundred pages of typewritten matter. The story of the homicide, as related by the witnesses and corroborated by the defendant's confession, draws down the curtain on the last act of the illicit relations which had existed between the unfortunate woman who was slain and the defendant who was urged by a jealous frenzy to take her life.

On the evening of March 16, 1937, at about the hour of 6 o'clock, Mrs. Olga Valle, who was described as a woman of German origin, came to the home of Charles Green, 1529 East Fifty-Seventh street, a rendezvous where liquors were illegally dispensed. She was well known to Green, who said she had acted as his nurse during times when he was indisposed. Green was a colored man, and his place seems to have been one frequented indiscriminately by men and women of his race and others. She had not been there long before a colored man named Louis Logan arrived. She and Logan soon left for a hospital where they went to call on a mutual friend who was interned at the hospital. Shortly after they had left Green's place, the defendant, who is a Mexican, appeared. He inquired of Green as to the presence of Mrs. Valle and Green informed him that she and Logan had gone to the hospital and they were going from there to Chinatown to get some food, and they would not return before 10 o'clock p. m. The defendant, according to his statement, had formerly sustained sexual relations with Mrs. Valle, but this relationship had been interrupted for some time past.

Some minutes after 10 o'clock, Mrs. Valle, Logan, and another colored man named Herbert Lewis arrived at Green's place. The defendant was then in the main room awaiting the arrival of Mrs. Valle. In the meantime, two other women were added to the number then in Green's sitting or living room. Upon the arrival of Mrs. Valle in company with the two persons above named, the defendant addressed her and said he wanted to talk with her. Both went into the kitchen. They talked some few minutes, but their

conversation was inaudible to the persons occupying the sitting room. As they returned to the sitting room the defendant said: "Olga, you don't love me no more." She replied: "I don't love you no more, I am through." The defendant then said: "You can't quit me. I love you. I will kill you—I will kill myself." They were both standing glaring at each other. The brother of the deceased who incidentally was a new arrival, said to the defendant: "Frank, let my sister alone, don't bother her." The defendant said, "All right, Jack," and they then stepped out onto the front porch and engaged in friendly conversation. As they returned, Mrs. Valle had left the house through a back door. Defendant asked Green where Mrs. Valle had gone and when told that he did not know he insisted that he did know and demanded that he bring her in. The defendant began looking for her, and while he was outside she returned to the room. The defendant also returned within a few minutes. The couple again went to the kitchen for further conversation at defendant's request. Their voices could be heard, but the only words distinctly heard by the persons in the sitting room were spoken by Mrs. Valle, to the effect, "Frank, I don't know nothing about it. I haven't got it." No one knew the significance of those words. Both came out and sat in the room. The defendant appeared to be in a sullen mood. They were talking in a quarrelsome manner until about 1:30 a. m. He again said he would kill her and kill himself. Finally, Mrs. Valle, who appeared to fear him, slipped out of the room into Green's bedroom and locked the door. Jim Turner, an Indian, had also arrived at the place and was in the room during a good part of the evening. Mrs. Valle called from the room and asked if Jim Turner would drive her home. On being assured that he would, she returned to the sitting room, and as she and Turner went down the steps she called to Herbert Lewis to come with them, as she was afraid to go home. Lewis complied with the request, and Mrs. Valle left in Turner's car accompanied by Turner and Lewis. The defendant left the premises some ten minutes later and was not seen until immediately before the commission of the crime, some hours thereafter. Green said that defendant appeared to be in a morose mood and said very little, if anything, to those present, except Mrs. Valle. When he departed for the evening, he said to Green that he would see him again.

Lewis, Turner, and Mrs. Valle drove to her home and found that she had lost or misplaced the key to her house, and they then went back to Green's place in quest of the key, but found it closed. Returning from Logan's house, where they had gone in search of the key, to Mrs. Valle's home, they stopped and bought some food. Upon arriving at Mrs. Valle's home, No. 5737 South Duarte street, they found the door locked. They forced the lock and entered. This was at about 2 o'clock, a. m., March 17th. Turner remained about ten minutes, leaving Lewis and Mrs. Valle at the house. Lewis testified that he was frying eggs for Mrs. Valle in the preparation of a sandwich he was making for her. She was in the bedroom in her night robe lying on the bed. He said that while he was in her room near the foot of her bed he heard the back door crash and in came the defendant with a large dagger in his hand, and he made a desperate lunge at him. Lewis by timely bodily maneuvers succeeded in avoiding defendant's knife thrusts and was closely pursued by defendant as he made a hasty retreat down the front steps. As he paused in the yard for a moment, he heard four screams coming from Mrs. Valle's bedroom. The first and second were very loud, the third not so loud, and the fourth was very feeble. The defendant then left the house by the rear door, and in leaving the premises he passed near the badly frightened Lewis. Neither spoke a word. After a few minutes Lewis entered the house and discovered the body of the deceased in a corner of the room partially under the bed. The floor and walls were bespattered with blood and he thought she was dead at the time he entered. He notified the sheriff's office and the officers arrived within a short time thereafter.

Manuel Rodriguez lived with his family in a house which was but fifteen or twenty feet from the house occupied by Mrs. Valle. He was awakened at about 3:30 on the morning of March 17th by the screams of a woman. The screams were several seconds apart, and emanated from Mrs. Valle's room. The first was very loud; the second not quite so loud; the third much weaker; and the fourth was quite faint. As he opened his bedroom window he heard a door slam, and saw the defendant leaving the premises. The defendant ran into an obstruction and changed his course. In strong language he commanded him to stop. The defendant momentarily halted and raised his face toward

Rodriguez's window. He muttered some expletive, "Oh my," or "I," bent over, and ran from the premises and was afterwards apprehended and lodged for a time in the Santa Ana county jail.

The report of the autopsy physician made on the body of the deceased was admitted in evidence on the stipulation of the attorney of the defense. The report stated that twenty wounds were visible on the chest and left arm and forearm of the deceased. Two penetrated the right lung. Two penetrated the right ventricle of the heart. Some of the other wounds were deep, and others were superficial. There existed no question as to the cause of death. The defendant did not take the witness chair in his defense but he made a statement or confession as to the commission of the crime which in all material respects agrees with the testimony adduced at the trial. Evidently he had gone to the home of the deceased and awaited her expected arrival with Lewis. From without he had observed his action in relation to Mrs. Valle. He said he broke through the door when he saw Lewis preparing to go to bed with Mrs. Valle. His statement in this respect under the circumstances of the situation is very persuasive. He attributed his act to jealousy. He gave his age as 49 years. He also said that his blood was impure. There was no evidence as to mental irresponsibility, and he said that he had drunk four or five glasses of beer during the evening, but that he was sober. While it is true that the abandonment of all sense of moral duty on the part of the unfortunate woman was exhibited in a shocking degree, the law will not justify or excuse the putting to death of such person unless in so doing it is necessary for the protection of the life or limb of the one who kills. No legal reason whatever is offered in extenuation of the crime admittedly committed by the accused. The defendant admitted that he had threatened to kill her on other occasions. He claimed that she had tricked him in some unexplained manner. Premeditation and deliberation extending over a period of four or five hours clearly appear. The knife which defendant used was described by him as "one of those long handle knives with a long blade." He said the blade was more than four inches in length. He did not claim that the woman made any attempt to strike him, and the inference, from his statement as to the merciless as-

sault, is that she tell to the floor wounded very early after he re-entered her bedroom.

Appellant in his brief frankly concedes the proposition that no question is presented as to the guilt of the defendant, and that the sole question presented is as to whether the jury was adequately instructed as to the degrees of murder, particularly as to murder of the second degree, and also as to the discretion reposed in the jury to relieve the defendant of the extreme penalty prescribed by the statute.

Appellant, in his brief, takes the position, as stated by him, that the question is "not whether the evidence in the case will sustain a verdict of guilty but whether a different verdict than the one the jury rendered would have been returned if no errors had been committed." No errors are claimed as to the admission or rejection of evidence, but the sole claim of error is placed upon the rejection of certain instructions offered by defendant as to the law of murder of the second degree and the inadequacy of the instructions which were given by the court as to the elements which must necessarily appear to constitute murder of the first degree. As to the latter degree, it is also contended that the jury was not as fully instructed in the exercise of its discretion as is usual in cases involving the death penalty.

Most if not all of the instructions offered by defendant were refused. He complains that certain instructions given by the court were sketchy and inadequate. As to the subjects above noted, he cites and quotes from *People v. Cook*, 148 Cal. 334-347, 83 P. 43, 49, wherein this court reversed the judgment for the reason that a proffered instruction requested by the defendant was refused. It is there said, former Chief Justice Beatty writing the opinion: "The court, however, refused the instruction, and its refusal is justified on the ground that another instruction framed by the judge on the same point was given. It is true that the instruction given stated the law correctly; but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis. The instruction as asked should have been given."

[1-3] The court in the instant case gave to the jury the definition of murder as set forth in section 187, Penal Code; also the definition of malice and the de-

grees of murder, as defined in sections 188 and 189, respectively, of said code. Section 189 does not specifically describe murder of the second degree. After describing murder of the first degree, it closes the subject with the clause, "and all other kinds of murders are of the second degree." The court gave an instruction which did somewhat amplify the concluding clause of section 189, Penal Code. In distinguishing the two degrees, it instructed the jury that to constitute murder of the first degree the "unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection and not upon a sudden heat of passion sufficient to preclude the idea of deliberation." Again the jury was told that if the circumstances show an abandoned heart it is murder of the second degree, unless the evidence proved the existence in the mind of the slayer of the specific intent to take life. While several instructions offered by the defendant and refused by the court were more elaborate, and perhaps would have given the jury a clearer understanding of the law as to murder of the second degree than the abstract definitions given by the court, we cannot say that they fail to meet the requirements of the law. Appellant also complains of the court's refusal to give approved instructions founded on basic principles of criminal law and the substitution of others which were weakened by phraseology, by modification, or eliminations; while the prosecution's instructions were couched in strong and virile language. As a ground of complaint he cites the instruction as to the discretion which the law reposes in the jury to relieve the accused of the extreme penalty of the law. We agree that it would be more satisfactory in death penalty case if the court would instruct the jurors that if they entertain a reasonable doubt as to which one of two or more punishments should be imposed, it is their duty to impose the lesser. This rule should prevail in every case where the punishment is divided into degrees and the jury is given discretion as to the punishment. We feel, however, that the jury was fully informed as to its discretion by the last instruction given in the case, as follows: "* * * It is entirely for the jury to determine which of the two penalties is to be inflicted in case of murder in the first degree, the death penalty or con-

finement in the state prison for life. If the jury should fix the penalty at confinement in the state prison for life, you will so indicate in your verdict. If, however, you fix the penalty at death, you will say nothing on this subject in your verdict, nor will you specify the death penalty in your verdict. In the exercise of your discretion as to which judgment shall be inflicted you are entirely free to act according to your judgment." The foregoing language clearly informed the jury that it had the discretion of relieving the defendant of the death penalty.

[4, 5] There was no semblance of manslaughter in the case, and the defendant was not legally entitled to an instruction as to manslaughter unless such an instruction was rendered material by the instruction given by the court as to the shifting of the burden of proof (section 1105 Pen. Code), wherein it is provided that the homicide being proved and the proof offered on the part of the prosecution to establish the homicide tended to show that the crime committed amounted to manslaughter or that the defendant was justifiable or excusable. The proof incontrovertibly showed the crime to be one of murder of the first degree.

We state here, and we do not mean to confine our observations solely to the instant case, that there seems to be an expanding tendency, on the part of trial courts particularly in aggravated cases of homicide, to curtail and limit the instructions by qualification and selection of phraseology, which have to do with the cardinal principles of criminal law to such an extent as to give basis of complaints which are too frequently presented to our appellate courts for review. Any attempt to improve on the pronouncements of the law of homicide which is the product of our most profound minds in the study of criminology and its relation to sociology is attended with dangers of overstepping the age-old axioms which have long stood as the measure by which human responsibility has been appraised.

We have, in our reports, a long approved thesis on the law of homicide in the case of *People v. Iams*, 57 Cal. 115. In that case the definition of murder in its dif-

ferent degrees is set forth in logical sequence and gives to the jury a complete understanding of the subject of homicide and the definition of reasonable doubt which has been carried into section 1096, Penal Code. We do not mean to say that in exceptional cases there may not be need for the court to meet a new or extraordinary situation by special instructions, but we do say that the cardinal rules there set forth as to the law of homicide furnish a safe and complete guide as to the subjects of which it treats. This court, in affirming the judgment in the *Iams* Case, in commenting on the instructions felt that it was "obliged to say, in justice to the learned judge who presided at the trial, that the charge to the jury is a very clear and able statement of the law of homicide."

Returning to the instant case, it may be said in consideration of the evidence and the statement made by the defendant, a plea of guilty would not have given additional strength to the conclusive character of the case made against him as to first degree murder. In justice to his defense it may be added that he did say in his statement that the relations which he witnessed as about to be entered into between his former amour and Lewis so stirred him with a feeling of outrage and indignation that he completely lost control of himself and he was thereby impelled by force of such mental perturbation as to commit the acts which resulted in immediate death.

[6] We must assume that the jury considered this feature of the case in determining whether the acts were the result of a sudden heat of passion and the motivating cause was sufficient to cause a reasonable person to act as he acted, and it determined, under all the circumstances of the case, that there did not appear sufficient reason to relieve the defendant of the extreme penalty of the law, or to reduce the crime to second degree murder.

We find nothing in the record that would justify this court in interfering with the judgment.

The order and judgment are accordingly affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.

I concur in the judgment: EDMONDS, J.

10 Cal.2d 203

**MOTHER COBB'S CHICKEN TURNOVERS, Inc., v. FOX
et ux.****L. A. 15529.**

Supreme Court of California.

Nov. 26, 1937.

1. Trade-marks and trade-names and unfair competition ⇨98

In action to enjoin unfair competition, finding that plaintiff had suffered no actual damages barred award of exemplary damages, notwithstanding that defendant's acts were actuated by spiteful and resentful motives, and that injunction was granted on stipulation.

2. Damages ⇨87(2)

The foundation for recovery of punitive or exemplary damages rests on fact that substantial damages have been sustained, and punitive damages are not given as a matter of right, nor can they be made basis of recovery independent of showing which would entitle plaintiff to award of actual damages.

3. Damages ⇨87(2)

Evil thoughts or acts, barren of result, are not the subject of exemplary damages.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Mother Cobb's Chicken Turnovers, Incorporated, against Harvey Fox and wife, doing business under the fictitious name and style of Mother Karl's Chicken Pies, Incorporated. From a judgment for plaintiff, named defendant.

Reversed.

Sol R. Simon and Aaron B. Rosenthal, both of Los Angeles, for appellant.

Horowitz & McCloskey and Fred Horowitz, all of Los Angeles, for respondent.

SEAWELL, Justice.

Plaintiff corporation brought this action to enjoin alleged unfair competition of defendants and to secure damages, compensatory and exemplary, by reason of the alleged unfair practices of defendants. Plaintiff sells chicken turnovers or pies under the name Mother Cobb's Chicken Turnovers, Inc. Defendants, according to the complaint and findings, opened a place of busi-

ness selling a turnover or pie under the name Mother Karl's Chicken Pies, Inc. Defendants Harvey Fox and Mrs. Harvey Fox, his wife, stipulated that an injunction might be entered against them as prayed for. It is stated that they had abandoned the use of the name Mother Karl's Chicken Pies, Inc. The court found that plaintiff had suffered no actual damages but awarded it judgment against defendant Harvey Fox alone for \$500 exemplary damages. From this judgment Fox appeals on the judgment roll. He contends that having denied compensatory damages, the court was without right to award exemplary damages.

According to the findings, which follow the allegations of the complaint, defendant Harvey Fox called at plaintiff's plant on February 18, 1935, and upon his representation that he might be interested in purchasing an interest in plaintiff's business, he was given all details of the business, including the ingredients used in plaintiff's turnovers and the names of many of plaintiff's customers. On March 3, 1935, upon plaintiff's refusal to accede to defendant's request to assign him a certain territory to sell plaintiff's products, he threatened to open a place of business of his own. On March 7, 1935, "with the avowed purpose of unfairly competing with plaintiff and to take from plaintiff the customers who would normally transact business with plaintiff," defendant Harvey Fox "opened a place of business, calling it 'Mother Karl's Chicken Pies, Inc.', and selling a turnover which is of the same size, and shape and containing substantially the same type of ingredients as the turnovers of plaintiff, and which turnover to all external appearances is identical with plaintiff's product and which turnover is packed in a glassine envelope of the same size and shape as plaintiff's." The defendants' envelope is marked "Mother Karl's."

The court found that the use of the word "Mother" and "Mother Karl's" is so similar to the use of the trade-name of plaintiff, "as to be, and it is so misleading to the public." The court further found, following the allegations of the complaint, that defendant Harvey Fox opened his place of business under the name Mother Karl's with the avowed purpose of unfairly competing with plaintiff and to cause confusion in the minds of the purchasing public. But in finding VIII as to the purpose of defendant Harvey Fox to cause confusion in the minds of the public, a line is drawn through

the words "and it does cause," thereby deleting said words.

[1,2] Having made the above findings as to the acts and intent of Fox, the court made the following finding as to actual damages: "It is not true that by reason of the acts aforesaid the plaintiff had suffered actual damages, ~~other than nominal damages.~~" This is an express finding that plaintiff has not suffered any actual damages. In view of this finding, the court was without right to award exemplary damages. The rule is stated in *Gilham v. Devereaux*, 67 Mont. 75, 214 P. 606, 33 A.L.R. 381, with annotation at page 384, as follows: "The foundation for the recovery of punitive or exemplary damages rests upon the fact that substantial damages have been sustained by the plaintiff. Punitive damages are not given as a matter of right, nor can they be made the basis of recovery independent of a showing which would entitle the plaintiff to an award of actual damages. Actual damages must be found as a predicate for exemplary damages. This is the rule announced in many authorities." This case has been cited with approval in this state in *Clark v. McClurg*, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908; *Haydel v. Morton*, 8 Cal.App.2d 730, 48 P.2d 709, 712, and in *Chavez v. Times-Mirror Co.*, 72 Cal.App. 694, 697, 237 P. 1085. In *Haydel v. Morton*, supra, the most recent of the cited cases, the jury returned a verdict for plaintiff in an action for slander in the following form: "We the jury find a verdict for the plaintiff and against the defendant on said count and assess the compensatory damages in the sum of \$00; we assess the exemplary damages at \$10,000; making a total verdict for the plaintiff in the sum of \$10,000." The appellate court reversed the judgment based on this verdict, citing *Gilham v. Devereaux*, supra, and *Clark v. McClurg*, supra.

A different rule is not to be applied in this case because the court, on stipulation of defendants, granted an injunction against their use of the name "Mother Karl's." Notwithstanding the consent injunction decree the rule applicable is, as declared frequently, that punitive damages are never more than an incident to a cause of action for actual damages, and, when allowed, are allowed only in addition to recovered actual damages.

[3] We know of no rule of law that would authorize the imposition of a penalty upon competition, even though the competi-

tor was actuated by spiteful motives to engage in competition against another, where no damage, as here, resulted from said competition. The acts complained of, though actuated by spiteful or resentful motives, did not, as expressly found, result in any damage to plaintiff. Evil thoughts or acts, barren of result, are not the subject of exemplary damages.

We are not concerned with the question as to whether the acts complained of were sufficient to entitle the plaintiff to injunctive relief, inasmuch as defendants stipulated that the injunction might issue against them.

The judgment for exemplary damages is reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.; SHENK, J.



10 Cal.2d 138

PEOPLE v. GIDNEY et al.
Cr. 4131.

Supreme Court of California.
Nov. 22, 1937.

Rehearing Denied Dec. 20, 1937.

1. Criminal law ☞957(2)

Affidavits of jurors, reciting that they would have cast ballots for acquittal had newly discovered evidence been introduced on trial, and describing conversations with bailiff on possible effect of recommendation of mercy and necessity for reaching immediate verdict were inadmissible, and were properly stricken from files (Code Civ.Proc. § 657).

2. Criminal law ☞1110(3)

An order of diminution of record could not be had in reviewing court to incorporate affidavits of jurors impeaching their verdict within record on appeal for purpose of giving affidavits weight or consideration in determination of whether trial court erred in denying motion for new trial or application for probation or for any other purpose involved in appeal (Code Civ.Proc. § 657).

3. Criminal law ☞1129(3)

Where specification of error was not supported by references or citation of judicial authority, reviewing court was not obliged to search record in effort to ascer-

tain sound legal reason for reversal of judgment of conviction or order denying new trial.

4. Criminal law §1130(5)

A point suggested on appeal cannot be considered where brief fails to point out page of record where alleged error is supposed to have occurred.

5. Criminal law §1130(5)

A claim of alleged error will not be considered, in absence of citation of authority.

6. Criminal law §1129(3)

A specification of error relating to admission of testimony would not be considered, where no reason was suggested why testimony was inadmissible or how it could have prejudiced accused's case.

7. Criminal law §938(1)

In rape prosecution, refusal of motion for new trial because of newly discovered evidence, supported by affidavits of witnesses that prosecuting witness was hysterical and drunk at time she encountered accused was discretionary, in absence of showing of diligence to obtain testimony at trial or of materiality of newly discovered evidence, especially in view of contradicting counter affidavits.

8. Rape §54(1)

No corroboration of testimony of prosecuting witness is necessary to support conviction for rape.

9. Rape §54(2)

Evidence, including testimony corroborating testimony of prosecuting witness, supported conviction for rape, notwithstanding that testimony of prosecuting witness, standing alone, would have been so improbable as to tax credulity to utmost.

10. Criminal law §649(1)

In rape prosecution, granting two-day continuance after jury had been sworn because of death of sister of prosecuting witness, with statement to jury that situation had occurred which compelled continuance was not error, where accused expressly consented to postponement in open court.

11. Criminal law §1171(1)

In rape prosecution, action of deputy district attorney in eliciting testimony from prosecuting witness that her sister had died on date of commencement of trial and that her mother was seriously ill was not reversible error, in absence of showing from

record that result was prejudicial to accused.

12. Criminal law §1136

In rape prosecution, contention of error, predicated on admission over objection of stenographic report of interview between prosecuting witness and police officer in presence of one accused, who conceded that statement was substantially correct, was not available to accused who were not present, where report was offered and received as evidence only against accused who was present, and jury was admonished to consider it as applying only to such accused.

13. Criminal law §865(1)

In rape prosecution, directing attention of jury, which had returned to courtroom for reading of testimony, to instruction including statement that it was advisable that verdict should be returned was not error as "forcing" verdicts, in absence of showing from record that jury was thereby influenced in rendering verdicts.

14. Criminal law §890

A trial court may accept original verdict with several unauthorized recommendations and disregard recommendations, rather than require jury to amend verdict, since recommendations constitute no part of verdict, but are mere surplusage.

15. Criminal law §957(1)

Accused's claim of prejudice from failure to instruct jury to retire again and bring in verdicts without unauthorized recommendations of leniency which were attached to original verdicts was not available on appeal, where contention was founded on attempted impeachment of verdicts by affidavits of jurors (Code Civ.Proc. § 657).

16. Criminal law §1126

An order denying application for probation would not be reversed, in absence of showing in record which would form basis for claim of abuse of discretion.

17. Criminal law §929, 1174(7)

The misconduct of bailiff in advising jurors as to legal effect of verdict and probable sentence if particular verdict were given, and that one accused had bad reputation with police, would justify new trial, and would constitute reversible error, if properly established.

18. Criminal law §957(3)

Affidavits of jurors are inadmissible to impeach their own verdict, whether such

affidavits disclose improprieties in their own deliberations or outside influences (Code Civ. Proc. § 657).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Elwood Gidney, Harvey Allen Zike, and Omar Gidney were convicted of rape, and from the judgments of conviction and orders denying their motions for new trial and applications for probation, accused appeal and file motions for diminution of the record.

Judgments and orders affirmed, and motions for diminution of the record denied.

Prior opinion, 69 P.2d 475.

Moses C. Davis, W. Thomas Davis, and Morris Lavine, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

LANGDON, Justice.

A hearing was granted in this case after decision by the District Court of Appeal, Second District, Division 1, in order to consider more fully defendants' contention that the court erred in refusing to consider affidavits of jurors filed in support of a motion for new trial. Upon such consideration, we believe that the said court reached the correct conclusion, and we hereby adopt the following opinion of Mr. Presiding Justice Houser as part of the opinion of this court:

"Each of the defendants appeal, not only from a judgment of his conviction on each of six counts of the commission by him of the crime of rape, but as well, both from an order by which his motion for a new trial was denied, and from an order by which his application for probation also was denied.

"Before a determination properly may be had on the merits of the appeal, a ruling by this court should be made on a motion herein presented to the effect that certain affidavits which were made by jurors who had acted as such on the trial of the action be included in the clerk's transcript on the appeal from the judgment. It appears that each of such affidavits was presented to the trial court on the hearing of defendants' motion for new trial, and that some of them contained a statement in attempted explanation of why the verdict, as returned, was so returned; or, in

the absence of such particularity, a declaration that if certain so-called 'newly discovered evidence' had been introduced on the trial, 'then he would have cast his ballot for acquittal of the defendants.' All other of such affidavits were of like import; a number of which being to the effect that some of the jurors had talked with the bailiff, in whose charge they were, regarding the possible effect of a recommendation of mercy for the defendants which might be made by the jury, or as to whether, if the jury did not soon agree on a verdict, the probabilities were that the jury 'would be locked up over the week-end.' It further appears that on the hearing of the motion for a new trial the trial judge sustained an objection that was made by the deputy district attorney who was in charge of the trial to the introduction in evidence of such affidavits, and ordered them to be stricken from the files of the action.

[1,2] "From 'time immemorial' it has been the general rule that affidavits of jurors by which they may seek to impeach their own verdict are inadmissible. The facts which hereinbefore have been indicated do not present a situation which would require that an exception to the general rule should be noted. No error was committed by the trial judge, either in refusing to admit in evidence the affidavits in question, or in making the order to which reference has been had. Since they are not now, nor ever were, properly a part of the record in the trial court, no order of diminution of the record may properly be made by this court which would have the effect of incorporating those affidavits within the record on appeal herein for the purpose of giving them any weight or right to be considered in a determination of whether the trial court committed error in denying either the motion for a new trial, the application of defendants for probation, or for any other purpose involved in the instant appeal.

"Regarding the appeal herein from the order by which the motion for a new trial was denied, the only point here urged has reference to the impelling force of the 'newly discovered evidence' upon which the defendants relied in support of their motion. In that connection, two affidavits only were presented by the defendants to the trial court. In each of such affidavits the affiant deposed to the effect that shortly preceding the time when, according to

the evidence, the prosecuting witness encountered the defendants, she was 'in a crying, hysterical, drunken condition'; that the reason why one of the affiants had not testified on the trial of the action was that 'she was only thirteen years old; her mother and father did not wish her to become involved in such a case; that her information was not told to any attorney in this case until the present affidavit was taken.' The other affidavit contained the statement that 'the reason your affiant has not told this information prior, was because her brother * * * told her he would 'punch her in the mouth' and would give her no more food if she said anything about this affair. Furthermore, he forcibly threw her on the bed when she started to say what she knew. However, your affiant is now willing to testify as to such things as she has knowledge.'

"The main facts set forth in those affidavits were flatly contradicted by statements contained in counteraffidavits. There was no attempt on the part of defendants to show that either they, or any of them, or their attorney, or any other person, had exercised due or any other diligence to secure the attendance at the trial of the action of either of the affiants whose affidavits were taken. Nor was any attempt made to show the materiality of the assumed fact that shortly before she met the defendants the complaining witness was in a drunken and hysterical condition, or how, if at all, that fact could have had any possible effect on the verdict that was returned by the jury. But by statements that were contained in a counteraffidavit, it appeared that affiant therein was the brother of the older of such proposed witnesses 'and that he has had opportunity to observe her mental condition throughout their entire life, and in his opinion, she is not mentally competent to make an affidavit; that she can neither read nor write, nor can she speak coherently, and this condition has existed throughout her life, to-wit, about thirty-one years.'

[3-6] "With reference to the specification of error which hereinbefore has been mentioned, no references of any sort are given, nor any citation of authority, except 'Carl Sandburg's Life of Lincoln' at page 467. In view of well-established appellate court procedure, this court is under no obligation to search the record in an effort to ascertain a sound legal reason either for reversal of the judgment, or the or-

der in question. *People v. Sanchez*, 57 Cal. App. 133, 206 P. 760; *People v. Buck*, 72 Cal.App. 322, 237 P. 63. Furthermore, a point suggested on appeal cannot be considered were the brief fails (as it does herein) to point out the page of the record where the alleged error is supposed to have occurred. *People v. Balmain*, 16 Cal.App. 28, 116 P. 303; *People v. Myrick*, 112 Cal. App. 117, 296 P. 320. In the absence of citation of authority, claim of alleged error will not be considered. *People v. Jenkins*, 118 Cal.App. 115, 4 P.2d 799; *People v. Titus*, 85 Cal.App. 413, 259 P. 465; *People v. Williams*, 96 Cal.App. 215, 273 P. 1087. A lack of authorities, references, and citations applies generally throughout appellants' brief; but especially with reference to the asserted error that the trial court committed in admitting certain testimony, it is noted that no reason is suggested why said testimony was inadmissible, or how it could have prejudiced the appellants' case in any way. In that regard, see *People v. Cebulla*, 137 Cal. 314, 70 P. 181; *People v. Hadley*, 175 Cal. 118, 165 P. 442; *People v. Peterson*, 120 Cal.App. 197, 7 P. 2d 366.

[7] "Considering all such circumstances, together with the law which is applicable thereto, it is apparent that the discretion that was vested in the trial court in the matter of its determination whether a new trial should be granted was not abused. *People v. Davis*, 135 Cal. 162, 67 P. 59.

[8,9] "But with respect to the appeal generally, it is first argued by appellants that the evidence which was adduced on the trial of the action was insufficient to sustain the judgment. With respect thereto, it ought to be apparent that no good to any person would result from a detailed statement herein of the facts upon which the verdict of the jury depended. It is enough to state that, notwithstanding possible false statements in several unessential details that were made by the prosecuting witness regarding the commission of the offenses by each of the defendants, as far as it may relate to the actual consummation of the several crimes of which the defendants were accused, together with the resistance and the failure of consent by the prosecuting witness to the said commission thereof, the evidence is positive and replete in affirmation of the several allegations that are contained in the in-

formation. And although no corroboration of such testimony was necessary to support a judgment of conviction of defendants, nevertheless, with reference to facts and circumstances which related to the physical, as well as to the mental, condition of the prosecuting witness, which were present immediately following the attack which she declared had been made upon her, the prosecuting witness was amply corroborated by other witnesses. Not only that, but in many respects, including the fact of sexual intercourse that the prosecuting witness testified had occurred between her and each of the defendants, the testimony of the defendants themselves was corroborative. Standing alone, and in the absence of the supporting testimony which was presented herein, the story that was told by the prosecuting witness regarding the episode in question approaches so nearly the condition or situation of being inherently improbable that to implicitly believe in the truth thereof would be to tax one's credulity to the utmost; but in the circumstances to which reference has been had with respect to the corroboration of such story, for this court judicially to declare that it is and was utterly unworthy of belief would amount to an assumption that could not be legally supported. It results that the point presented by appellants in this respect cannot be sustained.

[10, 11] "Appellants' contention, for which no authority is cited, that by reason of the death of the sister of the prosecuting witness the action of the trial judge in granting a continuance of two days after the jury had been sworn to try the cause, and in stating to the jury that 'a situation has occurred * * * which will compel * * * a continuance,' constituted error, is without merit. Not only through counsel, but personally, in open court, each of the defendants expressly consented to the postponement. With reference to the asserted misconduct of the deputy district attorney in eliciting testimony from the prosecuting witness to the effect that her sister had died on the day when the trial was commenced, and that her mother was seriously ill, beyond citing the occurrence as an instance of how the defendants 'were doomed to have all the breaks against them,' no attempt is made to justify from the record the conclusion that sympathy for the misfortunes of the prosecuting witness excited any prejudice whatever in the minds of the jurors against the defendants.

[12] "The court permitted to be read into evidence, over objection of the defendants, a stenographic report of an interview that had occurred between the prosecuting witness and a police officer in the presence of defendant Omar Gidney, who, at the time the statement was taken, was invited to and did interpose corrections and contradictions of the prosecuting witness' story in some particulars, but conceded that 'most of it, I guess,' was 'about what happened.' Appellants claim that the admission of this report was prejudicial error as to the defendants who were not present when it was taken, but cite no authority in support of their assertion. The report was offered and received as evidence against Omar Gidney alone; and the jury was admonished, both during the course of the trial and in the instructions, to consider it as applying to said defendant only. In such circumstances, there is no legal cause for complaint.

[13] "It is asserted, without reference to any authority, that the action of the trial court in directing the attention of the jury (which had returned to the courtroom for a reading of some of the testimony) to an instruction theretofore given which included the statement that 'it is advisable, both for the interests of the state and the benefit of the defendants, that a verdict should be returned,' had the effect of 'forcing' the verdicts. No reference is made to any matter in the record from which it could be inferred that the jury thereby was influenced in rendering its several verdicts. In similar situations, it frequently has been held that no error was committed. *People v. Miles*, 143 Cal. 636, 77 P. 666; *People v. Achal*, 125 Cal.App. 652, 14 P.2d 773; *People v. Baker*, 94 Cal. App. 687, 271 P. 777.

[14, 15] "Each of the verdicts contained a recommendation of leniency to the defendants and a suggestion that the court should consider an application for probation on their behalf. Complaint is made of the failure of the court to instruct the jury to retire again and bring in verdicts without any recommendations being thereto attached. No authority is cited in support of the proposition that the court, instead of requiring the jury to amend its verdict, may not accept the original verdict with its several recommendations, and thereafter disregard any unauthorized recommendations therein contained. To the contrary, in such circumstances it has been

held that recommendations by the jury constitute no part of the verdict, but are mere surplusage, only. *People v. Collins*, 195 Cal. 325, 233 P. 97; *People v. Sykes*, 10 Cal.App. 67, 101 P. 20; *People v. Lamb*, 67 Cal.App. 263, 227 P. 969; *People v. Parker*, 119 Cal.App. 246, 6 P.2d 82; *People v. Lopez*, 210 Cal. 55, 290 P. 582. Moreover, appellants' claim of prejudice in this respect necessarily is founded upon the same attempted impeachment of the verdicts that is sought by their motion for diminution of the record, hereinbefore discussed, and hence cannot be considered.

[16] "The record herein contains nothing that would form a basis for the claim that the trial court abused its discretion in denying the application made by defendants for probation. *People v. Jones*, 87 Cal.App. 482, 262 P. 361."

[17] In the petition for hearing before this court, defendants contend that the circumstances of this case justify an exception to the general rule that jurors may not impeach their own verdict. The affidavits disclose gross and inexcusable misconduct by the bailiff, a court officer, who had the effrontery to discuss the case with certain jurors and advise them both on the legal effect of their verdict and the probable decision of the judge with respect to sentence in the event that a certain kind of verdict was given. Another affidavit charges the bailiff with informing the juror that one of the defendants had a bad reputation with the police. That these activities would justify a new trial cannot be doubted, and it may be conceded that such misconduct, properly established, would constitute reversible error.

[18] There remains the question whether it was properly established, and in this case the only evidence to show the misconduct was that of the jurors themselves. Their affidavits constitute an impeachment of their verdict, and under the provisions of section 657 of the Code of Civil Procedure, cannot be admitted in evidence. Counsel for defendants urges that a distinction should be made between the situation where jurors affirm improprieties in their own deliberations and where, as here, they disclose outside influences, unauthorized communications by a court officer. Some jurisdictions make this distinction, while others apply the general rule literally. See 5 Wigmore, Evidence (2d Ed.) § 2354, pp. 135, 136; *Emmert v. State*, 127

Ohio St. 235, 187 N.E. 862, 90 A.L.R. 242; 44 Yale L.J. 516. In California the rule is statutory, and it has been held that the statutory exception of chance verdicts is exclusive. Accordingly, affidavits of jurors showing misconduct out of court or evidence received by them from outside sources have been refused admission. *People v. Reid*, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; *People v. Wong Loung*, 159 Cal. 520, 114 P. 829; see 23 Cal.L.Rev. 218. The case of *People v. Reid*, supra, is particularly in point, for the misconduct charged therein was a prejudicial statement by the bailiff to the jurors. Only where the misconduct of a juror occurred before empanelment of the jury, or constituted false swearing on his voir dire examination, has the statutory prohibition been deemed inapplicable. See *Williams v. Bridges*, 140 Cal.App. 537, 35 P.2d 407; 23 Cal.L.Rev. 359.

The rule has been criticized by eminent authority (see 5 Wigmore, Evidence § 2352-2354, and Supplement), but the evil, if any, is established in this state by the legislative authority, and can only be cured by amendment.

The judgments, and the orders denying motions for new trial and applications for probation, are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; EDMONDS, J.



10 Cal.2d 212

JOHNSON v. STATE BAR OF CALIFORNIA.

L. A. 16346.

Supreme Court of California.

Nov. 26, 1937.

I. Judges ⇨4

The constitutional provision that no person shall be eligible to office of superior court judge unless admitted to practice before State Supreme Court for at least five years immediately before his election or appointment requires that candidate therefor be attorney actually entitled to practice in state courts for such period, and attorney suspended from practice during such time is ineligible (Const. art. 6, § 23).

2. Attorney and client ⇨53(2)

A local administrative committee of state bar board of governors was justified in finding that statements, in sworn declaration of candidacy for nomination to office of superior court judge by one who had been suspended from practice of law for almost five months, that he was lawyer and had been for past three years, a lawyer admitted to practice in state nine years before, were false and made with intent to deceive, so as to warrant his disbarment, though he represented client in federal court during suspension period (St.1933, pp. 358, 362, 363; Const. art. 6, § 23).

3. Attorney and client ⇨46

The fact that registrar of voters refused to accept for filing suspended attorney's declaration of candidacy for nomination to office of superior court judge because of false statements therein that he was lawyer admitted to practice in state did not preclude his disbarment because of such statements, where he did everything he could to bring about filing of declaration (St.1933, pp. 358, 362, 363; Const. art. 6, § 23).

4. Attorney and client ⇨46

Disciplinary proceedings are instituted against attorney, not to punish him, but to protect public, courts, and legal profession, and fact that he was prevented by factor beyond his control from accomplishing dishonest act constitutes no defense.

5. Attorney and client ⇨57

Contentions, made by attorney and fully and adequately dealt with by Supreme Court's opinion in disciplinary proceedings resulting in his suspension, need not be discussed by such court in his subsequent proceeding to review order of state bar board of governors recommending his disbarment for later conduct involving moral turpitude (St.1927, p. 38, as amended).

6. Attorney and client ⇨58

An attorney, suspended from practice for three years on two charges, convicted of contempt respecting matters involving same subject-matter as subsequent charge against him, and apparently unable to realize that improper conduct, of which he was found guilty by local administrative committee of state bar board of governors, was blameworthy, should be disbarred.

In Bank.

Proceeding by George C. Johnson to review an order of the Board of Governors of the State Bar of California, recommending petitioner's disbarment from the practice of law.

Order that petitioner be disbarred from practice of law in all courts of the state and that his name be stricken from roll of attorneys.

George C. Johnson, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

CURTIS, Justice.

This is a proceeding to review an order of the board of governors of the State Bar, adopting the findings of one of its local administrative committees, and recommending to this court that petitioner be disbarred from further practice of law in this state.

We have examined the record with care, and are satisfied that the evidence adduced at the hearing before the local administrative committee is sufficient to support the findings of said committee and to justify its conclusion that petitioner has been guilty of conduct involving moral turpitude and should be disbarred. The gravamen of the charge against petitioner is that he made a false statement in a sworn declaration of candidacy for the office of judge of the superior court of Los Angeles county, to the effect that his occupation for the past three years had been that of practicing lawyer whereas in fact he was then and had been under suspension for almost five months prior thereto. Petitioner was admitted to practice in California in 1927 upon motion, having previously practiced in Illinois and Texas. On December 23, 1935, by order of this court, petitioner was suspended from practice for a period of three years upon two separate charges, said suspension to commence thirty days from the date of the filing of said order of suspension. *Johnson v. State Bar*, 4 Cal.2d 744, 52 P.2d 928. On June 20, 1936, the petitioner presented to the registrar of voters in the county of Los Angeles his sworn declaration of candidacy for the nomination to the office of superior judge of Los Angeles county, to be voted for at the primary election to be held on the 25th of August, 1936. The form for such declaration is specifically set forth in the Direct Primary Law (Stats.1933, pp. 358, 362,

363). In said sworn declaration of candidacy, petitioner described his "occupation for the past three years" as follows: "Lawyer, practicing, and admitted to practice since 1927 in California," and described his "present occupation" as "Lawyer." The registrar refused to accept the said declaration of candidacy for filing and returned the filing fee. The document was, however, retained by the registrar of voters, who stated to petitioner that he would seek further legal advice as to whether he should file it. Several days later he notified petitioner that he had been authorized not to accept it for filing, but did not return the document to petitioner. On July 2, 1936, petitioner filed in this court a petition for a writ of mandate praying this court to issue a writ of mandate directed to the registrar of voters of Los Angeles county requiring said registrar to declare said petitioner a duly qualified and eligible candidate for judge of the superior court. Said petition was denied by this court on July 10, 1936. On July 15, 1936, petitioner filed in the superior court of the county of Los Angeles a verified petition for a writ of mandate seeking the same action by the superior court as had been sought by him in this court, and failing to show by affidavit, or otherwise, that he had theretofore made a similar application in this court. For such failure, petitioner in the superior court of Los Angeles county was found guilty of contempt in accordance with the provisions of section 1008 of the Code of Civil Procedure (as added by St. 1933, p. 1898, § 177). Thereafter petitioner was served with an order to show cause why he should not be disciplined for professional misconduct by reason of the facts hereinabove set forth.

[1,2] In *Townsend v. State Bar*, 4 Cal.2d 619, 51 P.2d 879, an almost identical situation arose. In that case the petitioner therein was charged with having filed, on two occasions, sworn declarations of candidacy for election to the superior court wherein he stated that he had been in active practice of the law during the preceding three years, when in fact he had been under suspension during a portion of that time. The local administrative committee found that said false statement was made with intent to deceive the registrar of voters, or persons entitled to inspect and rely upon the statement, and the board of bar governors recommended a suspension for six months. In accordance with such recommendation, this court suspended the at-

torney for said period. Petitioner attempts to distinguish his case from the *Townsend* case by pointing out that in the *Townsend* case the attorney therein could not truthfully state that he had practiced law during the preceding three years inasmuch as he had appeared in court only in propria persona, whereas he, the petitioner herein, had during his period of suspension been representing a client in the federal court, and could truthfully aver that his occupation was that of a practicing lawyer. It may be admitted that, if the statement of petitioner with reference to his occupation be taken away from the context in which it was used, and entirely divorced from the purpose for which it was uttered and the result intended to be accomplished by its use, then the argument may seem plausible that the sworn statement was not a misstatement. But when said statement is considered in connection with the surrounding situation, and in conjunction with the fact that it was made in a sworn declaration of candidacy for nomination to the position of a judge of the superior court of this state, it is obvious that the statement was deceptive, dishonest, and untruthful, and was deliberately made with the intention of giving an impression which was not correct. Article 6, § 23, of the California Constitution provides that: "No person shall be eligible to the office of * * * a judge of a superior court, * * * unless he shall have been admitted to practice before the supreme court of the State for a period of at least five years immediately preceding his election or appointment to such office." It follows that no one is eligible to hold the office of superior judge who has not been an admitted practitioner before the Supreme Court of this state for a period of five consecutive years immediately preceding his election or appointment to such office. Certainly an attorney who has been suspended from the practice of law during this period cannot successfully claim to be eligible. *State ex rel. Willis v. Monfort*, 93 Wash. 4, 159 P. 889, L.R.A.1917B, 801. It is self-evident, we think, that said provision requires as a fundamental qualification for the office of superior judge, that the candidate for such position be qualified as an attorney actually entitled to practice in the state courts, and when petitioner in his sworn declaration of candidacy for such position made under oath the statement that his occupation was that of "lawyer" and his occupation for the three years immediately preceding was that of "lawyer,

practicing, and admitted to practice since 1927," there cannot be the slightest doubt that he intended thereby to convey the idea that he was in fact a lawyer legally entitled to practice in the state courts. These statements of petitioner, considered in their context as they necessarily must be, were false and were undoubtedly made with the intent to deceive. Clearly, the local administrative committee was justified in so finding.

[3,4] Some stress is laid by petitioner upon the fact that in the Townsend Case, the attorney therein actually filed the declaration of candidacy containing the false statements, whereas in the instant proceeding petitioner was prevented from filing said declaration by the refusal of the registrar to accept said document for filing. Petitioner did everything which he possibly could do to bring about the filing of the document, even to the extent of seeking a writ of mandate from this court and from the superior court of Los Angeles county. The fact that petitioner was unable to accomplish his purpose of filing the document does not minimize in the slightest degree the moral turpitude involved in the making of the false statement under oath. Disciplinary proceedings are instituted, not to punish the attorney, but to protect the public, the courts, and the legal profession, and the fact that the attorney was prevented by some factor out of his control from actually accomplishing a dishonest act, cannot constitute a defense in his behalf.

[5] It is not necessary to discuss the other arguments advanced by the petitioner, that this court has no jurisdiction of this proceeding, that the State Bar Act (St. 1927, p. 38, as amended) is unconstitutional, that each member of this court is disqualified because of his relation to the State Bar as "a member and stockholder," that petitioner is entitled to a jury trial, and that the right to practice law is a valuable property right of which he may not be deprived without due process of law, for the reason that these same contentions were made in the former disciplinary proceeding wherein petitioner was suspended for three years, and were fully and adequately dealt with in the opinion in that case. *Johnson v. State Bar*, supra.

[6] The penalty of disbarment may seem unduly harsh in view of the nature of the charge made against petitioner, but having in mind that the petitioner has

heretofore been suspended for three years on two separate charges, that he was found guilty of contempt with reference to matters involving the same subject-matter as the charge here made, together with the fact that petitioner seems to be utterly incapable of realizing that his conduct in the instant case is in the slightest degree blameworthy, we are of the opinion that the recommendation of the board of bar governors should be followed, and the petitioner disbarred from the practice of law in this state.

It is ordered that petitioner be disbarred from the practice of law in all the courts of this state and that his name be stricken from the roll of attorneys, effective thirty days after this order becomes final.

We concur: WASTE, C. J.; LANGDON, J.; EDMONDS, J.; SHENK, J.; SEAWELL, J.



10 Cal.2d 104

THORPE et al. v. STORY et al.

GOODMAN v. THORPE et al.
L. A. 15745.

Supreme Court of California.

Nov. 18, 1937.

Rehearing Denied Dec. 16, 1937.

1. Parties ⇨95(6)

In action on guaranty of bonds to holders and purchasers, petition alleging that plaintiffs were owners and holders of bonds as joint tenants could be amended to allege that plaintiffs, as members of bondholders' committee, were trustees with legal title and power of collection, without change in cause of action or in theory on which action was predicated (Code Civ.Proc. §§ 367, 369, 469; § 473, as amended by St.1933, p. 1851).

2. Guaranty ⇨85(1)

Petition alleging that defendants guaranteed bonds to "holders and purchasers," that default had been made, that due date of bonds was accelerated, and that plaintiffs had accepted bonds, and, as members of bondholders' committee under bondholders' agreement, were trustees with legal title and power of collection, alleged cause of action (Code Civ.Proc. §§ 367, 369).

3. Parties ¶7(2)

Trustees of an express trust may bring suit in their own names without joining the beneficiaries (Code Civ.Proc. §§ 367, 369).

4. Vendor and purchaser ¶1

A "purchaser" is one who has acquired property by buying it for a price in money.

[Ed. Note.—For other definitions of "Purchaser," see Words & Phrases.]

5. Guaranty ¶30

A guaranty of bonds to "holders and purchasers," giving "holder" right to bring suit thereon, was executed for benefit of those who were either holders or purchasers, and not merely for benefit of those who were both.

6. Guaranty ¶91

In action by members of bondholders' committee on guaranty of bonds to "holders and purchasers," evidence establishing deposits of bonds under bondholders' agreement was sufficient to establish that plaintiffs were "holders of bonds," and plaintiffs were not required to show circumstances under which each depositor acquired and held bonds.

[Ed. Note.—For other definitions of "Holder of Bond," see Words & Phrases.]

7. Guaranty ¶7(1), 81

An absolute guaranty is binding on guarantor without notice of acceptance, and delay in enforcement does not exonerate him (Civ.Code, §§ 2795, 2823).

8. Guaranty ¶7(4)

Guarantors were liable on "guarantee" whereby guarantors "do hereby unconditionally guarantee" to holders and purchasers payment of bonds, notwithstanding lapse of over six years between execution of "guarantee" and filing of action thereon by bondholders' committee, as against contention that "guarantee" was made for benefit of third persons and was not an absolute guaranty, but a mere offer of guaranty which was revoked by lapse of unreasonable time without communication of acceptance (Civ. Code, §§ 1587, 2787, 2795, 2806, 2823).

9. Guaranty ¶7(4)

Where bondholders' committee filed action on "guarantee" of bonds to holders and purchasers promptly after default of principal and prior to any effort of guarantors to rescind, although over six years after execution of "guarantee," guarantors would be

liable, even if "guarantee" were a contract for benefit of third persons (Civ.Code, §§ 1559, 1587, 2787, 2795, 2806, 2823).

10. Guaranty ¶32

The assignment of guaranteed bonds operated as assignment of guaranty even as respects assignees of bonds who had no knowledge of guaranty, where guaranty did not prohibit its assignment.

11. Guaranty ¶32

A guaranty is assignable even before cause of action thereon has become complete, if contract guaranteed is itself assignable and can be enforced by one who can enforce principal obligation, unless it manifests plain intent to restrict guarantors' liability to original creditor.

12. Guaranty ¶32

Whatever operates as assignment of debt will operate, prima facie at least, as assignment of guaranty, on the theory that it is an incident thereof, though assignee may be ignorant of guaranty when he acquired debt.

13. Guaranty ¶91

In action by bondholders' committee on guaranty of bonds to "holders and purchasers" which provided that it should be a continuing guaranty, and that "holder" might bring suit thereon, evidence that guarantors had knowledge that initial purchasers of bonds, who demanded guaranty, were purchasing for resale to their clients, authorized recovery, notwithstanding absence of formal written assignment of guaranty to committee, as against contention that guaranty was executed solely for benefit of initial purchasers.

14. Guaranty ¶91

Evidence established that modifications in proposed trust indenture securing bonds were made prior to delivery of guaranty of bonds, and were relatively unimportant and immaterial, so as to authorize recovery on guaranty, notwithstanding that modifications were made without knowledge or consent of guarantors.

15. Guaranty ¶36(6)

Under guaranty of bonds, limiting liability to the fraction of "total amount of principal and interest" set after name of each guarantor, guarantors were only liable for stipulated fractions of amount unpaid, and not for stipulated fractions of face amount of bonds.

16. Guaranty ⇨31

A guaranty of bonds, limiting liability to fraction of "total amount of principal and interest" set after name of each guarantor, imposed only a several liability.

17. Pleading ⇨138

Provisions of Code of Civil Procedure regarding cross-complaints and counterclaims are given broad and liberal interpretation (Code Civ.Proc. §§ 438, 442).

18. Pleading ⇨149

In action on guaranty of bonds by bondholders' committee, defendant guarantor who held bond not deposited with committee could file cross-complaint on guaranty against other defendant guarantors.

19. Guaranty ⇨82(2)

In action on guaranty of bonds by bondholders' committee, wherein a defendant guarantor who held bond not deposited with committee filed cross-complaint on guaranty, guarantor who was not named as defendant in principal action was not a "necessary" or "indispensable party."

[Ed. Note.—For other definitions of "Indispensable Party" and "Necessary Parties," see Words & Phrases.]

20. Appeal and error ⇨187(2)

The objection that a cross-defendant, who was not named defendant in principal action, was not a necessary party, could not be urged for the first time on appeal.

21. Guaranty ⇨84

In action on guaranty of bonds by bondholders' committee acting under bondholders' agreement providing that no separate action should be taken by depositor of bonds with committee, defendant guarantor could not file cross-complaint on guaranty on account of bonds deposited by him with committee.

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Spencer Thorpe and others against W. P. Story, sometimes known as Walter P. Story, and others, wherein Spencer Thorpe and others, as the bondholders' protective committee and as agents and trustees, under the provisions of the Annandale Corporation Bondholders' Protective Agreement, dated as of March 31, 1932, were substituted as plaintiffs, wherein June Braun Pike and others were substituted for defendant F. W. Braun as executors of his

will and estate, and wherein defendant N. W. Goodman filed a cross-action, naming as additional parties W. W. Mines and others. The action was dismissed as against M. H. Pehr and George A. Orloff. From an adverse judgment, cross-complainant and the other defendants appeal, and, from an adverse order, plaintiffs appeal.

Order affirmed, and judgment affirmed in part and reversed in part, with directions.

Kenyon F. Lee, of Los Angeles, in pro. per.

Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for appellant A. C. Robbins.

Biby & Biby, John E. Biby, and Chandler, Wright & Ward, all of Los Angeles, for appellants June Braun Pike, Dr. Edwin H. Schneider, and J. A. Hartley.

John Perry Wood and Stanley Arndt, both of Los Angeles, for appellant N. W. Goodman.

Ray E. Nimmo, of Los Angeles, for appellant Walter P. Story.

Irving S. Baltimore, of Los Angeles, for appellant R. W. Allen.

Rosecrans & Emme, of Los Angeles, for appellant M. C. Marsh, Jr.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for appellant Brian K. Welch.

Hewitt & Perkins and Leslie R. Hewitt, all of Los Angeles, and Roy W. Colegate, of Palm Springs, for appellant Horace N. Taylor.

Bauer, MacDonald, Schultheis & Pettit, Fred E. Pettit, Jr., R. H. Edwards, Jr., and Spencer R. Thorpe, all of Los Angeles, for plaintiffs and respondents.

PER CURIAM.

This action was brought by the members of a bondholders' protective committee against eleven guarantors to recover upon a written guaranty of a \$350,000 bond issue of the Annandale Corporation, which guaranty reads as follows:

"Guarantee. Be it remembered that the undersigned, being stockholders of the Annandale Corporation, a corporation organized and existing under the laws of the State of California, in consideration of the issuance and sale of three hundred fifty thousand dollars (\$350,000.00) in par amount of the First Mortgage Six and One-half Per Cent Sinking Fund Gold Bonds of the corporation, secured by a certain trust indenture between the Annandale Corporation, as

grantor and trustor, and Citizens Trust and Savings Bank, as grantee and trustee, dated September 1, 1925, and in consideration of the benefit that will be derived therefrom by each of the undersigned personally and as stockholders of the Annandale Corporation, and to facilitate the sale of said bonds, and to protect the purchasers thereof, do hereby unconditionally guarantee, as hereinafter provided, to the holders and purchasers, of said bonds from time to time, the punctual payment of the Annandale Corporation First Mortgage Six and One-half Per Cent Sinking Fund Gold Bonds, both principal and interest thereon, at the time and place and in the manner specified in said bonds and in the coupons thereto annexed, and if default in the payment of either principal or interest thereof be made by said the Annandale Corporation, we and each of us, agree punctually to pay said principal and/or interest in the manner specified in said bonds and in the coupons thereto annexed.

"We jointly and severally expressly agree that any indulgence extended to the maker or failure to enforce payment by the sale of any security, or otherwise, shall in no way affect our liability hereunder and we hereby waive notice of non-payment of any bond or coupon.

"It is provided, however, as a condition hereof that the obligation and liability of each of the undersigned hereunder shall be limited in amount to the fraction of the total amount of principal and interest of said bonds set after his respective name as follows: (Listing the signers of the document, with a fraction after the name of each, starting with 'W. W. Mines, 1002 Stock Exchange Bldg. 8/60'.) * * * and that each one of the undersigned shall be liable hereunder in an amount equal to, but not in excess of the respective aforesaid fractional amount of the entire principal and interest of said bonds.

"This guarantee is a continuing guarantee and shall not be exhausted by one or more recoveries thereon but shall bind us in the above proportions until payment has been made in full of the principal and interest of said bonds. The holder of any bond may from time to time bring suit upon this guarantee either by himself as plaintiff or as plaintiff in conjunction with the holder of other bonds and in any such suit may join all or any part of us as defendants. This guarantee shall be deposited with and held by the Citizens Trust and Savings Bank and

the holder of any bond shall have access thereto for examination.

"Witness our hands this 11th day of November, 1925. W. W. Mines, Guy M. Rush, A. C. Robbins, by A. C. Robbins, Jr., Atty. in fact, Guy Cochran, M. H. Pehr, W. P. Story, George A. Orloff, R. W. Allen, M. C. Marsh, Jr., Brian K. Welch, Kenyon F. Lee, N. W. Goodman, Allen T. Archer, E. R. Kibler, Horace N. Taylor, F. W. Braun, A. C. Robbins."

The \$350,000 bond issue was created for the financing of a project to purchase, subdivide, improve, and resell a tract of land of some 158 acres located back of the Annandale Golf Club in Pasadena. The bonds, dated September 1, 1925, were secured by deed of trust of the same date on the real property as well as by the guaranty of November 11th. Upon completion of the various negotiations and proceedings necessary to insure the validity of the bonds, they were on January 2, 1926, finally released from escrow for sale under the terms of the trust and of permits issued by the corporation commissioner. Between January 2, 1926, and October 11, 1926, the entire issue was purchased, in installments at a price of 93 plus accrued interest, by the John M. C. Marble Company and Hunter, Dulin & Company. These firms then marketed the bonds to their clients. On March 1, 1932, at which time bonds of an aggregate face value of \$104,000 had been retired, leaving \$246,000 outstanding, the Annandale Corporation defaulted in interest payments and thereafter it made no payments on the bonds of either principal or interest. It likewise failed to pay taxes on the real property which, although theretofore valued at some \$790,000, had greatly depreciated in value. No payments were made upon the guaranty. In May, 1932, the trustee, in response to notice of default and demand, accelerated the outstanding bonds, making them immediately due and payable. Meanwhile the bondholders had organized a protective committee to further their interests and a number of them had deposited their outstanding bonds in trust under the terms of the bondholders' protective agreement, which was in the usual form of an agreement of that character.

On September 29, 1932, this action was filed by the members of the bondholders' protective committee to recover upon the guaranty as to deposited outstanding bonds in the aggregate principal sum of \$216,000.

After prolonged hearings, demurrers, filed separately by the various defendants, were sustained to the complaint and to the first and second amended complaints, but were overruled as to the third amended complaint. Thereafter plaintiffs dismissed the action as against M. H. Pehr and George A. Orloff, two of the eleven original defendants. The cause was finally tried upon the issues joined by plaintiffs' third amended complaint as amended, and the separate answers of the other nine defendants thereto; the amendment and second amendment to the third amended complaint and the answers of all said defendants thereto; the cross-complaint of defendant Goodman, and the answers of plaintiffs, the joint answer of seven defendants and cross-defendant Archer, and the separate answer of defendant and cross-defendant Taylor thereto; and the supplement to the cross-complaint as amended and the joint answer of all said defendants and cross-defendants thereto. The conclusion of the trial court was that plaintiffs were entitled to recover against each of the nine defendants in respective specified amounts aggregating \$126,108.42, but that defendant Goodman should take nothing by his cross-action. A judgment was entered accordingly. From this judgment the nine defendants united in filing notice of appeal, and eight of them have joined in a single set of briefs on appeal. Defendant and cross-complainant Goodman, whose status differs from that of his codefendants, has filed a separate set of briefs. Plaintiffs, who were dissatisfied with the amount of their award, moved the court for an order vacating the judgment and for the entry of another and different judgment. This motion was denied, and plaintiffs have appealed from the order of denial. This appeal is also separately briefed. The appeals will now be considered in the following order: (1) Joint appeal of defendants from the judgment; (2) the separate appeal of plaintiffs from the order denying their motion for an order vacating judgment and for entry of another and different judgment; and (3) the appeal of defendant and cross-complainant Goodman.

Joint Appeal of Defendants From the Judgment.

The first main point of these appellants is stated as follows: "Does a Guaranty made for the express benefit of a special class of persons (holders and purchasers) impose any liability upon the guarantors in favor of persons who are not within the class, or

assignees of the class for whose benefit the guaranty was made?" Appellants urge that as the bondholders' protective agreement did not by its terms constitute plaintiffs "holders and purchasers" of the bonds, and, as no evidence was offered or received that the depositors who turned in their bonds under that agreement were in fact "holders and purchasers," plaintiffs had no standing in court and their complaint failed to state a cause of action.

In disposing of this contention reference must be made to the terms of the bondholders' agreement, particularly those bearing upon plaintiffs' capacity to sue, and the allegations of plaintiffs' complaint. The agreement is dated March 31, 1932. Preliminary recitals refer to issuance of the bonds, to the trust indenture securing them, to the guaranty, to the default of the corporation, and to the fact that "it is in the best interest of the depositors to act jointly and through a competent committee to protect their interests and enforce their rights in accordance with the terms of said trust indenture * * * and under said guaranty." Section 1 provides that any holder of bonds may become a party to the agreement either by signing it or by depositing his bond or bonds within a specified time with the depository, Citizens National Trust & Savings Bank of Los Angeles, trust department, and that upon such deposit a deposit certificate, in specified form, shall be issued to the depositor. The section provides for the transfer of certificates of deposit, and further provides: "After any such deposit no separate action shall be taken by a depositor with respect to the deposited securities."

Section 2 of the agreement provides: "2. To the end that the Committee may be able to protect and promote the interest of the Depositors, the Committee is hereby vested under the terms of this agreement *as trustee of an express trust with legal title to and ownership* of all the Deposited Securities deposited hereunder, and the Depositors hereby, for the consideration aforesaid, and each also in consideration of the assignment and transfer by the other Depositors, severally assign, transfer and set over to the Committee the bonds and coupons of the Depositors respectively deposited by them hereunder, and no limitation is imposed on the powers of the Committee as the legal owner except the duty of doing whatever is calculated in its opinion to promote the in-

terest of the Depositors without preference priority of any of them over any other of them, and the Committee hereby assumes such duty. The Depositors hereby constitute and appoint the Committee their attorneys in fact * * * and * * * empower the Committee to institute * * * such legal proceedings * * * necessary or convenient to enforce any remedies provided for in the deed of trust in the event of a default * * * and to enforce said agreement of guaranty, and to perform any act, proceeding or thing which the Depositors themselves, or any of them, might or could do if this agreement had not been made, including the commencement and prosecution to final judgment and satisfaction or the settlement and compromise of any action to enforce the rights of Depositors under said trust indenture or said agreement of guaranty or under the laws of of the state of California with respect to stockholders' liability."

Section 3 elaborates in still greater detail the authority given to the committee and the various incidents of ownership of the bonds vested in them. The remaining thirteen sections of the agreement contained detailed provisions for effecting its purposes and terminating and completing the trust.

Undoubtedly this agreement was intended to and did vest in the members of the committee the legal title to and ownership of the deposited bonds. *Bullard v. City of Cisco*, 290 U.S. 179, 54 S.Ct. 177, 78 L.Ed. 254, 93 A.L.R. 141; *Dreiske v. Los Angeles I. S. Corp.*, 13 Cal.App.2d 59, 56 P.2d 299.

We shall now refer to the allegations of plaintiffs' complaint, particularly those relating to their right to sue upon the guaranty. The members of the bondholders' committee were three, Mr. Spencer Thorpe, president of the Hamilton Life Insurance Company, which company owned \$10,000 worth of the bonds; Mr. Ernest E. Jones, treasurer of Pomona College, which owned \$30,000 of the bonds; and Mr. John M. Marble of the John M. C. Marble Company which had marketed to its clients half of the bond issue. These three persons originally brought this action in their own names as follows: "Spencer Thorpe, Ernest E. Jones and John M. Marble, Plaintiffs," and in their several complaints, including the third amended complaint,

they alleged: "That the plaintiffs herein are now and since prior to the filing of this action on the 29th day of September, 1932, have been, the owners and holders as joint tenants with right of survivorship of certain of said bonds of The Annandale Corporation, in an aggregate principal sum of Two hundred Sixteen Thousand Dollars (listing the bonds). * * *" During the trial of this action, however, at the time the bondholders' agreement was offered in evidence, the trial court ruled that plaintiffs were not suing in their individual capacity, but were simply trustees of an express trust, or assignees of the bonds for purposes of collection, and permitted them to amend their third amended complaint to allege: "That the plaintiffs herein are now and since prior to the filing of this action on the 29th day of September, 1932, have been, the holders of legal title to and ownership of, and are the owners, holders and purchasers of, an aggregate of \$216,000 principal amount of The Annandale Corporation First Mortgage Six and One-half Per Cent Sinking Fund Gold Bonds, as Agents and Trustees for depositing bondholders under the provisions of such Bondholders' Protective Agreement, which said Bondholders' Protective Agreement is in words and figures as follows [setting it forth in haec verba]. * * *" At the same time in the caption of the complaint the names of plaintiffs as individuals were eliminated and it was made to read: "Spencer Thorpe, Ernest E. Jones and John M. Marble as the Bondholders' Protective Committee and as agents and trustees under the provisions of the Annandale Corporation Bondholders' Protective Agreement dated as of March 31, 1932, Plaintiffs. * * *"

The body of the pleading alleged the facts relative to creation of the bond issue, execution of the trust indenture, and the further proceedings which culminated in completion of the escrow on January 2, 1926, and sale of the bonds. It alleged that prior to sale and delivery of any of the bonds, and under date of November 11, 1925, in response to and in compliance with the request and demand of Hunter, Dulin & Co. and John M. C. Marble Company, the underwriters and initial purchasers of all the bonds, and in accordance with the terms of the agreement between those companies and the Annandale Corporation, and in consideration of the sale and un-

derwriting, defendants executed and delivered and deposited with the escrow agent contemporaneously with the delivery of the bonds, "for the benefit of each and all of the owners, holders and purchasers of said bonds from time to time," the written guaranty, setting it forth in full. Next was alleged the default of the corporation and the acceleration of the due date of the bonds and that "the plaintiffs herein, as such bondholders, did previously, to-wit, by the filing of this action on the 29th day of September, 1932, and do now affirm, ratify and accept said guarantee so made for their benefit, and that said defendants by their execution and delivery of said guaranty * * * did thereby make and enter into a contract expressly for the benefit of third persons, to-wit, the plaintiffs herein, among others." The prayer of the complaint was for judgment in the sum of \$244,080, plus interest on the principal sum of \$216,000 from September 1, 1933, to date of trial, the liability of defendants, however, to be limited to the fraction of the total and entire amount of principal and interest guaranteed by each, listing the defendants, the alleged fractional liability of each, and the sum sought to be recovered from each.

[1-3] The position of plaintiffs is that their third amended complaint, both as originally drawn and as amended during trial, was sufficient to state a cause of action and that the amendment, although not at all improper, was unnecessary. By the pleading as it stood when the cause went to trial, plaintiffs, as individuals, alleged themselves to be "owners and holders as joint tenants with right of survivorship" of the bonds. There is authority which supports the argument that this was a sufficient allegation of plaintiffs' capacity to sue upon the guaranty, and brought them within the class of persons for whose benefit it was made. *Cortelyou v. Jones*, 132 Cal. 131, 64 P. 119; 25 Cal.Jur. p. 352, § 197; 20 Cal.Jur. p. 495, § 12. However, we here expressly refrain from passing upon the adequacy of that allegation for the reason that the later amendment of the complaint, alleging the full details of the trust relationship, was properly allowed by the court, and the pleading, as so amended, was amply sufficient to state a cause of action. Plaintiffs, as has already been stated, acquired, by virtue of the bondholders' protective agreement, legal title to

and ownership of the deposited bonds as trustees of an express trust. That trustees of an express trust may bring suit in their own names, without joining the beneficiaries, is thoroughly settled. Sections 367, 369, Code Civ.Proc.; 20 Cal.Jur. p. 493, § 12; 25 Cal.Jur. p. 351, § 197. The trial court's action in requiring or permitting the amendment and the change in the caption of the pleading was proper, and it did not constitute a change in the cause of action or in the theory upon which the suit was predicated. Section 469, Code Civ.Proc. and section 473 (as amended by St.1933, p. 1851). *Lasar v. Johnson*, 125 Cal. 549, 58 P. 161; *Security Trust & Savings Bank v. Southern Pac. R. Co.*, 214 Cal. 81, 3 P.2d 1015; *Fairbairn v. Eaton*, 6 Cal.App.2d 264, 43 P.2d 1113; 49 C.J., p. 518.

These appellants contend that, even if it be held that plaintiffs' allegations in their third amended complaint as amended, to the effect that they were "owners, holders and purchasers," etc., of the bonds, entitled them to go to trial, nevertheless upon the trial they utterly failed to show that they were within the special class of persons for whose benefit the guaranty was made, i. e., "holders and purchasers"; that, aside from the recitals in the bondholders' agreement, plaintiffs did not offer, and there was not received in evidence, any proof which would tend to show that plaintiffs, or the depositors of the bonds whom they represent, ever owned or purchased any of the bonds, except that it appears that Hamilton Life Insurance Company purchased and now owns \$10,000 face value of said bonds; that plaintiffs made no attempt to prove that the persons who deposited the bonds or the holders of certificates of deposit had any interest in the bonds or were entitled to the benefits of the guaranty.

Upon the trial plaintiffs did not attempt to show under what circumstances each depositor had acquired and held the bonds deposited under the bondholders' agreement, but plaintiffs did introduce in evidence full records of the depository bank giving complete data as to the deposit of the bonds, the issuance of certificates of deposit, and subsequent transactions as to said certificates. In other words, plaintiffs showed that as trustees of the express trust they had acquired and held legal title to and ownership of certain described bonds of \$216,000 face value, and the trial

court so found. More particularly, the trial court found that the allegations of paragraph III of the amendment to the third amended complaint ("that the plaintiffs herein are now and since prior to the filing of this action * * * have been, the holders of legal title to and ownership of, and are the owners, holders and purchasers of, an aggregate of \$216,000 principal amount of" the bonds " * * * as Agents and trustees for depositing bondholders under" the pleaded bondholders' protective agreement), were true, "*except*" that the court found that "no money was paid by plaintiffs herein or any of them to the depositing bondholders or any thereof, either at the time of their respective deposits of bonds or at any other time, and that *said plaintiffs were and are not purchasers in the sense that they paid money for said bonds.*"

[4-6] These appellants contend that these findings do not establish plaintiffs within the class of persons entitled to recover upon the guaranty, to wit, as "holders and purchasers" of the bonds; that, while plaintiffs may be "holders" of the bonds, neither the evidence nor the findings establish their status as "purchasers" thereof within the usual and ordinary meaning of the latter term, as is apparent from the language of the italicized portion of the finding last above quoted. To state appellants' claim another way: They urge that the guaranty runs to the benefit only of "holders and purchasers," not "holders" or "purchasers," and that plaintiffs, to bring themselves within the special class entitled to recover upon that instrument, must show that they were both "holders" and "purchasers," within the common meaning of the latter term as signifying those who have acquired property by buying it for a price in money. Concededly, as the court found, plaintiffs are not "purchasers in the sense that they paid money for said bonds." However, we find it unnecessary to indulge in a discussion of the refinements of the definition of the term "purchasers," as it is our view that the guaranty runs for the benefit of both "holders" and "purchasers" of the bonds. This is apparent from the exact language of the guaranty that the signers "do hereby unconditionally guarantee * * * to the holders and purchasers" payment of the bonds; that "the *holder* of any bond may from time to time bring suit upon this guarantee either by himself as plain-

tiff or as plaintiff in conjunction with the holder of other bonds," etc. To interpret the instrument to limit recovery to those who paid actual money for their bonds, to the exclusion of those who may have acquired them by gift, devise, or in another way as did these plaintiffs, would be to defeat the obvious purpose of the guaranty and to leave without relief various classes of persons obviously entitled thereto. On the other hand, to hold that the guaranty runs for the benefit of "holders" as well as of "purchasers" is not to extend its terms by implication or inference, but is merely to give to the language used a reasonable and normal construction. It follows that the trial court's finding to the effect that plaintiffs were, in some sense of the word, "purchasers" of the bonds, is not inconsistent with their true position, and the finding that plaintiffs are "holders" of the bonds is fully supported by the evidence showing the various deposits under the bondholders' agreement.

The trial court found to be true plaintiffs' allegation that as bondholders they did, by the filing of this action, and "do now affirm, ratify and accept said guaranty so made for their benefit, and that said defendants by * * * said guaranty * * * did thereby make and enter into a contract expressly for the benefit of third persons, to wit, the plaintiffs herein, among others." The court also found that "it is not true that plaintiffs have no right, title or interest in said guaranty; on the contrary it is true and is so found that they are the beneficiaries thereof to the extent of the outstanding bonds which they hold, and are entitled to such benefits of said Guarantee and the right to sue thereon in accordance with its express provisions and the provisions of the bondholders' protective agreement * * * irrespective of the fact that there were no mesne transfers or assignments in writing of said guaranty * * * that said guaranty was made for the benefit of all owners, holders and purchasers of bonds * * * and was not made for the exclusive benefit of the bonds of said corporation owned and held by plaintiffs, and that it is incumbent upon the court to preserve the rights of all bondholders in common under a guarantee of the character sued upon herein * * * that said guaranty was delivered on January 2, 1926, at the same time as and concurrently with the original obligation of said The

Annandale Corporation, to wit, the first installment of Two Hundred Fifty Thousand Dollars aggregate principal amount of said bonds, the remaining installments of which were delivered during the year 1926, as hereinabove found; that the parties beneficiary under said guarantee, while not identified therein by name, and while not parties to the original transactions culminating in the issuance of said bonds, and were third parties so far as said transactions were concerned, the said beneficiaries of said guarantee are nevertheless clearly identified by the express language of said guarantee."

[7-9] These appellants claim that the finding of acceptance by plaintiffs of a guaranty for their benefit was erroneous; that plaintiffs could not qualify as beneficiaries of the guaranty as a contract allegedly made for the benefit of third persons, without alleging and proving that the persons whom they represented were holders and purchasers of the bonds; and, furthermore, that it appears from the facts that the acceptance of the offer made by the guarantors, if the same be construed as an offer for the benefit of plaintiffs, was revoked by the lapse of an unreasonable time without communication of the acceptance. Section 1587, Civ.Code. This contention is without merit. The guaranty, by its terms, is not an offer of guaranty, but an absolute or unconditional guaranty (sections 2787, 2806, Civ.Code) to the "holders and purchasers of said bonds from time to time," a "continuing guarantee," which "shall not be exhausted by one or more recoveries thereon but shall bind us in the above proportions until payment has been made in full of the principal and interest of said bonds." An absolute guaranty is binding upon the guarantor without notice of acceptance, and delay in enforcement does not exonerate him. Sections 2795 and 2823, Civ.Code. Thus the fact that more than six years elapsed between the date of execution of the guaranty and the date of filing of this action is immaterial. Furthermore, even were the guaranty to be treated as in the nature of a contract for the benefit of third persons, it would appear that there was no unreasonable lapse of time in the bringing of this action, which was filed promptly after the default of the corporation and prior to any effort of the guarantors to rescind. Sections 1559 and 1587, Civ.Code.

[10-12] A further question grows out of the fact that the guaranty, a separate instrument, was not printed on the bonds, and, so far as the record shows, the bondholders may not have acquired or purchased the bonds with knowledge of or in reliance upon the guaranty. Plaintiffs introduced no evidence to show under what conditions or upon what representations the bonds were acquired or purchased, and it may be that they were acquired or purchased in ignorance of the existence of the guaranty. Hence the question is presented: Did assignment of the debt (bond) operate as an assignment of the guaranty, so that whoever may enforce the debt may enforce the guaranty, and this even though the assignee may have been ignorant of the guaranty at the time he acquired the debt? On this subject there is a long standing conflict of authority (7 Cyc. 542), which has never been resolved by the courts of this state. We here approve the rule which is stated as follows in Spencer on Suretyship, pp. 152, 153, § 113: "By weight of authority also, a guaranty is assignable even before a cause of action thereon has become complete, if the contract guaranteed is itself assignable as not being personal in its character, and can be enforced by the same person who can enforce the principal obligation, unless it manifests a plain intent to restrict the guarantors' liability to the original creditor. Furthermore, whatever operates as an assignment of the debt will operate, *prima facie* at least, as an assignment of the guaranty, on the theory that it is, like a mortgage, an incident thereof, so that whoever may enforce the debt may enforce the guarantee; and this was held even though the assignee may have been ignorant of the guaranty when he acquired the debt."

The text-writer cites as authority for the last statement *Tidioute Sav. Bank v. Libbey*, 101 Wis. 193, 77 N.W. 182, 184, 70 Am.St.Rep. 907. That case is directly in point here. The defendants in said action executed and delivered to the R. Company a written guaranty of all indebtedness then due or to become due to the R. Company, or its assigns, occasioned by any act of the F. Company, in which company defendants were heavy stockholders. Thereafter the F. Company sold and indorsed a promissory note of C. Company to the R. Company. The R. Company then sold the note to plaintiff bank, which took it without notice of the existence of defend-

ants' written guaranty. No formal assignment of the guaranty was made. The note was presented for payment, which was refused. Learning of the guaranty, plaintiff bank then sued defendant guarantors and had recovery on the theory that the transfer of the note carried with it all security without any formal assignment or delivery, or even mention of the latter. Among other things, the court said: "The fact that the Tidioute Savings Bank did not know of the existence of this guaranty at the time it purchased the C. * * * Company note is of no significance. The securities pledged for a debt follow it, in equity, no matter how the debt be modified or into whose hands it may come. Until the debt is paid, the pledge accompanies it, and remains for its payment, and is available to all who may acquire title thereto. Coleb.Col.Sec. § 79; Stearns v. Bates, 46 Conn. 306. The guaranty in question was given to secure the payment of any and all indebtedness due, or thereafter to become due, to R. * * * Co., or their assigns, 'growing out of, or occasioned by, any or through any act or acts of the said F. * * * Company.' The defendant used apt words to make the guaranty impersonal, so far as the holders of the debts so created are concerned. They executed and delivered a contract as security for all the debts created by the F. * * * Company to R. * * * Co. within the amount limited, which became an incident to each such debt, and which passed to the bank pro rata, upon its purchase of the note, even though it may not have known of its existence at that time. Keyes v. Wood, 21 Vt. 331; Evertson v. Booth, 19 Johns. [N.Y.] 486. To require the defendants to pay these notes is but to require them to fulfill their promise. It entails no hardship and creates no obligation beyond the plain tenor of their contract."

In Postlethwaite v. Minor, 168 Cal. 227, at page 232, 142 P. 55, will be found certain language which is not in harmony with the above holding. These remarks, however, are dicta, for that decision turned upon the basic question of the existence or nonexistence of the guaranty, and the court concluded that there was no present contract of guaranty. Said language we expressly disapprove.

The second main point of these appellants is stated as follows: "The Guaranty protects one class only—the purchasers of the bonds. The evidence conclusively

shows that Hunter, Dulin & Co. and the John M. C. Marble Company were the purchasers of all the bonds from The Annandale Corporation and purchased the same in installments from time to time. As plaintiffs show no privity with them, they are not entitled to judgment." Appellants urge that from the face of the guaranty and other evidence it appears that the guaranty was made for the benefit of Hunter, Dulin & Co., and the John M. C. Marble Company, the original purchasers of the bonds, and that, when they purchased, the guaranty became a binding obligation in their favor; that, since they did not execute any assignment thereof to any person or persons, the trial court erred when it construed the guaranty as having been made for the benefit of plaintiffs who, the evidence failed to show, were purchasers of any of said bonds or in privity with either the Hunter, Dulin & Co., or the John M. C. Marble Company.

These appellants refer to the recital in the guaranty that it was given "in consideration of the issuance and sale" of bonds of \$350,000 par value, etc., "and to facilitate the sale of said bonds, and to protect the purchasers thereof"; also to the evidence showing that the entire issue was purchased, half and half by the John M. C. Marble Company and the Hunter, Dulin & Co., in installments as follows: January 2, 1926, a block of bonds of \$250,000 par value, purchased half by each company; March 15, 1926, \$15,000 purchased by Hunter, Dulin & Co., \$10,000 by John M. C. Marble Company; May 12, 1926, \$35,000 by Hunter, Dulin & Co., \$15,000 by John M. C. Marble Company; October 1, 1926, \$15,000 by John M. C. Marble Company; and October 11, 1926, a final installment of \$10,000 by the latter company, thus completing the purchase of the entire issue by said two companies. The purchase price was received, through administration of the trust, for the benefit of the Annandale Corporation.

Upon trial of the cause several of the defendant guarantors testified, over objection of plaintiffs, that in signing the guaranty they intended to protect, and believed they were protecting, only the initial purchasers of the bonds; that is, said two companies or any one who bought bonds from the corporation. These witnesses testified that they construed the words "purchasers, of said bonds from time to time," found in the sentence of the guar-

anty reading: "* * * do hereby unconditionally guarantee * * * to the holders and purchasers, of said bonds from time to time, the punctual payment * * *" of the bonds, as referring to the purchase "from time to time," during 1926 in installments, of the bonds by the John M. C. Marble Company and the Hunter, Dulin Company.

This parol evidence of the guarantors' secret intention in executing the guaranty would seem to have been inadmissible, in the light of the precise phraseology of the guaranty itself and of the other competent evidence. The guaranty was not drawn hastily but was considered over a period of months preceding the culmination of the transaction on January 2, 1926. Its meaning is clear. Had it been the intention to protect only the initial purchasers of the bonds, undoubtedly the guaranty would have been drafted to run to the benefit of "initial purchasers," or of the John M. C. Marble Company and Hunter, Dulin & Co., instead of to the benefit of "holders and purchasers, of said bonds from time to time." Then, too, the statement that the guaranty was to protect only initial purchasers is inconsistent with its further provisions that "This guarantee is a continuing guarantee and shall not be exhausted by one or more recoveries thereon but shall bind us in the above proportions until payment has been made in full of the principal and interest of said bonds. The holder of any bond may from time to time bring suit upon this guarantee either by himself as plaintiff or as plaintiff in conjunction with the holder of other bonds. * * * This guarantee shall be deposited with and held by the Citizens Trust and Savings Bank and the holder of any bond shall have access thereto for examination."

[13] Whether or not the John M. C. Marble Company and Hunter, Dulin & Co., were "underwriters," in the sense of that term given by appellants, of the bond issue (as held by the court below in finding true various allegations of the third amended complaint), is immaterial, for the fact of the matter was that both companies purchased the bonds for the purpose of marketing them to their clients and did so market them, and knowledge of this purpose and of the desire to protect purchasers by guaranty was freely circulated among the guarantors. Some of the evidence on this subject is as follows:

At the very inception of the negotiations for purchase of the bonds by the John M. C. Marble Company, that company demanded a guaranty. (The Hunter, Dulin & Co. entered upon the scene at a later date.) As early as May 29, 1925, the John M. C. Marble Company addressed a letter to the Annandale Syndicate reading in part: "We understand that you are contemplating the subdivision and sale of approximately 158 acres of land adjacent to the Annandale Country Club. * * * we also understand that it is your intention to finance this subdivision with a bond issue totaling \$350,000, * * * We will purchase these bonds from you at 93 and accrued interest, subject to the following terms and conditions. \$135,000 of the bonds are to be issued at once. This amount is to be used to complete the purchase of the property. The next installment of bonds to be taken down will consist of \$115,000 par value. These are to be taken down in blocks of not less than \$20,000 on engineers certificates with the understanding that the last \$25,000 may be taken down without certificates. This amount of \$25,000 is to be used in the partial liquidation of a note of the syndicate now outstanding. The last \$100,000 of bonds may be issued in blocks of not less than \$20,000 on the following basis. You must show the expenditure of an equal amount of money in addition to the bond money desired, or you may deposit with the trustee mortgages, contracts of sale, or trust deeds, in addition to those already outstanding in double this amount. The same to be approved by ourselves before the bonds are issued. The bonds are to be secured by first mortgage upon the property and by assignment of any contracts, mortgages, or bills receivable that may be created in the selling of the property and you are to furnish us with satisfactory guarantee of title evidencing the first lien of the mortgage. * * * *The bonds are to be further secured by the unconditional guarantee, principal and interest by the various members of the syndicate.* This guarantee to be on a rateable and several basis, based on each member's proportionate interest in the syndicate. * * * Your acceptance of the above is to constitute a valid and binding contract between the John M. C. Marble Company and yourselves. Very truly yours, the John M. C. Marble Company by H. M. Worcester, Vice Pres." This letter was indorsed: "Accepted and agreed to: W.

W. Mines, W. P. Story, F. W. Braun, Kenyon F. Lee, Horace N. Taylor, M. H. Pehr, Brian K. Welch, Edwin R. Kibler, N. W. Goodman, Guy Cochran, A. C. Robbins, John R. Powers." All of these parties except Powers later signed the guarantee and seven of them were named as defendants when this action was filed.

About October 1, 1925, Hunter, Dulin & Co., which by that date had become interested with the John M. C. Marble Company in the partial purchase of the bond issue, prepared certain advertising copy designed to foster purchase of the bonds by the general public. Under the heading "Guarantee," this advertisement stated: "As additional security these bonds, will be unconditionally guaranteed, both principal and interest, ratably and severally by the following group of men who are the owners of all the outstanding stock of the company" (listing all but four of the seventeen guarantors and one Powers). On this advertising copy appeared the notations: "O K, Gibson, Dunn & Crutcher by J. C. Macfarland, Oct 1 1925 (Mr. Macfarland of the law firm of Gibson, Dunn & Crutcher prepared the bond forms and many of the other documents used in connection with the bond issue); OK Guy M. Rush, W. W. Mines, OK WPS (W. P. Story); OK N. W. Goodman by M A Lyon, Atty., OK Kenyon F. Lee." In admitting the advertising copy in evidence, the trial court ruled that only the defendants who had put their O. K.'s thereon would be bound by it and all of the indorsements were not identified.

Representatives of both the John M. C. Marble Company and Hunter, Dulin & Co. testified that the bonds were purchased for resale and they were sold to the respective clients of those two firms; that they could not and would not have been marketed without protection of the guaranty. In a letter dated December 31, 1925, written by the John M. C. Marble Company and Hunter, Dulin & Co. to the escrow agent transmitting their check to be used in payment of the purchase price of the first \$250,000 installment of bonds, it was specified that the check was to be delivered only upon compliance with certain instructions, requiring among other things that the escrow agent receive, (1) permit of the corporation commissioner authorizing issuance and sale of the bonds; (2) opinion of Gibson, Dunn & Crutcher approving the regularity of the proceedings

for creation of the indebtedness; (3) written instrument of guaranty of the bonds signed by the guarantors (listing them); and (4) policy of title insurance showing the recording of the mortgage or deed of trust, as a first lien on the real property securing the bonds.

Under the showing made by the record it is clear that appellants' contention that the guaranty was intended to run solely to the benefit of the John M. C. Marble Company and Hunter, Dulin & Co., or other initial purchasers from the corporation, cannot be sustained. In view of the absolute nature of the guaranty running to a designated class, and not to initial purchasers, no formal written assignment of the guaranty to plaintiffs was necessary. Plaintiffs' title to the bonds brings them within the class for whose benefit the guaranty was made, and they are entitled to recover upon it without assignment thereof.

[14] The third main contention of these appellants grows out of the fact that between the date shown on the guaranty, November 11, 1925, and January 2, 1926, the date of completion of the steps incident to valid issuance of the bonds, certain changes were made in the provisions of the trust indenture securing the bonds. Appellants state their contention as follows: "Plaintiffs failed to prove that preliminary negotiations for the guaranty of bonds of Annandale, as a part of which preliminary negotiations an indenture of trust containing the terms and conditions upon which the bonds were to be secured and paid by Annandale and guaranteed by the guarantors was to be executed, were ever finally consummated with the consent of all parties interested, and no liability under said alleged guarantee was established. There was no meeting of the minds upon the alleged guarantee or the terms of the indenture of trust which is referred to in the guarantee and in the bonds, which indenture of trust forms a part of the contract of guarantee." Appellants' position is that the guaranty consists of three documents, i. e., guaranty, bonds, and trust indenture, all of which must be construed together to ascertain whether there is any basis upon which to hold the guarantors liable; that, as the evidence shows that, subsequent to execution of the guaranty and without the knowledge or consent of the guarantors, material changes were made in the proposed form of trust indenture, there never ac-

tually came into existence any valid and subsisting contract of guaranty nor was there ever any meeting of minds of the parties as to such a contract.

Respondents agree that the guaranty, bonds, and trust indenture should be construed together (San Francisco T. Seminary v. Monterey County G. & E. Co., 179 Cal. 166, 175 P. 693), but they urge that the evidence clearly establishes that all happenings prior to January 2, 1926, were a part of preliminary negotiations only, and that the entire transaction was reflected for the first time in contract form on January 2, 1926, when the contemporaneous delivery to the depositary of guaranty, bonds, and trust indenture merged prior negotiations into a valid and binding contract whereby each and all of the instruments became effective legal documents, conferring rights and obligations in accordance with their tenor. Further, respondents contend that the changes made in the trust indenture were not material.

The trial court found in accord with the views of respondents, and these findings have support in the evidence. It found that, at the time of the issuance of the supplemental permits by the corporation commissioner, none of the bonds had been issued, sold, or delivered, or recorded, and that the guaranty, although signed by the guarantors, had not then been delivered. It found that the deed of trust was delivered and recorded on January 2, 1926, following which, and on the same date, the guaranty was delivered to the depositary in accordance with its express provisions, and bonds in the aggregate principal sum of \$250,000 were delivered. It found that " * * * although in the drafting of said mortgage or deed of trust and the preparation thereof in form for execution and delivery by said The Annandale Corporation some changes were made in drafts thereof, all of said changes were made prior to the signing by said The Annandale Corporation in due corporate form of said mortgage or deed of trust on or about the 29th day of December, 1925; that none of such changes as were made in the drafting thereof in any way affected the principal of the bonds, the interest thereon, the term, the maturity of the obligation thereof to pay; that none of said changes in said drafts was material; that there never was in fact any mortgage or deed of trust in existence prior to the 2d day of January, 1926, when the mortgage or deed of trust

referred to in the Third Amended Complaint was delivered and recorded; and that the same was and is the sole and only deed of trust executed and delivered by said The Annandale Corporation."

The court, at the request of appellants, also made detailed specific findings setting forth the exact changes made in the draft of trust indenture, and it then further found: "All of the changes above referred to were made in the drafts of said trust indenture, prior to the execution thereof in corporate form on December 29, 1925, and the delivery and recording thereof on January 2, 1926. The area of the mortgaged premises comprised approximately 158 acres of land, and the value thereof at said time, in its unimproved condition, was in excess of three-quarters of a million dollars. By reason of the facts, firstly, that all of said changes were made in drafts of proposed trust indenture prior to the execution, delivery and recording of any trust indenture and prior to the delivery of said guarantee and the delivery of said bonds concurrently therewith on the 2d day of January, 1926, secondly, that the area omitted by the change in description of premises to be mortgaged bore but a very small proportion to the area of the premises actually mortgaged; thirdly, that the value of the property omitted by said change in description bore but a very small proportion to the value of the premises actually mortgaged; fourthly, that all of said changes had to do with relatively unimportant details in the working up of said trust indenture into final form for execution, and fifthly, that none of said changes affected the principal of the bonds, the interest thereon, the term, the maturity, or the obligation thereof to pay, the Court finds as a fact that none of said changes was material and that none of said changes in said unexecuted draft of trust indenture operated to release the guarantors of their obligation under the terms and provisions of said guarantee."

The court also found that "whether the defendants herein were or were not stockholders of The Annandale Corporation when said Guarantee was signed is quite immaterial in view of the statements and representations therein made with reference to being stockholders and the consideration for said guarantee." The foregoing findings are supported by the record.

The court concluded that: "(i) No trust indenture other than that delivered and re-

corded on January 2, 1926, was ever executed, delivered and recorded. All changes, referred to in the foregoing Findings of Fact, were changes in drafts of trust indenture made prior to delivery of said Guarantee, said bonds and said trust indenture. None of the changes made was material, or was of a character to relieve the guarantors of their obligations under said Guarantee. No changes whatever in said trust indenture were made subsequent to January 2, 1926, the date of delivery of said trust indenture, of the first installment of bonds, and of the Guarantee. The trust indenture referred to in the Guarantee is therefore the only trust indenture ever executed, and it is the one delivered and recorded on January 2, 1926."

We are in accord with the conclusions expressed by the trial court, and any further comment or enlargement of its holding would appear to be superfluous. Neither will we set forth and separately comment upon the various changes made in the proposed form of trust indenture. An examination of the document in its proposed and final forms shows that, as found by the court, all modifications were made prior to the delivery of the guaranty, the bonds, and the trust indenture, and all were relatively unimportant and immaterial, having no effect upon the amount of the principal obligation, interest, or term of indebtedness. There is no merit in appellants' contention that these changes afford a basis for exonerating the guarantors from liability.

There are no further questions on this appeal which merit discussion. We conclude that the claims of these appellants are untenable.

Separate Appeal of Plaintiffs from Order Made July 12, 1935, Denying Plaintiffs' Motion for an Order Vacating Judgment and for the Entry of Another and Different Judgment.

This separate appeal by plaintiffs does not involve the right of recovery. It presents the sole question of the extent of the liability of each guarantor under the terms of the guaranty. Plaintiffs claim the right to a larger recovery than that awarded by the trial court.

The guaranty provided that the "undersigned * * * do hereby unconditionally guarantee * * * the punctual payment" of the bonds, "both principal and interest thereon * * * and if default in

the payment of either principal or interest thereof be made by said The Annandale Corporation, we and each of us, agree punctually to pay said principal and/or interest in the manner specified in said bonds and in the coupons thereto annexed." The limitation clause provided: "It is provided, however, as a condition hereof that the obligation and liability of each of the undersigned hereunder shall be limited in amount to the fraction of the total amount of principal and interest of said bonds set after his respective name as follows: W. W. Mines * * * $\frac{3}{60}$, Guy M. Rush * * * $\frac{1}{120}$, A. C. Robbins * * * $\frac{5}{60}$, Dr. Guy Cochran * * * $\frac{5}{60}$, M. H. Pehr * * * $\frac{5}{60}$, W. P. Story * * * $\frac{1}{480}$, Geo. A. Orloff * * * $\frac{1}{480}$, R. W. Allen * * * $\frac{1}{480}$, M. C. Marsh * * * $\frac{1}{480}$, Brian K. Welch * * * $\frac{1}{60}$, Kenyon F. Lee * * * $\frac{1}{60}$, Dr. N. W. Goodman * * * $\frac{1}{60}$, Allen T. Archer * * * $\frac{1}{60}$, E. R. Kibler * * * $\frac{3}{60}$, Horace N. Taylor * * * $\frac{2}{60}$, F. W. Braun * * * $\frac{1}{60}$, and that each one of the undersigned shall be liable hereunder in an amount equal to, but not in excess of the respective aforesaid fractional amount of the entire principal and interest of said bonds. This guarantee is a continuing guarantee and shall not be exhausted by one or more recoveries thereon but shall bind us in the above proportions until payment has been made in full of the principal and interest of said bonds. * * *

The fractions specified in the guaranty total $\frac{480}{480}$. At the time here involved bonds to the aggregate principal sum of \$104,000, out of the original \$350,000, had been retired, leaving \$246,000 outstanding, of which plaintiffs held an aggregate of \$216,000, the subject of this action. On said amount of \$216,000, the interest at $\frac{6}{2}$ per cent. from date of last payment by the corporation to April 8, 1935 (date of conclusion of trial of this cause), was \$50,661. Thus, \$216,000 plus \$50,661, or \$266,661, is the sum to be used in computing the liability of the guarantors.

The trial court concluded as a matter of law that the guaranty "imported and expressed only a several liability upon the part of each guarantor, in the respective proportion of the unpaid principal and interest upon the bonds owned and held by plaintiffs, namely, \$266,661.00, set opposite the respective name of each guarantor," and that plaintiffs were therefore entitled to a several judgment against each of the

defendants, listing them and their several liability commencing as follows: "(a) Against the defendant A. C. Robbins, $\frac{5}{100}$ of \$266,661.00, to-wit, \$22,221.75." As the case of defendant Robbins may be used in illustrating the point under discussion, the remainder of the list will not be set forth. The liability of each defendant as fixed in the conclusions of law was carried into the terms of the several judgment entered for plaintiffs.

Plaintiffs' contention is that the trial court erred in entering a several judgment wherein the maximum limit of liability of each guarantor was reduced to an extent corresponding proportionately to the reduction of the main obligation guaranteed by retirement of some of the bonds and payment of some interest, instead of a judgment holding each defendant liable to the extent of $\frac{216}{246}$ of the maximum specified liability of each, plus interest from the time the liability arose, without any reduction in the limit of liability by reason of reduction of the principal obligation guaranteed. Plaintiffs claim that the liability of each defendant should have been computed in the following manner—still using the Robbins case as an illustration:

Example: The aggregate principal sum of the bonds at the outset was \$350,000, the interest thereon $6\frac{1}{2}$ per cent., and the term 10 years; that is, the total interest at the specified rate for the specified term was \$227,500, and therefore "the total amount of principal and interest" amounted to \$577,500, and the limit of liability of A. C. Robbins, fixed in the guaranty, was $\frac{5}{100}$ of the last-mentioned sum, or \$48,125. But, as only \$216,000 aggregate principal amount of \$246,000 outstanding is involved in this suit, $\frac{216}{246}$ of \$48,125, or \$42,256.10, is the maximum amount that plaintiffs would have been entitled to recover from Mr. Robbins, had he paid as soon as his obligation to pay accrued. Between March 1, 1932, and May 12, 1932, an interest installment of \$7,020 was in default, and the interest upon that sum for that period was \$91.26. Interest on said sum of \$42,256.10 from the latter date, May 12, 1932 (date of acceleration of principal), to April 8, 1935 (date of completion of trial of this cause), at $6\frac{1}{2}$ per cent. per annum, amounts to \$7,988.17. Hence the total interest which accrued to date of trial by reason of Mr. Robbins' failure to pay to plaintiffs as and when his obligation to pay arose, \$8,079.43 (\$91.26 plus \$7,988.17), added to \$42,256.10

(said $\frac{216}{246}$ of his total liability to the holders of outstanding bonds), amounts to \$50,335.53, the maximum liability as of April 8, 1935, date of completion of trial. Plaintiffs contend that they were entitled to a judgment against defendant guarantors to the extent of \$266,661, limited only by a maximum recovery against each computed by the method used above to fix the maximum limit of recovery against defendant Robbins at \$50,335.53.

Plaintiffs contend that, if it had been the intent to limit the proportionate guaranty to fractions of the outstanding unpaid indebtedness, rather than to fractions of the entire indebtedness, the guaranty would have so specified by insertion of the word "unpaid" in such phrases as "the obligation and liability of each of the undersigned hereunder shall be limited in amount to the fraction of the total amount of (unpaid) principal and interest," and "each one of the undersigned shall be liable hereunder in an amount equal to, but not in excess of the respective aforesaid fractional amount of the entire (unpaid) principal and interest of said bonds." Defendants, on the other hand, claim that it is clear from the provision of the guaranty that "*if default* * * * be made * * * we and each of us, agree punctually to pay said principal and/or interest, * * *," that the guarantors intended to and did, by the clear purport of the language used, guarantee in the maximum only the specified fraction of outstanding unpaid indebtedness.

[15] We are in accord with the construction placed upon the guaranty by the trial court. By the plain import of its terms it gives to each bondholder a right of action against each guarantor for a fractional proportion of the indebtedness represented by each bond, so that the payment of a bond proportionately reducing the main indebtedness satisfies each guarantor's proportionate liability for payment of the bond retired. In this way, plaintiffs, holding \$216,000 of the bonds, would be entitled to recover, for example, from defendant Robbins, $\frac{5}{100}$ of that sum with interest, and in like manner from each other guarantor. It is not necessary to discuss with greater particularity plaintiffs' analysis of the language of the guaranty, as it appears on the face of the instrument that the above construction is the proper one.

It is true that, with liability computed in the manner here approved, there will not be, in the event of insolvency of some of

the guarantors, a complete recovery for the bondholders, whereas, with liability computed by plaintiffs' method, the possible recovery would total more than the unpaid indebtedness. Plaintiffs say that the latter fact is immaterial for the reason that overlapping protection is proper and customary in providing against possible financial irresponsibility of some guarantors, and for the further reason that plaintiffs could not in any event recover more than the existing debt on the bonds which they hold, nor more than the proportion of each guarantor's specified maximum liability. Plaintiffs' theory is that the guaranty consists of two separate and distinct parts, the first and fundamental part being a joint and several guaranty of the entire obligation, both principal and interest, and the second part being the limitation in amount of liability of each of the guarantors; that, therefore, upon retirement of any bond, there would come into operation the "joint" feature which would permit collection from each guarantor of an amount equal to his fraction of liability upon the retired bond, which amount could be applied to make up any deficit caused by other guarantors' inability to pay.

[16] The guaranty, in our view, imposes only a several liability, regardless of which method is used to compute it, and in reality the judgment for which plaintiffs are asking is simply a several judgment against each defendant guarantor for his fraction of the entire indebtedness without deduction for retired bonds. But we find no warrant under the terms of the guaranty for holding any guarantor liable for more than his proportion of the unpaid indebtedness. Plaintiffs' argument seems strained, and it does not support any reasonable interpretation of the guaranty. The actual wording of the instrument, and its only clear and reasonable purport, imposes a several liability against the guarantors limited to fractional proportions of the outstanding unpaid indebtedness. The trial court used the proper method in computing the respective amounts awarded by the judgment, and properly denied plaintiffs' motion for an order vacating judgment and for the entry of another and different judgment.

Appeal of Defendant and Cross-Complainant Goodman.

This appellant filed a separate answer to plaintiffs' complaint, and in addition filed, on February 13, 1934, a cross-complaint and

counterclaim for an accounting, equitable set-off, and declaratory relief, wherein he joined as cross-defendants: (1) The plaintiffs; (2) his codefendants; and (3) other of the guarantors who were not named as defendants in the main action, and of whom defendant Archer was served and answered.

The cross-complaint alleged in detail facts and circumstances surrounding the making of the guaranty, and issuance and sale of the bonds, and the disputed issues litigated under the pleadings in the main action. It further alleged that cross-complainant was the owner and holder of a \$1,000 outstanding bond, being one of the \$30,000 block of outstanding bonds which were not deposited with the bondholders' committee; that cross-complainant was also the owner and holder of a certificate of deposit for 20 bonds, of \$20,000 par value, deposited with the committee; hence that cross-complainant occupied a triple status, to wit, (1) as a signer of the guaranty; (2) as owner and holder of a \$1,000 outstanding undeposited bond; and (3) as owner and holder of the certificate of deposit and of the \$20,000 of deposited bonds represented by said certificate. The dates upon which cross-complainant acquired the \$1,000 bond and \$20,000 certificate were not alleged, but upon the trial the evidence showed, and the court found, that the \$20,000 certificate was acquired on January 30, 1934 (about two weeks prior to the filing of the cross-complaint and more than a year after the commencement of this action), and that cross-complainant owned the \$1,000 bond on the date he filed his cross-complaint.

The pleading set forth cross-complainant's claim to a right of recovery from his coguarantors upon the \$1,000 bond; likewise his rights by reason of his beneficial ownership of the \$20,000 bonds, and his claim to a set-off of his liability, if any, as a guarantor against any amount recovered by plaintiffs upon said bonds; that is, his claim to 20/216 of any judgment secured by plaintiffs against defendant guarantors, with the further right to a set-off pro tanto of any liability or obligation which might be due from him as a guarantor. The prayer of cross-complainant was for a declaration of the rights and liabilities of the parties, for an accounting from plaintiffs, for allowance of set-off, for costs, and for general relief.

The original defendants herein, and cross-defendant Archer, joined in filing an

answer to the cross-complaint which admitted every allegation thereof save a conceded error as to a date. Plaintiffs filed a separate answer containing admissions and denials.

The trial court made full findings as to the truth or untruth of the allegations of the respective cross-pleadings, which findings were consistent with its findings on the issues presented by the main case. It also found that, as between cross-complainant and the answering cross-defendants other than plaintiffs, the allegations of the cross-complaint were deemed true because of failure to deny same. As a matter of law the court concluded that the allegations of the cross-complaint and answer of plaintiffs thereto raised no issues whatever between the plaintiffs, on the one hand, and cross-complainant, on the other hand, not fully raised by the pleadings in the main action; that the rights of cross-complainant as owner of the \$1,000 bond and \$20,000 certificate were not mutual and in the same right as those of the plaintiffs as trustees of an express trust, and therefore credit or offset was unavailable; that cross-complainant was liable for 4/60 of \$266,661, or \$17,777.40; that he was not entitled to any relief under the allegations of his cross-complaint and supplemental pleadings, either as against plaintiffs or the other cross-defendants. The judgment conformed to these conclusions. Cross-complainant's appeal therefrom is separately briefed under two main headings: (1) That the judgment against defendants was erroneous; and (2) that the judgment that cross-complainant take nothing on his cross-complaint was erroneous.

Under part I of his brief this appellant argues every contention set forth in the briefs filed on the main appeal. These questions need no further discussion, as they have already had ample consideration. In addition, this appellant contends that the effect of admissions in the pleadings is to compel a reversal of the judgment against the guarantors. In this connection appellant reviews in great detail the lengthy and elaborate pleadings and findings and asserts: That the allegations of the cross-complaint showed that there was no liability on the part of the guarantors for various reasons, such as that the trust indenture was changed or materially altered subsequent to "execution" of the guaranty, execution, as defined by section 1933 of the Code of Civil Procedure, including both

the subscribing and the delivering of the instrument; that plaintiffs, in their answer to the cross-complaint, by failure to deny, admitted these vital allegations establishing the nonliability of the guarantors; that certain findings of the trial court were contrary to the matters so admitted by failure to deny, and hence such findings must be disregarded in determining the proper conclusion of law to be drawn from the facts found. 24 Cal.Jur. p. 982, par. 211.

This appellant's analysis of these lengthy pleadings is highly technical, and we are not prepared to say that he is correct in his contention that certain material allegations were admitted by failure to deny same. It is certain that plaintiffs, in their answer to the cross-complaint, had no intention of making admissions which might defeat recovery by them, and which would be directly contrary to the allegations of their pleadings upon which issues were joined in the main action, and directly contrary to some of the contentions most strongly urged by them. It would seem that, if the pleadings in the cross-action are read as a whole, and the language of plaintiffs' answer is given its usual and ordinary meaning, and said allegations are viewed in the light of plaintiffs' pleadings in the main action, it should not be said that the answer to the cross-complaint failed to sufficiently define and join the issues in a manner consistent with the issues as joined in the main action. Undoubtedly the trial court read the pleadings as properly joining the issues, for, although throughout the trial this appellant urged that under the admissions of the answers to his cross-complaint no recovery could be had against him, and moved for exclusion of testimony, for dismissal of the complaint as to him, for judgment on the pleadings, et cetera, these motions were repeatedly denied. Thus, in this particular case and under the peculiar circumstances here shown, the findings of the trial court in the cross-action, consistent with its findings upon identical issues joined in the main action, are conclusive and appellant's claims as to alleged admissions by failure to deny cannot be sustained.

[17] This brings us to a consideration of the questions urged in part II of this appellant's brief, based upon his claim that the judgment denying him relief upon his cross-complaint was erroneous. In disposing of these contentions we are mindful of the broad and liberal interpretation which

has, since the amendments of 1927, been adopted with reference to sections 438 and 442 of the Code of Civil Procedure, and other sections regarding cross-complaints and counterclaims. *Terry Trading Corp. v. Barsky*, 210 Cal. 428, 292 P. 474; *Hanes v. Coffee*, 212 Cal. 777, 300 P. 963; *California Trust Co. v. Cohn*, 214 Cal. 619, 7 P.(2d) 297; *Martin v. Hall*, 219 Cal. 334, 26 P.2d 288. In the case last cited the cross-complaint was based upon facts arising subsequent to issue joined on the original pleadings, which is the situation presented in this case.

[18] The first question is: Should not this appellant, as owner and holder of the \$1,000 unpaid, undeposited bond, have been accorded relief against his coguarantor cross-defendants? This question must be answered in the affirmative. As appears from the discussion of the main appeal, the owner and holder of any one of the unpaid bonds of \$30,000 par value which were not deposited with plaintiffs has a right to sue upon the guaranty. This right has been expressly protected by the trial court's method of fixing the liability of the guarantors and by its conclusion of law that: "The court is of course obligated to preserve and protect the rights of other bondholders not parties to this action. The plaintiffs were not required to join in this action, either as plaintiffs or defendants, the holders of other bonds outstanding, for the reason that the guarantee expressly provides that the holder of any bond may from time to time bring suit upon said guarantee either by himself as plaintiff or as plaintiff in conjunction with the holders of other bonds. There was no defect in parties defendant in that other guarantors were not joined in this action, for the reason that said guarantee expressly provides that the holder or holders of any bonds may in any suit join all or any part of the guarantors as defendants."

This appellant, as owner of the \$1,000 bond, unquestionably could have brought a separate action against all or part of his coguarantors to recover upon the guaranty. There is no reason why he should not be permitted to seek such relief in this action. The right in this respect, which he asserted as a cross-complainant, was identical with the right asserted by plaintiffs, as holders of unpaid bonds, to recover upon the guaranty.

[19] A question arises as to the status of cross-defendant Archer. This guaran-

tor was not a defendant in the main action, but was brought into the case as a new party by the filing of the cross-complaint. He was not a necessary or indispensable party to the action. Cross-complainant might have sued him separately upon his several liability under the guaranty. However, he raised no question of misjoinder in the trial court. He was served and joined in the answer of his co-guarantor cross-defendants to the cross-complaint, which answer admitted all material allegations of that pleading. He made no appearance on the trial, and on this appeal he filed no brief supporting his position as a respondent.

As between plaintiffs and cross-defendant Archer there was, of course, no issue, and plaintiffs have made no objection to his presence as a cross-defendant. As between cross-complainant and said cross-defendant, however, the relief sought was identical with the relief sought against the other guarantor cross-defendants, and with the relief sought by plaintiffs against defendants in the main action. It involved no collateral issue, but was relevant to, indeed a part of, the very transaction upon which the main action was based. To permit the issue between cross-complainant and said cross-defendant to be here litigated is merely to avoid the prosecution of a separate suit.

[20] Under these circumstances, it will not be held on appeal that the trial court erred in refusing to exclude said new party cross-defendant. Objection to the joinder on the ground that he was not a necessary party should have been urged in the trial court. On appeal it is too late to raise the point. *Syvertson v. Butler*, 3 Cal.App. 345, 85 P. 164; *Kunz v. California Trona Co.*, 169 Cal. 353, 146 P. 885; *Bank of America v. Fidelity & D. Co.*, 9 Cal.App.2d 687, 51 P.(2d) 472; 20 Cal.Jur. p. 538, § 34.

Cross-complainant, as owner of the \$1,000 bond, is entitled to judgment against the cross-defendant guarantors, including cross-defendant Archer.

Lastly, there is the question of the propriety of the trial court's action in denying this appellant any relief by way of cross-complaint, set-off, or counterclaim, growing out of his ownership of the certificate of deposit representing \$20,000 of the \$216,000 par value bonds deposited with plaintiffs. Upon this issue the trial court's conclusion was that the rights of appellant as owner of the certificate were "not mutual

and in the same right as those of the plaintiffs herein as trustees of an express trust, and therefore credit or offset is unavailable."

[21] We are of the view that the action of the trial court in this regard was proper. The bondholders' protective agreement clothed the committee with broad powers in the handling of the deposited bonds, the conduct of litigation, and the consummation of the purposes of the trust. Among other things, it provided concerning deposited bonds: "After any such deposit no separate action shall be taken by a depositor with respect to the deposited securities." This section effectually bars appellant in this action from asserting any separate right as to his deposited securities not asserted by other depositors. Appellant might have taken steps to withdraw his deposited securities and thus have become free to assert all rights incident to ownership thereof. The bondholders' agreement contains a provision permitting withdrawal of securities, with the consent of the committee, upon the giving of notice, and payment of the depositor's pro rata of all expenses. Appellant was not denied the right of withdrawal. He simply, so far as this record shows, made no effort to invoke the provision. Under such circumstances, he is bound by the contract of deposit prohibiting independent action on the deposited securities.

Conclusion.

(1) The order of July 12, 1935, denying plaintiffs' motion for an order vacating judgment and for the entry of another and different judgment, is affirmed.

(2) That portion of the judgment which denies cross-complainant Goodman any recovery upon his cross-complaint is reversed, with directions to the court below to modify its findings of fact and conclusions of law to accord with the views above expressed and to enter a several judgment in favor of cross-complainant Goodman, as owner of the \$1,000 bond, against all cross-defendant guarantors properly served; said judgment to be computed by the method used by the trial court in computing the award in the main action; on this appeal by cross-complainant Goodman, both parties to bear their own costs on appeal.

(3) In all other respects the judgment, including that against said Goodman as a defendant in the main action, is affirmed.

REED et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 16258.

Supreme Court of California.

Nov. 26, 1937.

Dissenting Opinion Nov. 29, 1937.

Rehearing Denied Dec. 23, 1937.

1. Insurance ⇨435

Workmen's compensation ⇨212

An individual member of partnership was the employer of partnership's employee and liable to employee for workmen's compensation, and hence compensation insurer was liable on policy covering individual only.

2. Partnership ⇨63

A partnership is not ordinarily considered an entity, but an association of individuals.

3. Partnership ⇨219(3)

Even where partners are jointly liable, a several judgment may be had against an individual partner by proper joinder and pleading.

EDMONDS, J., dissenting.

In Bank.

Proceeding under the Workmen's Compensation Act by George Reed, claimant, opposed by W. B. Mellott and Irwin G. Gordon, doing business as Gordon & Mellott, employers, and the Hartford Accident & Indemnity Company, insurer. Petition by the claimant and the employers to review an award of the Industrial Accident Commission against the employers alone.

Award annulled, and proceeding remanded.

Rehearing denied; EDMONDS, J., dissenting.

Jack J. Rimel, of Los Angeles, and Harry C. Westover, of Santa Ana, for petitioners.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

F. Britton McConnell, of Los Angeles, for respondent Hartford Accident & Indemnity Co.

LANGDON, Justice.

This is a petition to review an award of the Industrial Accident Commission. The facts are simple and undisputed.

On March 11, 1935, W. B. Mellott, a building contractor, obtained a policy of workmen's compensation insurance from Hartford Accident & Indemnity Company, for the period of one year. The insured was designated therein as "W. B. Mellott * * * Individual." Thereafter Mellott became associated with Irwin G. Gordon, another contractor, and they conducted the building contract business as "W. B. Mellott and Irwin G. Gordon, doing business as Gordon and Mellott." The policy remained unchanged. The record does not disclose whether the insurance company had knowledge of the association.

[1] On March 5, 1936, while the policy was in force, George Reed, an employee, sustained a compensable injury, and filed his application with the commission. The commission first decided that the insurance company was liable, but on rehearing reversed itself and gave its award against the employers alone. The employee and employers petitioned, seeking to hold the insurance company liable. In its answer, the commission admits error in the decision, but the respondent insurance company maintains that the same was correct. The position of said respondent is, in brief, that the policy insured W. B. Mellott, an individual, and not the partnership of Gordon & Mellott; that Reed was employed by the firm of Gordon & Mellott, and not by W. B. Mellott; and that consequently, the policy did not cover the injury, because Reed's employer, the partnership, was not insured. This position is unsound on principle and contrary to prior decisions in this state.

[2,3] The underlying fallacy in respondent's argument is the assumption that the partnership is a distinct unit, separate from the members thereof. Occasional suggestions of this "entity" theory of partnership are found in statutes or decisions, but, apart from exceptional situations, a partnership is not considered an entity, but an association of individuals. See *First Nat. Trust & Savings Bank v. Industrial Accident Commission*, 213 Cal. 322, 331, 2 P.2d 347, 78 A.L.R. 1324; 9 Cal.L. Rev. 119. In consonance with this view, an employee of a partnership is an employee of each of the partners, and no individual partner may escape liability to such employee on the ground that only the partnership and not the individuals composing it can be held. It is immaterial whether the liability of the partners in

this situation is joint and several, or joint, for even in the case of joint liability, a several judgment may be had against an individual partner by proper joinder and pleading. See *Palle v. Industrial Commission*, 79 Utah 47, 7 P.2d 284, 81 A.L.R. 1222; *Merchants' Nat. Bank v. Clark-Parker Co.*, 215 Cal. 296, 9 P.2d 826, 81 A.L.R. 778. The result is that W. B. Mellott, a partner in the firm of Gordon & Mellott, was an employer of petitioner Reed, and was undoubtedly liable to Reed for workmen's compensation. Since W. B. Mellott procured insurance with respondent company to cover such liability, and paid the required premium therefor, the company must perform its obligation by paying the award.

This conclusion is supported by two closely analogous decisions. In *First Nat. Trust & Savings Bank v. Industrial Accident Commission*, supra, Charles Hascall and S. W. Powell carried on a business as copartners under the firm name of "Hascall & Powell," and procured workmen's compensation insurance covering the employees of the business. Then Hascall bought Powell's interest and continued to conduct the business under the same name. The insurance carrier resisted liability for a compensable injury on the ground that it had insured a particular entity, the partnership. Describing this point as "a most technical one," we held that it was not a good defense for the reason, among others, that a partnership was not a legal entity. 213 Cal. 322, 331, 2 P.2d 347, 351, 78 A.L.R. 1324.

In *Zimmerman v. Industrial Accident Commission*, 119 Cal.App. 253, 6 P.2d 291, 292, Sam Zimmerman carried a policy naming the insured as "Sam Zimmerman (an individual) doing business as Royal Paint and Wall Paper Company." He took in one Stern as partner, and they continued to do business under the same name. A compensable injury occurred, and the court followed our decision in *First Nat. Trust & Savings Bank v. Industrial Accident Commission*, supra, holding the insurance company liable. The court pointed out that, although Stern, the new partner, was not covered by the policy, Zimmerman continued as an employer and "to the extent that he may be required to respond in the matter of the payment of said award is entitled to the full protection afforded by his policy."

There are several minor factual differences between the instant case and the cited cases, but as to the basic issue, whether change of a business from single individual to partnership, or partnership to individual, avoids liability of an insurance carrier to its named insured, they are squarely in point and are controlling.

The award is annulled, and the proceeding remanded to the commission for an award in consonance with the foregoing opinion.

We concur: CURTIS, J.; SHENK, J.; SEAWELL, J.

EDMONDS, Justice (dissenting.)

I dissent. The decision holding the insurance company liable for compensation is based upon the theory that the injured workman was the employee of W. B. Mellott, one of the partners, and not of the partnership. This theory ignores the stipulated facts concerning employment, the terms of the policy contract, and specific provisions of the law under which the applicant claims.

It was agreed that the applicant sustained an injury "while employed * * * by W. B. Mellott and Irwin G. Gordon doing business as Gordon and Mellott." The claim for compensation names "W. B. Mellott and Irwin G. Gordon dba Gordon and Mellott" as the employer, and the answer thereto, expressly admitting the employment, is signed "Gordon and Mellott by W. B. Mellott." Upon the hearing the applicant testified that at the time of the accident he was working for the partnership of Gordon and Mellott and there is no evidence to the contrary. Gordon testified that he employed Reed under the name of Gordon & Mellott.

But it is said that the partnership is not an entity and that the applicant was the employee of each of the partners. However, the Workmen's Compensation Act (St.1917, p. 831, as amended) requires that the term "employer" as used in it shall be construed to include every firm and voluntary association. Section 7, St.1917, p. 835, as amended by St.1929, p. 306. This is specific statutory authority for holding that a partnership may be an employer so far as the rights and liabilities arising under that act are concerned. Also, by the policy here in controversy, the Hartford Accident & Indemnity Company made certain agreements with "this employer, named and described as such in the declarations," and

there are provisions, added by indorsement, which apply if "any member of a firm, association, or co-partnership" is insured under it. As the act prohibits any change in the standard form of policy "except by endorsement thereon in accordance with a form or forms prescribed by the insurance commissioner or in accordance with rules and regulations adopted by the insurance commissioner after consultation with the industrial accident commission" (section 31, St.1917, p. 860, as amended by St.1929, p. 1169) it is clear that the indorsement was written by those charged with the administration of the compensation law to provide insurance if a copartnership is an "employer."

This is significant in two connections, first, as an administrative construction of the plain terms of the compensation law, and, second, as positive evidence that the policy written by the respondent insurance carrier does not include any partnership liability. The policy contract names W. B. Mellott as the employer. In the schedule of declarations which is a part of the standard form of policy issued to him the question whether the employer is an "individual, copartnership, corporation, or estate" is answered by the designation "individual." This is certainly a contract between the insurance company and an individual, with the approval of the Industrial Accident Commission, that the employer insured under it is an individual and not a copartnership, corporation, or estate.

The facts in the case are not disputed and they show that at the time the policy was written Mr. Mellott was engaged in the contracting business as an individual. He testified that when he took out the policy it was with the intention of insuring his liability as an individual and that he then had no thought of entering into any copartnership. Thereafter he and Mr. Gordon went into business together. The record does not show whether this was a continuation of the old business in which work uncompleted by Mr. Gordon was taken over by the copartnership or an entirely new venture. No transfer of an interest in the business carried on by Mr. Mellott is shown and for all that appears the copartnership may have been formed to erect some particular building or buildings, or Mr. Mellott may have continued his individual business by completing some of the work he then had in course of construction. There is no evidence that the

insurance company ever knew of the partnership operations, and even had these come to its attention it might very properly have concluded that Mr. Mellott was continuing the policy as a protection against his individual liability in any personal business he was carrying on. Also, it had a right to rely on the provision that "no assignment of interest under this policy shall bind the company" without its written consent.

The early case of *Harrison v. McCormick*, 69 Cal. 616, 620, 11 P. 456, 458, announced the rule that "several persons, contracting together with the same party, for one and the same act, shall be regarded as jointly and not individually or separately liable, in the absence of any words to show that a distinct as well as entire liability was intended to fasten upon the promisors. * * * Especially is this the rule as to the legal liability of partners upon their partnership obligations." This case was followed in *Miner v. Rickey*, 5 Cal.App. 451, 90 P. 718, which was an action against an individual for services. Although the evidence introduced by the plaintiff was sufficient to prove that the services had been rendered, it also appeared from the evidence presented by the defendant that whatever liability existed was against a partnership of which he and another were members, and a judgment for the plaintiff was reversed. Since these decisions were rendered the Uniform Partnership Act has become the law of this state (section 2395 et seq., Civ.Code) and has also been enacted in Utah. Construing its provisions in a compensation case, the Supreme Court of Utah held that a partner is jointly, but not jointly and severally, liable for injuries suffered by an employee of the partnership. *Palle v. Ind. Comm.*, 79 Utah 47, 7 P.2d 284, 285, 81 A.L.R. 1222. It seems clear, therefore, that while Mr. Mellott is jointly responsible to the applicant for compensation, his liability rests upon membership in a copartnership which was the employer. Obviously, then, he was not the employer and, as the insurance company assumed only the liability of the employer, it is not responsible to the applicant.

The case of *First Nat. Trust & Savings Bank v. Industrial Accident Commission*, 213 Cal. 322, 2 P.2d 347, 351, 78 A.L.R. 1324, was decided upon an exactly opposite state of facts and is not controlling here. In that case a policy insuring against liability for workmen's compensation was is-

sued to two individuals doing business under a firm name and described in the declaration as a copartnership. One of them dropped out of the business and the other continued it as before without making any change in the policy. Subsequently, an employee was injured and this court properly held the insurance company liable. But the situation there shown was governed by section 2557 of the Civil Code which, as it then existed, provided that "a transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured." Although the court said that "in this state a partnership is not usually considered a legal entity," this does not mean that under unusual or particular circumstances a partnership may not be so regarded.

The case of *Zimmerman v. Industrial Accident Commission*, 119 Cal.App. 253, 6 P.2d 291, presents practically the same facts as the present case but the conclusion there reached, as in the decision here, fails to recognize the rights of the insurance company under its policy. The only contract which the insurer made in this case was with W. B. Mellott, an individual. It did not agree to insure either a partnership of which Mr. Mellott might thereafter become a member, or the individual liability of Mr. Mellott as a member of such a partnership.

The award of the Industrial Accident Commission should be affirmed.



10 Cal.2d 218

**CORPORATION OF AMERICA v.
MARKS et al.**
L. A. 15744.

Supreme Court of California.

Nov. 26, 1937.

I. Judgment ☞785(1)

A judgment lien is designed to secure priority of judgment creditor over third persons acquiring rights in property subject to lien between creation thereof and execution sale.

2. Judgment ☞801

An equitable action to foreclose judgment lien is unnecessary; usual method of

enforcing such lien being by execution sale (Probate Code, § 716).

3. Judgment ⚡800(8)

Judgment debtor's death does not terminate judgment lien, but merely right to enforce it by levy of execution and sale thereunder (Probate Code, § 732; Code Civ. Proc. § 674, as amended by St.1935, p. 1017).

4. Executors and administrators ⚡261

A judgment lien creditor may file claim against deceased debtor's estate, in which case priority of lien will be protected in administration proceedings and he will have claim for deficiency against decedent's general estate (Probate Code, §§ 716, 732; § 950, subd. 7; § 762, as added by St.1935, p. 478).

5. Judgment ⚡752

A judgment lien, which is matter of public record, is highest form of security.

6. Executors and administrators ⚡431(3)

The statute authorizing action to enforce mortgage or lien against decedent's property subject thereto, if recourse against other property of decedent is expressly waived in complaint, applies to judgment liens, and recognizes judgment lien creditor's right to bring equitable action to foreclose lien after debtor's death (Probate Code, § 716).

7. Executors and administrators ⚡431(1)

An equitable action to foreclose judgment lien after judgment debtor's death may be brought during course of administration proceeding or after distribution of debtor's estate if recourse against other property of decedent is waived (Probate Code, § 716).

8. Executors and administrators ⚡429

The statute terminating right to levy execution against property subject to judgment lien on judgment debtor's death does not exclude enforcement of lien through equitable action to foreclose it (Probate Code, §§ 716, 732).

9. Executors and administrators ⚡431(2)

The statutory requirement that money judgment against decedent be filed or presented in same manner as other claims against his estate means that judgment lien creditor must file claim to obtain payment of judgment through administration proceeding and recover any deficiency (Probate Code, § 732).

In Bank.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by the Corporation of America against Walter B. Marks and others. From a judgment of dismissal, plaintiff appeals.

Reversed.

Edmund Nelson, Howard Waterman, Freston & Files, and Ralph E. Lewis, all of Los Angeles (Louis Ferrari, of San Francisco, of counsel), for appellant.

H. L. Dearing, of Orange, for respondents.

SEAWELL, Justice.

Plaintiff prosecutes this appeal from a judgment of dismissal entered after sustaining of defendants' general demurrer to the third amended complaint without leave to amend.

The complaint is entitled: Third Amended Complaint to Enforce and Foreclose Judgment Liens. It appears therefrom that plaintiff corporation procured two judgments against F. O. Marks in the municipal court of San Francisco for the aggregate sum of \$1,129.56. It caused abstracts of said judgments to be recorded in Orange county, and thereby secured a judgment lien upon the real property which is the subject of this action. F. O. Marks, the judgment debtor, subsequently died, and his estate was probated in Orange county. Said estate had been finally settled and closed and the executor discharged prior to filing of the third amended complaint. The date of filing of the original complaint does not appear, but from the fact that the executor of the estate was originally named as defendant, and the devisees were thereafter substituted in his place, it is to be inferred that when the original complaint was filed the estate had not been finally closed by discharge of the executor. The real property which is the subject of this action was distributed to Walter V. Marks, Albert J. Marks, and Rebecca Marks Fenn, residuary legatees, who are the defendants herein.

Plaintiff alleges that it did not file any claim against the estate of F. O. Marks, deceased, and that it had no knowledge of his death until after the time for filing claims had expired. The sole question presented is whether a judgment creditor who does not learn of the death of his debtor

until after the time for filing claims has expired, and who fails to take steps to secure payment of his claim in the course of administration, may thereafter, within five years of the entry of judgment, bring an equitable action to foreclose a judgment lien against those to whom the estate has been distributed.

Section 732, Probate Code (formerly section 1505, Code Civ. Proc.), provides that: "A judgment against the decedent for the recovery of money must be filed or presented in the same manner as other claims." The section also terminates the judgment creditor's right to execution levy and sale upon the death of the judgment debtor, except where execution has been levied on the debtor's property prior to his death, in which event a sale may be had thereafter. Plaintiff contends that the above section means only that if the judgment creditor would enforce his judgment and judgment lien through the administration proceedings he must file a claim.

Under section 716, Probate Code (formerly section 1500, Code Civ. Proc.), plaintiff contends, a judgment lien creditor may bring an independent equitable action to foreclose his judgment lien where he waives recourse against other property of the decedent. Said section provides: "No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator, except in the following case: An action may be brought by the holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless the claim was filed or presented as aforesaid." (Italics ours.)

The rule as to mortgage liens is well settled. An action to foreclose a mortgage, waiving recourse against other property, may be brought during the course of administration proceedings or after the estate has been distributed. *Dreyfuss v. Giles*, 79 Cal. 409, 21 P. 840; *German Sav. & L. Soc. v. Fisher*, 92 Cal. 502, 28 P. 591; *Visalia Sav. Bank v. Curtis*, 135 Cal. 350, 67 P. 329.

[1, 2] During the lifetime of the debtor, the usual and ordinary method of enforcement of a judgment lien is by execution sale. The judgment lien is designed to se-

cure the priority of the judgment creditor over third persons who may acquire rights in the property between the creation of the judgment lien and the sale of the property upon execution in satisfaction of the judgment. An equitable action to foreclose the judgment lien is not required. *Lisenbee v. Lisenbee*, 42 Cal.App. 567, 569, 183 P. 862; 2 Freeman on Judgments, p. 2122.

[3, 4] Section 732, Probate Code, terminates on the death of the debtor the right of the judgment lien creditor to enforce his lien by levy of execution and sale thereunder. But the death of the debtor does not terminate the judgment lien. *Morton v. Adams*, 124 Cal. 229, 56 P. 1038, 71 Am.St.Rep. 53; *Estate of Wiley*, 138 Cal. 301, 71 P. 441; *Hibernia Savings & Loan Soc. v. London, etc., Ins. Co.*, 138 Cal. 257, 71 P. 334; *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 100 P. 242, 132 Am.St.Rep. 81. Said lien continues for five years from the entry of judgment, unless sooner satisfied or discharged. Section 674, Code Civ. Proc. as amended by St.1935, p. 1017. The judgment lien creditor, like the holder of a mortgage lien, may file a claim, and in such event the priority of his lien will be protected in the administration proceeding (section 950, subd. 7; section 762 [formerly 789], Prob.Code as added by St.1935, p. 478), and he will have a claim for any deficiency against the general estate of the decedent.

[5] Defendants contend that enforcement of the judgment lien in the course of the administration proceeding is the exclusive remedy of the judgment lien creditor upon the death of the debtor prior to levy of execution. If a judgment lien is enforceable only through the probate proceeding, and upon the filing of a claim in that proceeding, it alone is singled out from all other liens. Other liens, by virtue of the provisions of section 716, Probate Code, may be enforced against the property subject to the lien, waiving recourse against other property, notwithstanding the time for filing a claim thereon has expired and the estate has been closed. *Dreyfuss v. Giles*, supra; *German Sav. & L. Soc. v. Fisher*, supra; *Visalia Sav. Bank v. Curtis*, supra. The heirs and distributees take subject to such liens. We can perceive of no reason why the Legislature should wish to single out judgment liens for separate, less favorable treatment. "A judgment lien has always been regard-

ed as the highest form of security." *Morton v. Adams*, 124 Cal. 229, 231, 56 P. 1038, 1039, 71 Am.St.Rep. 53. It is a matter of public record.

[6-8] We are of the view that section 716, Probate Code, applies to judgment liens, and recognizes a right in the judgment lien creditor to bring an equitable action to foreclose his lien on the death of the judgment debtor. The language of said section is broad. It applies to "mortgages or liens." As in the case of a mortgage lien, such an action may be brought during the course of the administration proceeding or after the estate has been distributed against those who have succeeded to the property subject to the lien; recourse against other property being waived. Section 732, Probate Code, terminates the right to levy execution upon property subject to the lien, but we find nothing in said section excluding enforcement of a judgment lien through an equitable action brought to foreclose it, which right is recognized as to mortgages and other liens generally by section 716. There is a difference between an execution levy and sale by the sheriff without prior court order, and a foreclosure sale held pursuant to order of the court in an equitable action for foreclosure.

[9] In this analysis, the requirement of section 732, Probate Code, that "a judgment against the decedent for the recovery of money must be filed or presented in the same manner as other claims," means that if the judgment lien creditor would obtain payment of his judgment through the administration proceeding, with a right to a deficiency in the event the property subject to the lien is insufficient to pay him in full, he must file a claim notwithstanding his debt has already been reduced to judgment. This is the rule which applies to mortgages and other liens.

In *Hibernia Savings & Loan Soc. v. London etc. Soc.*, 138 Cal. 257, 71 P. 334, the judgment debtor before her death conveyed the property subject to the judgment lien to her daughter. The conveyance to the daughter did not, of course, extinguish the judgment lien. The death of the mother terminated the creditor's right to execution sale. Since the property had been conveyed before death and constituted no part of the mother's estate, the creditor could not enforce its lien in the course of the administration proceeding upon the mother's estate. In a suit

brought by the holder of the first mortgage lien on the property it was held that the holder of the judgment lien, which was a junior incumbrance, could by cross-complaint enforce said lien. See, also, *Everett v. Hayes*, 94 Cal.App. 31, 270 P. 458. In the instant case, the judgment lien creditor had the remedy of enforcement in the probate proceeding, since the property subject to the lien was part of the estate of the judgment debtor. But said decision is an illustration of the principle that in a proper case a judgment lien may be enforced through an equitable decree for foreclosure. By virtue of the provisions of section 716, Probate Code, we are of the view that such an action lies in the instant case, and that enforcement through the probate proceeding, upon a claim filed, was not an exclusive remedy.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.



10 Cal.2d 207

BOYAR v. KRECH.

L. A. 15740.

Supreme Court of California.

Nov. 26, 1937.

Rehearing Denied Dec. 23, 1937.

1. Action ☞6

Where complaint prayed for declaratory judgment, costs, and other proper relief, judgment that plaintiff take nothing held not subject to attack on ground that judgment constituted refusal to entertain complaint for declaratory relief.

2. Principal and agent ☞29½

An actor's agent had no rights against actor by virtue of one-year agency contract providing that it should remain in force after 1 year, if actor were under contract to motion picture company as result of options accruing from original contract procured by agent, although actor entered into subsequent contract with such company, where subsequent contract had no connection with original contract or options accruing therefrom and actor telegraphed agent that he no longer wanted his representation.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Ben Boyar against Warren W. Krech, also known as Warren William. Judgment for defendant, and plaintiff appeals.

Affirmed.

Ben C. Cohen, Martin Gang, and Robert E. Koop, all of Los Angeles, for appellant.

Sherman & Sherman and W. B. Thomas, all of Los Angeles, for respondent.

LANGDON, Justice.

This action was brought for a declaration of rights under an agency contract.

In 1931, defendant, an actor on the New York legitimate stage, was desirous of entering moving pictures. On March 14, 1931, he entered into a contract with plaintiff, a theatrical agent, by the terms of which defendant engaged plaintiff to act as his manager and personal representative. The agreed compensation was 10 per cent. of money received by the actor for any engagements during the term of the agreement. The specified term was one year, but an additional provision read as follows: "It is further agreed between the parties hereto that should the Artist be under contract to a motion picture company, as a result of options accruing from an original contract and such options or contractual periods extend beyond the life of this contract, that all the terms of this contract shall be in force through all such optional or contractual periods."

On March 12, 1931, 2 days prior to the execution of the said agency contract, plaintiff had secured an engagement for defendant with Warner Bros. Pictures Corporation. In his previous stage work, defendant had been earning a salary of about \$650 per week; under the Warner contract, in the standard form of motion picture contract, his salary commenced at \$750 per week for an original period of 26 weeks, commencing March 23, 1931, with a number of options in the studio to extend the employment for additional 26-week periods at increased compensation. Defendant's first pictures were unsuccessful, and the first option was not exercised at the stipulated rate of \$1,000 per week,

but an agreed reduction to \$850 per week was adopted. Other options were eventually exercised until some time in 1933.

In the early part of 1932, however, defendant was dissatisfied with his compensation. Plaintiff's activities in California were conducted through the William Morris Agency, his western representative, and defendant took up the matter of modification of the Warner contract with Mr. Feil of this agency. He was advised that because of depressed conditions the action was not desirable. In March, 1933, shortly after the national bank holiday, the motion picture studios proposed a general waiver of one-half salary to their employees, and defendant signed a waiver agreement in accordance with the terms of the "Emergency Bulletin" of the Academy of Motion Picture Arts and Sciences. This agreement was dated March 14, 1933, and provided for waiver during an 8-weeks period beginning March 6, 1933, and ending April 30, 1933. Warner Bros. studio paid salaries at the reduced rate, but a dispute arose with the emergency committee of the academy, as a result of which the committee decided that back salaries withheld under the waivers should be paid. About this time, defendant thought it possible to secure a release from the Warner contract, and consulted Mr. Feil and the attorney for the agency. On April 18, 1933, a letter drawn by said attorney and signed by defendant was sent to Warner Bros., stating that because of the studio's failure to comply with the terms of the Emergency Bulletin, and because of lack of consideration, the defendant did not consider himself bound by the waiver agreement, and accordingly demanded payment of the sums withheld. The studio, however, sent the unpaid sum dating only from April 10.

Subsequently, defendant consulted other counsel, and engaged M. C. Levee, another agent, to negotiate for him. Under instructions of his counsel, on May 2, 1933, defendant sent another letter to Warner Bros. demanding payment of the money withheld by May 6, 1933, and advising the studio that on refusal the defendant would consider the Warner contract void. The object of the letter was concededly to terminate the contract, if possible, in order that defendant might be free to negotiate with the studio or others for better terms. The studio at this time noti-

fied defendant that under the terms of his contract it had loaned his services to Columbia Pictures Corporation for a new picture, and that he should be ready to serve. Defendant's counsel replied that defendant would not comply with this order, because the Warner contract had terminated on May 6, 1933. The letter suggested that, if a new contract was desired, defendant would be willing to discuss terms. Negotiations followed, and on May 9, 1933, a new contract was entered into between defendant and Warner Bros. for one year, commencing at a salary of \$1,750 per week, with four additional yearly options at increased salary. The contract referred to the previous Warner contract, and declared that such contract and all former agreements and understandings "shall be deemed to be terminated and at an end." A few hours before the signing of this new agreement, defendant wired plaintiff: "I have not secured representation by you while in California and as our agreement has expired I no longer want you to represent me or act in my behalf." On June 6, 1933, the new agreement of May 9 was replaced by a more detailed instrument substantially similar in terms, and declaring that, as of the date of May 9, it should be deemed to supersede and cancel all prior agreements, particularly the original contract of March 6, 1931.

The present action was thereafter brought by plaintiff. The prayer of the complaint requests a declaratory judgment on the rights of the parties under the agency contract of March 14, 1931, and also asks for costs and for "such other and further relief as to the Court seems meet and proper."

Plaintiff's theory was that his 1-year agency contract with defendant, made on March 14, 1931, did not expire at the end of the year; but continued under the extension provision as the various options were exercised under defendant's Warner Bros. contract; and that the new agreements with Warner Bros. made on May 9, 1933, and June 6, 1933, grew out of and were "a result of" options under the original Warner contract, and hence, like these options, continued in force the agency contract between plaintiff and defendant.

The court's findings and conclusions of law were that defendant's telegram of May 9, 1933, stating that he no longer desired

plaintiff's representation, operated to discharge and terminate the agency contract on said date; that defendant's original contract of March 12, 1931, with Warner Bros. terminated on May 6, 1933; that the Warner Bros. contracts of May 9, 1933, and June 6, 1933, were entirely new agreements, with different terms, and having no connection with the original Warner Bros. contract and neither of the 1933 contracts was entered into as a result of options accruing from the original 1931 contract.

The court further concluded that "defendant is entitled to a judgment that plaintiff take nothing by way of his complaint, and that defendant recover his costs expended herein."

[1] The first contention made by plaintiff on this appeal is that the judgment of the court that "plaintiff take nothing by way of his complaint" was improper, since the complaint sought only a declaration of rights and no affirmative relief; and that such judgment was, in fact, a refusal by the court to entertain the complaint for declaratory relief, and a refusal to declare the rights of the parties. Plaintiff's own complaint would seem to be a simple answer to this contention, for it demands costs and general relief; but we deem it unnecessary to discuss this point, for at best it constitutes a criticism of the form of a portion of the court's judgment, and raises no issue of substance. Disregarding the criticised statement, the balance of the court's findings and conclusions of law fully declare the rights of the parties under the contract, and are entirely responsive to the issues raised at the trial.

[2] The other contention of plaintiff attacks the court's conclusion on the merits. It is argued that the waiver agreement entered into by defendant with Warner Bros. was supported by consideration and was binding upon defendant; that consequently defendant had no valid ground upon which to terminate his original Warner Bros. contract; that, even if Warner Bros. was guilty of a breach in withholding salary due, the amount was small and the withholding was in good faith in reliance upon the waiver agreement, and therefore could not constitute a material breach. Plaintiff concludes that, since defendant had no legal ground of termination of his Warner

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FOR SAN BERNARDINO COUNTY.

S. F. 15908.

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Bros. contract, and was under obligation to plaintiff as long as the Warner Bros. contract continued in force, defendant could not justifiably enter into any voluntary arrangement with Warner Bros. to cancel their agreement and thus destroy plaintiff's rights under the agency contract.

The above argument, however, proceeds upon certain assumptions of fact and law, concerning which different inferences and conclusions are possible. In the first place, there is no satisfactory evidence in the record to show that the so-called waiver agreement was actually signed on behalf of Warner Bros. Secondly, there is evidence of a serious dispute between the emergency committee and the studio as to whether the studio complied with its obligations under the waiver agreement, as a result of which the committee took the view that the studio had failed to perform and that consequently the agreement was not binding. Under this view, defendant was legally justified in declaring a termination of the original Warner Bros. contract, for breach of its terms requiring salary payments, and such breach, following a period of negotiations and two separate demands for payment, might well be considered a material one. Thirdly, irrespective of the actual legal rights of the parties, there was undoubtedly a serious and bona fide dispute between defendant and Warner Bros. as to whether defendant was bound by the terms of his contract, and whether he was entitled to back salary payments. This dispute could be compromised by the cancellation of such contract and the execution of a new agreement with different terms. The fact that the new agreement was made at a considerable increase in salary, and with numerous terms beneficial to defendant which were not in the original contract, is an indication that Warner Bros. conceded that the binding effect of the original contract was at least doubtful.

The above discussion sufficiently shows the soundness of the conclusion of the trial court, and it is unnecessary to discuss various other objections to plaintiff's action raised by defendant.

The judgment is affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; HOUSER, J.

1. Mandamus ☞4(1)

Ordinarily, alternative writ of mandate to set cause for trial or show cause for failure to do so should not issue at instance of party desiring advance ruling by Supreme Court on issue ordinarily determinable on appeal from respondent court's judgment.

2. Eminent domain ☞168(2)

The power, given special commission for selection of prison site by statute creating it, to institute condemnation proceedings, takes precedence over general power of state, acting through director of finance, to institute such proceedings (St.1935, p. 1467, § 12; Pol.Code, § 675, subd. 7).

3. Statutes ☞105(1)

The objects of constitutional provision that statute shall embrace but one subject expressed in title are to prevent legislative abuse and passage of acts bearing deceitful and misleading titles, protect members of Legislature, as well as public, against fraud, and guard against passage of bills, titles of which give no intimation of matters contained therein (Const. art. 4, § 24).

4. Statutes ☞119(2)

A title of an act, "An act to establish the Southern California Prison; * * * to provide for purchase or acquirement of farm lands by unconditional gift or use of lands owned by the state therefor," is sufficient to embrace provision authorizing special commission to institute condemnation proceedings for acquisition of prison site (St.1935, p. 1465; p. 1467, § 12; Const. art. 4, § 24).

The words "acquisition by purchase" have been held to include every mode of taking title, except descent or inheritance, and term "purchase" as including in its general signification all modes of acquiring property except descent and specifically, authority to bring condemnation proceedings, while word "establish" has been defined as including meaning of originating, founding, instituting, or

creating anything with view to securing its permanent existence.

[Ed. Note.—For other definitions of "Acquisition By Purchase," "Establish" and "Purchase," see Words & Phrases.]

5. Eminent domain ⇐7

Though power of eminent domain is inherent in sovereignty, neither state nor any subsidiary thereof can lawfully exercise such right without precedent legislative authority.

6. Eminent domain ⇐168(1)

The agency to which authority to institute condemnation action is delegated by statute has exclusive power to do so.

7. Statutes ⇐109

A statute is not unconstitutional as embracing subject not expressed in title, where title affords clear indication of ends proposed to be effectuated by legislation, though not embracing abstract or catalogue of entire contents of act, and it would be apparent to ordinarily intelligent mind from reading of title that details, incidents, or methods of procedure provided for in body of act are germane to main purpose thereof and obviously necessary to its accomplishment (Const. art. 4, § 24).

8. Constitutional law ⇐48

All presumptions and intendments favor validity of statute, and mere doubt as to its validity does not afford sufficient reason for judicial declaration of its invalidity, but statute must be upheld as constitutional unless its invalidity clearly, positively, and unmistakably appears.

In Bank.

Proceeding by the People of the State of California, acting by U. S. Webb, Attorney General, and another, for a writ of mandate to the Superior Court of the State of California in and for the County of San Bernardino.

Alternative writ discharged.

U. S. Webb, Atty. Gen., and Robert W. Harrison and Neil Cunningham, Deputy Attys. Gen., for petitioners.

Guthrie & Curtis, of San Bernardino, and O'Melveny, Tuller & Myers, William W. Clary, Jackson W. Chance, and Ray H. Lindman, all of Los Angeles, for respondent.

HOUSER, Justice.

By act of the Legislature of this state, duly approved by the Governor thereof (Stats.1935, p. 1465), authority was conferred upon a commission that purportedly was created by said act to establish "the [a] Southern California Prison under the management and control of the State Board of Prison Directors; to provide for purchase or acquirement of farm lands by unconditional gift or use of lands owned by the State therefor; and the construction of buildings and other improvements in connection therewith; to provide for the commitment and transfer of prisoners thereto and therefrom; to provide for the equipment, conduct and management thereof; and to make an appropriation therefor." To that end, to the commission was delegated the right to select a suitable site for such prison. In addition thereto, by the terms of section 12 of the act (St.1935, p. 1467), it was provided that: "The title to the land shall be taken in the name of the State of California. The commission shall select such farm site and acquire the same by unconditional gift or purchase or if the same can not be so acquired, may institute condemnation proceedings for the acquisition of the site."

In assumed due course, a selection by the commission of certain property that was proposed to become the site of the prison was made; but neither by purchase nor by "unconditional gift" was the commission able to, nor did it, acquire the property from the owner for the State of California. Failing in that regard, for the purpose of acquiring the site for prison purposes, an action in the exercise of the right of eminent domain was commenced by the State of California against the owner of the property. As a part of its answer to the complaint that was filed in the action, and as a defense thereto, the defendant therein alleged that: "Plaintiff has no capacity to institute or maintain this proceeding in eminent domain, in that there is an agency of the State of California especially directed and empowered to institute such proceedings, to-wit, the Special Commission for the selection of a prison site in Southern California, by virtue of Stats.1935, Chap. 414, Sec. 12." A motion that was presented by the plaintiff to the trial court to strike such defense from the answer of the defendant was denied; following which, a motion that likewise was made to the trial court by the plaintiff to set the cause for trial also was

denied. Thereupon, at the instance of the plaintiff, this court caused its alternative writ of mandate to issue, directed to the trial court, to the effect that it either set said cause for trial, or that on a specified date, it show cause why it had not done so. In response thereto, the respondent to said alternative writ has filed its "return and answer" to the petition, and the cause is now ready for determination by this court.

From the record herein, the fact is disclosed that the allegation by the defendant in its answer to the complaint, to the effect that the plaintiff therein, to wit, the State of California, has no capacity either to commence or to maintain the action, rests upon the foundation that, by the terms of the enabling statute, the right to institute the action was exclusively conferred upon the special commission, the creation of which was provided for by the terms of the statute. Consequently it is contended by the defendant that the action having been brought, not by the commission, but by the State of California, the incapacity of the latter in the premises is conclusively established. On the other hand, the position of the plaintiff, State of California, is that, notwithstanding the fact that within the body of the statute authority to institute the action was attempted to be conferred upon the special commission, such purported authority is void and of no effect in the face of the additional fact that the title to the act was fatally defective in that nowhere therein, in disregard of the requirements with reference thereto which are contained within the provisions of section 24 of article 4 of the Constitution, was either the subject of eminent domain mentioned, or the authority of the special commission to exercise such privilege in any manner set forth.

[1] At the outset, it should be noted that this court withholds its approval of the irregular procedure, or that which may be termed the "short-cut" method which has been pursued by the parties with reference to their apparent purpose to obtain an advance ruling herein on an issue which, if thought desirable by the aggrieved party in the litigation, ordinarily should have been determined on an appeal from the judgment. Regarding proper procedure, it is apparent that ordinarily, in like circumstances, an alternative writ of mandate should not issue. However, since with the obvious concurrence of all interested parties to the action the matter has been pre-

sented to this court, and is now before it for determination, and since the litigation is one in which the public is concerned, the deciding issue will be given consideration.

As hereinbefore has been indicated, the basic question is, considering the fact that by the terms of section 24 of article 4 of the Constitution, the statute under consideration was required to "embrace but one subject, which subject shall be expressed in its title," were the pertinent words of the title to the statute sufficient to legally authorize the special commission to condemn land, the title thereof to be "taken in the name of the State of California"?

[2] By the language contained in section 12 of the instant statute specific authority is conferred upon the special commission to "institute condemnation proceedings for the acquisition of the site." And in substance, by the terms of subdivision 7 of section 675 of the Political Code, where in appropriate circumstances no other agency of the state has been empowered to institute a condemnation proceeding, the director of finance is authorized to do so "in the name of the State of California." In the premises, if the special commission, the creation of which is authorized by the terms of the statute, has the power to institute the action, manifestly it takes precedence in that regard over the general power of the State of California, acting through its designated agent, the director of finance.

Reverting to the wording of the title to the statute, as far as is here pertinent it appears that it was "An act to establish the Southern California Prison; * * * to provide for purchase or acquirement of farm lands by unconditional gift or use of lands owned by the State therefor." St. 1935, p. 1465.

Although concededly the title to the act embraces but "one subject," it is obvious that in terms it does not purport to authorize or to empower any agency either to institute or to maintain an action in eminent domain to effectuate either or any of the manifest purposes of the statute. It is clear that the objective of the statute was "to establish the (a) Southern California Prison." That much is expressed in unmistakable terms. Ordinary intelligence would indicate that in order that such an objective be successfully accomplished, for the location of a prison, it would be most desirable that the most suitable site therefor should be obtained; also that in the efficient selection

of such a site numerous elements or factors of economic desirability would receive consideration; for example, general climatic conditions, soil, water supply, availability of gas and electricity, transportation facilities, and distance from the different centers, not only of general supply but also of possible inmates of the prison. In that connection, readily, if not spontaneously, would occur to the "mind" of the thinking public the thought that, after due and careful deliberation, the commission having reached a conclusion regarding the selection of the most desirable site, for any one of various reasons the owner thereof might be averse either to the sale or other disposition of his property even for ordinary uses; but especially with knowledge of the certainty that if sold to the state, it would be used for prison purposes, would the owner decline or refuse to sell either a part or the whole of his property. In these days when everyone is witnessing the completion of vast construction projects not only by the state but also by the federal government, the inference is so persuasive that its strength approaches the force of a conclusive presumption that resistance to the wishes of such agencies is useless, and that eventually governmental forces, although perhaps not unwilling to negotiate with private individuals, nevertheless "take what they want." In such circumstances, the average citizen would naturally assume that if the state were to insist upon acquiring the property, the only means by which it might accomplish its purpose in that regard would be by the method known as a condemnation proceeding, or, "speaking by the book," by an action in the exercise of the right of eminent domain.

In the consciousness of the situation which ordinarily obtains in the "mind" of the affected public, it may be well to consider the purpose of the constitutional requirement to which reference hereinbefore has been had.

[3] As was declared in *Ex parte Liddell*, 93 Cal. 633, 636, 29 P. 251, 252: "The object of the provision [sec. 24, art. IV., Const.] is to prevent legislative abuse; to prevent the passage of acts bearing deceitful and misleading titles. It is intended to protect the members of the legislature, as well as the public, against fraud; to guard against the passage of bills the titles of which give no intimation to the members of the legislature, or to the people of the matters contained therein." To the same ef-

fect, see *In re Werner*, 129 Cal. 567, 570, 62 P. 97; *Law v. San Francisco*, 144 Cal. 384, 388, 77 P. 1014; *People ex rel. Chapman v. Sacramento Drainage Dist.*, 155 Cal. 373, 385, 103 P. 207; *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 658, 103 P. 341; *Estate of Elliott*, 165 Cal. 339, 344, 132 P. 439; *Moore v. Williams*, 19 Cal.App. 600, 606, 127 P. 509; *People v. Wong*, 61 Cal. App. 497, 503, 215 P. 409; and *People v. Sterling Refining Co.*, 86 Cal.App. 558, 566, 261 P. 1080.

[4] In the light of such declaration of the purposes of the constitutional provision, and having in mind that which might be termed the universal knowledge of the public with reference to the usual means which from "time immemorial" have been employed by sovereignty in acquiring for public use the lands or other property of its private citizens or denizens, to wit, by an action in the exercise of the right of eminent domain, it becomes clear that the title to the act in question neither adversely affected, nor could so affect, either any member of the general public, or any member of the Legislature, as far as it might deceive, mislead or defraud him or them concerning the authority of the state to condemn any suitable property for "the establishment of the (a) prison in Southern California."

It also may be noted that included within the title to the act, following the statement to the effect that its purpose is "to establish the Southern California Prison," the language employed is "to provide for purchase or acquirement of farm lands by unconditional gift or use of lands owned by the state therefor."

Directing attention to the particular words that occur therein, to wit, "to provide for *purchase*," it well may be argued that "*ex proprio vigore*," such language imports authority not only to acquire lands by bargain and sale agreement for their agreed cash value, by possible exchange of some previously-owned land by the state for other land that might be more suitable for prison purposes, or even by the means that was adopted and sought to be made effective herein, to wit, by means of an action in the exercise of the right of eminent domain. In other words, that the word "purchase" is broad enough to include within its meaning any means other than by descent. The books abound with general definitions of the word "purchase." In 7 Words and Phrases, First Series, p. 5853,

may be found references to many different cases, wherein it is held, respectively, that, "Acquisition by purchase" includes every mode of taking title except descent or inheritance"; also, "The term 'purchase,' in its general signification, and which is the legal sense of it, includes all modes of acquiring property except by descent." In full accord with such authorities and extending the principle specifically to situations in analogy with that herein presented, in each of several condemnation suits, it has been held that the word "purchase" includes authority to bring a condemnation proceeding. In the case of *U. S. v. Beaty* (D.C.), 198 F. 284, 286, the court said: "When used in a statute, the word 'purchase' is frequently held to include any method of acquisition other than by descent. 7 Words and Phrases, First Series, p. 5853. To construe the word here to mean only acquisition by buying, we must assume that Congress had in mind the method of acquisition rather than the general purpose to acquire. The mere use of the word 'purchase'—which may have been used in its technical sense—is not to my mind a sufficient reason for such assumption. If, as we must, we give the members of Congress credit for a reasonable knowledge of human nature, they must be assumed to have known that to restrict acquirement to voluntary sales by the owners would most probably defeat the chief purpose for which the appropriation was made. * * * The very purpose of that [first] section was to authorize condemnation whenever, theretofore or thereafter, an act of Congress authorized land to be 'procured' for public use." See, also, *U. S. v. Whipple Hardware Co.* (C.C.A.) 191 F. 945, and *Trustees of Schools v. Berryman*, 325 Ill. 72, 155 N.E. 850.

Again, as is expressly declared, the purpose of the act is "to establish the Southern California Prison." The several dictionary definitions of the word "establish" include the meaning of originating, founding, instituting, or creating anything with a view to securing its permanent existence, such as a colony, a state, or "other institution." And in "establishing" a prison, it is manifest that in a proper and pertinent sense as applied to the subject-matter of the act, many different and sundry things necessarily would require performance. It would seem most improbable that anyone could conceive of the establishment of a modern prison in the absence of at least the construction of suitable buildings for that pur-

pose; and if the existence of such an element in the consummation of the general purpose be conceded, very naturally it would follow that a location or site for the building or buildings would be of paramount necessity; from which situation, the mind of any interested person would be directed to the several means by or through which a suitable site might be obtained; and as hereinbefore has been indicated, either as a matter of personal experience, or through general reading or observation regarding the construction of state projects, he would at once understand and appreciate the fact that one of the available means to that end would be by or through the procedure commonly known as a condemnation of the property of some private citizen.

[5, 6] It is a well-established legal principle that although the power of eminent domain is inherent in sovereignty, nevertheless neither the state itself nor any subsidiary thereof may lawfully exercise such right in the absence of precedent legislative authority so to do. And equally established is the rule that the agency to which has been delegated the authority to institute a condemnation action has the exclusive power in the premises. In that regard, in the case of *San Joaquin, etc., Irr. Co. v. Stevinson*, 164 Cal. 221, 226, 128 P. 924, 925, it is said: "It is conceded by plaintiff that the power of eminent domain is vested in the state, and that no person or corporation can avail himself or itself of that power, even in aid of a recognized public use, unless the state has granted to such person or corporation a right to exercise the power for the particular use proposed. There must be a statute conferring the power, either expressly or by necessary implication." To the same effect, see 20 C.J. 885, 887; *Nichols on Eminent Domain*, vol. 1, § 19; also, *Ventura County v. Thompson*, 51 Cal. 577.

Full recognition by the Legislature of this state of the former foregoing rule appears not only within the statute here in question, but also by the general statute to which reference hereinbefore has been had, to wit, subdivision 7 of section 675 of the Political Code.

Furthermore, by judicial interpretation or construction, it has been held that the legislative intent as expressed by it in conferring statutory authority must be strictly pursued. *Stanford v. Worn*, 27 Cal. 171; *McCarty v. S. P. Co.*, 148 Cal. 211, 82 P.

615; *Los Angeles v. Glassell*, 203 Cal. 44, 46, 262 P. 1084; *Cooley's Constitutional Limitations* (8th Ed.) p. 1119; *Bensley et al. v. Mountain Lake Water Co.*, 13 Cal. 306, 307, 315, 316, 73 Am.Dec. 575; *U. S. v. Raders*, 70 F. 748 (D.C.Ga.), and *Wise v. Yazoo City*, 96 Miss. 507, 51 So. 453, 26 L.R.A.(N.S.) 1130, Ann.Cas.1912B, 377; see, also, section 387, *Lewis on Eminent Domain* (3d Ed.).

In other words, unless with reference to the power delegated, the statute be unconstitutional, the action must be commenced and maintained by the agency which has been specially authorized by legislative act to institute it.

[7] Many decisions that heretofore have been rendered by this court attest the rule in substance, that a statute is not within the constitutional inhibition (section 24, of article 4), where it appears that the title to such act affords a clear indication of the ends that are proposed to be effectuated by the questioned legislation, but which title does not embrace "an abstract or catalogue" of the entire contents of the act, provided that from a reading of the title it would be apparent to an ordinarily intelligent mind that the details, incidents, or methods of procedure, for which provision is made in the body of the act, are germane to the main purpose of the statute and obviously are necessary to its accomplishment. In the case of *Ex parte Liddell*, 93 Cal. 633, 29 P. 251, 252, it is said: "In *Abeel v. Clark*, 84 Cal. [226], 229, 24 P. 383, we held it was not necessary that the title of the act should embrace an abstract of its contents. * * * It certainly was not intended that the title should be a repetition of the provisions found in the body of the bill. * * * If the title contains a reasonable intimation of the matters under legislative consideration, the public cannot complain. * * * Numerous provisions, having one general object fairly indicated by the title, may be united. *Montclair v. Ramsdell*, 107 U.S. 147, 2 S.Ct. 391, [27 L.Ed. 431]. When the general purpose of the act is declared, the details provided for the accomplishment of that purpose will be regarded as necessary incidents. * * * The title of the act clearly shows what the legislature intended to accomplish, and the provisions referred to simply conduce to that object; they are auxiliary to and promotive of the main purpose of the act, and have a 'necessary and natural connection' therewith. They are germane to

the subject stated in the title of the act." Also in *Estate of McPhee*, 154 Cal. 385, 388, 97 P. 878, 880, the court said: "It is now well settled that the constitutional provision requiring the subject of the act to be expressed in its title must be liberally construed, and that all that is required to be contained therein in order to meet the constitutional requirement is a reasonably intelligent reference to the subject to which the legislation of the act is to be addressed. It is not necessary that it should 'embrace an abstract or catalogue of its contents.'" And in the late case of *People v. One Ford V8 Tudor Sedan*, 12 Cal.App.2d 517, 55 P. 2d 908, 910, wherein the constitutionality of the State Narcotic Act was challenged upon the ground that its title did not embrace the subject-matter of the act, the court said: "The title is not required to give the substance of the bill, as that would make it almost as cumbersome as the bill itself and would tend to defeat rather than to accomplish its purpose. Nor need it express all of the details found in the body of the act, as the details provided for the accomplishment of the general purpose of an act will be regarded as necessary incidents thereto. So, also, the title need not embrace an abstract or catalogue of the contents of a statute, or consist of an index of all the provisions thereof. It is sufficient if provisions not mentioned in the title are germane to the general subject expressed." See, also, *In re Bonds of South San Joaquin Irr. Dist.*, 161 Cal. 345, 119 P. 198; *Wheeler v. Herbert*, 152 Cal. 224, 92 P. 353; *Evans v. Superior Court*, 215 Cal. 58, 8 P.2d 467; *Coachella Valley County Water District v. Stevens*, 206 Cal. 400, 274 P. 538; *Estate of Wellings' Estate*, 192 Cal. 506, 221 P. 628, and *People v. Standley*, 126 Cal. App. 739, 748, 15 P.2d 180.

[8] With reference to general principles of constitutional law, judicial decisions abound with declarations to the effect that all presumptions and intendments favor the validity of statutes; that mere doubt by the judicial branch of the government as to the validity of a statute will not afford a sufficient reason for a judicial declaration of its invalidity, but that statutes must be upheld as constitutional unless their invalidity clearly, positively, and unmistakably appear.

So tested, and especially in consideration of the views hereinbefore expressed, this court experiences no hesitancy in declar-

ing, as it now does, that, as far as the issue here presented is concerned, the statute in question is not properly subject to the objections or either of them that have been urged by petitioners herein, with the consequence that each of the several rulings that were made by the lower court and to which the attention of this court has been directed, should be and are approved; from which it follows that the alternative writ of mandate that hereinbefore has been caused to issue, should be and it is discharged.

We concur: WASTE, C. J.; EDMONDS, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.



HART et al. v. CITY OF BEVERLY HILLS
et al.*
Civ. 11571.

District Court of Appeal, Second District,
Division 2, California.

Dec. 1, 1937.

Hearing Granted by Supreme Court
Jan. 27, 1938.

1. Constitutional law ⇨253

Under constitutional provisions restricting the taking of property without due process of law, municipality may pass ordinance the effect of which is to take private property without compensation, where such ordinance has substantial relation to the public health, safety, morals, or general welfare (Const.Cal. art. 1, § 13; Const.U.S. Amend. 14).

2. Constitutional law ⇨253

Courts will overthrow municipal ordinance which results in the confiscation in one form or another of the citizen's property, where the ordinance is not a valid exercise of the police power (Const.Cal. art. 1, § 13; Const.U.S. Amend. 14).

3. Constitutional law ⇨296(2)

In determining validity of municipal ordinance forbidding conduct of auction sales in residential district with respect to right of an owner to conduct an auction sale of his household goods and furnishings located in such district, court would determine whether the conduct of a single auction sale could

reasonably be said to affect either the public health, safety, morals, or general welfare (Const.Cal. art. 1, § 13; Const.U.S. Amend. 14).

4. Constitutional law ⇨296(2)

A single auction sale of owner's household goods and furnishings, located in residential district in which such sales are forbidden, did not have any reasonable relation to the public health, safety, or morals (Const. Cal. art. 1, § 13; Const.U.S. Amend. 14).

5. Constitutional law ⇨253

Æsthetic considerations alone are not sufficient to justify under the police power the enactment of an ordinance the effect of which deprives the citizen of his property without compensation (Const.Cal. art. 1, § 13; Const.U.S. Amend. 14).

6. Auctions and auctioneers ⇨2

Municipal ordinance forbidding conduct of auction sales within residential district, supported only by æsthetic reasons showing such regulation to be within police power of municipality, could not be supported under that branch of the police power denominated "general welfare" (Const. art. 1, § 13).

7. Constitutional law ⇨87

It is an undoubted right guaranteed by Federal and State Constitutions that every citizen may dispose of his property in such innocent manner as he pleases.

8. Auctions and auctioneers ⇨7

Sale of property at "public auction" is an innocent and legal manner of disposing of such property.

[Ed. Note.—For other definitions of "Auction," see Words & Phrases.]

9. Constitutional law ⇨253

Municipal ordinance forbidding conduct of auction sales within residential district operated to deprive a citizen of the United States and the State of California of his constitutional right to dispose of his own property in an innocent and legal manner, and was unconstitutional as depriving a citizen of his property without due process of law (Const.Cal. art. 1, § 13; Const.U.S. Amend. 14).

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Petition by Lewis S. Hart and another for a writ of mandate directed to the City

*For subsequent opinion see 79 P.2d 1080.

of Beverly Hills, a municipal corporation, and others. Judgment for the respondents, and petitioners appeal.

Reversed, and trial court ordered to issue writ of mandate pursuant to prayer of petition.

Desser & Rau, of Los Angeles (Jack L. Rau, of Los Angeles, of counsel), for appellants.

Richard C. Waltz, City Atty., and C. Richard Maddox, Asst. City Atty., both of Beverly Hills, for respondents.

McCOMB, Justice.

This is an appeal by appellants from a judgment in favor of respondents after the trial court sustained a demurrer without leave to amend to a petition for a writ of mandate requiring respondents to issue petitioners a license to hold an auction sale.

The material facts alleged in the petition are:

Andrew Rice, a resident of the City of Beverly Hills, County of Los Angeles, State of California, living in zone R.4, a resident income property zone in the City of Beverly Hills, engaged on June 9, 1937, appellant Lewis S. Hart, a duly licensed auctioneer of the State of California, to conduct an auction sale of his household goods and furnishings located in his residence in the City of Beverly Hills. Thereafter appellant Hart made application to respondents for a license to conduct the afore-mentioned auction sale which was refused upon the ground that there was in effect in the City of Beverly Hills an ordinance reading in part as follows: "* * * provided, further, that no such auction sale for the sale of goods, wares or merchandise, or at which goods, wares or merchandise or personal property is sold, shall be held in any residential district in the City of Beverly Hills, to-wit: in Zones R.1, R.1.5, and R.4; and all auction sales except for the sale of real property are required to be held in the retail business district, to-wit: C.3, or in the manufacturing district, to-wit: M.2." Ordinance No. 430, amending Ordinance No. 80 of the City of Beverly Hills.

This is the sole question presented for determination:

Is a municipal ordinance which prohibits an individual from selling his personal property located in his residence by auction sale at said residence a constitutional and valid exercise of the police power of the municipality?

This question must be answered in the negative. The Fourteenth Amendment to the Constitution of the United States of America provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 13 of article 1 of the Constitution of the State of California provides in part: "No person shall be * * * put in jeopardy * * * nor be deprived of life, liberty, or property without due process of law."

[1,2] Both of the foregoing provisions have been construed by our courts as permitting a municipality to pass an ordinance, the effect of which is to take private property without compensation when the ordinance has substantial relation to the public (a) health, (b) safety, (c) morals, or (d) general welfare. *Miller v. Board of Public Works*, 195 Cal. 477, 490, 234 P. 381, 38 A.L.R. 1479. It is likewise the established law that the courts will unhesitatingly overthrow a municipal ordinance which results in the confiscation in one form or another of a citizen's property when the ordinance is not a valid exercise of the police power. *Curtis v. City of Los Angeles*, 172 Cal. 230, 234, 156 P. 462.

It is particularly important that we strictly adhere to and observe this latter rule at the present time when it is a matter of common knowledge that the government—federal, state, and municipal—is continually reaching its tentacles into the field of private domain in an endeavor to wrest from the citizenry their hard-won constitutional guaranties of freedom of life, liberty, and the right to possess property.

[3,4] It therefore becomes our duty to determine whether the conducting of a single auction sale of personal property by the owner thereof can reasonably be said to affect either the public (a) health, (b) safety, (c) morals, or (d) general welfare. *Pacific Palisades Ass'n v. City of Huntington Beach*, 196 Cal. 211, 217, 237 P. 538, 40 A.L.R. 782. It needs no argument to demonstrate that the conducting of an auction sale does not have any reasonable relation to the public health, safety, or morals. Therefore, it leaves for consideration the single query of whether it can reasonably

be said that such an auction sale has a direct relationship to the "general welfare" of the community.

[5, 6] It is established that æsthetic considerations alone are not sufficient to justify under the police power the enactment of an ordinance, the effect of which deprives a citizen of his property without compensation (*Varney & Green v. Williams*, 155 Cal. 318, 320, 100 P. 867, 21 L.R.A.[N. S.] 741, 132 Am.St.Rep. 88), and since the only reasons advanced in support of the ordinance under this branch of the police power fall under the class of reasons designated as æsthetic, we are forced to the conclusion that the ordinance may not be supported under that branch of the police power commonly denominated "general welfare."

[7] It is an undoubted right, guaranteed by our Federal and State Constitutions, that every citizen may dispose of his property in such innocent manner as he pleases. *Ex parte Quarg*, 149 Cal. 79, 80, 84 P. 766, 5 L.R.A.(N.S.) 183, 117 Am.St.Rep. 115, 9 Ann.Cas. 747; *People v. Davenport* (Cal. App.) 69 P.2d 862. In *Ex parte Quarg*, supra, 149 Cal. 79, at page 80, 84 P. 766, 5 L.R.A.(N.S.) 183, 117 Am.St.Rep. 115, 9 Ann.Cas. 747, Mr. Justice Shaw says: "The constitutional guaranty securing to every person the right of 'acquiring, possessing and protecting property,' refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter. * * * *These rights are in fact inherent in every natural person, and do not depend on constitutional grant or guaranty.* Under our form of government by Constitution, the individual, in becoming a member of organized society, unless the Constitution states otherwise, surrenders only so much of these personal rights as may be considered essential to the just and reasonable exercise of the police power in furtherance of the objects for which it exists. *Cooley on Stat.Lim.* pp. 68, 244; 1 Barb. on Rights, pp. 122, 284." (Italics ours.)

[8] There can be no question that the sale of property at public auction is an innocent and legal manner of disposing there-

of. *Dornberg v. City of Spokane*, 125 Wash. 72, 215 P. 518, 519, 31 A.L.R. 295; *Hayes v. City of Appleton*, 24 Wis. 542, 545; *Miller v. City of Greenville*, 134 S.C. 314, 132 S.E. 591, 592, 46 A.L.R. 155.

[9] Applying the foregoing rules to the instant case, it is evident that the ordinance adopted by the City of Beverly Hills deprived appellant Rice, a citizen of the United States and of the State of California, without just compensation of his constitutional right to dispose of his own property in an innocent and legal manner and is therefore unconstitutional as depriving a citizen of his property without due process of law.

The judgment is reversed, and the trial court is ordered to issue a writ of mandate pursuant to the prayer of appellant's petition.

I concur: CRAIL, P. J.

WOOD, Justice (dissenting).

I dissent:

A large discretion is vested in the legislative body of the City of Beverly Hills in the matter of the exercise of its police power. The courts should not nullify an ordinance enacted by a city board unless it is palpable that the ordinance has no real or substantial relation to the public health, safety, morals, or general welfare. In many decisions the so-called zoning ordinances have been upheld, ordinances in which cities have been divided into residential, commercial, and industrial districts. In *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 386, 38 A.L.R. 1479, an ordinance made it unlawful for any person to erect within the residential zone any building intended to be used for housing more than two families. The petitioner sought to compel the issuance of a permit to erect a four-family flat dwelling within such zone. In upholding the ordinance the court said: "The establishment of such districts [residential] is for the general welfare because it tends to promote and perpetuate the American home."

Auctioneering has become a well-established and well-defined business. A number of sections of the Civil Code are devoted to the rights and duties of auctioneers and to the manner of conducting sales by auction. The auctioneer may reserve the right of the seller to bid in his own behalf. Civ.Code, §§ 1741, 2362, 2363. It is common knowledge that auction sales frequently attract bidders in large numbers and from great

distances. In conducting auction sales in private residences a practice has developed which is frequently followed of transferring articles of merchandise from business establishments in the commercial districts to be sold together with the merchandise of the owners of the residences.

In my opinion it was within the discretion of the legislative body to prohibit auctioneering in the residential district. In so doing the city did not deprive petitioner of his property. It merely exercised a reasonable regulation of the manner of the sale of the property.



23 Cal.App.2d 616

GIOSCIO v. LAUTENSCHLAGER et al.
Civ. 5930.

District Court of Appeal, Third District,
California.

Nov. 26, 1937.

1. Adverse possession Ⓒ42

Where purchasers bought land under contract from wife, who was in possession with husband's consent and had forged deed from husband, on March 8, 1926, their possession was not adverse to husband until they made final payment to wife under contract June 22, 1927, and hence action for possession filed January 19, 1932, was not barred under 5-year statute (Code Civ.Proc. § 322).

2. Adverse possession Ⓒ13

To acquire title by adverse possession, all elements, including actual, open, notorious, and exclusive occupation, continuous in time and interest, under claim of right to hold land against owner, and owner's knowledge or means of knowledge of occupation and claim, must exist (Code Civ.Proc. § 322).

3. Estoppel Ⓒ74(4)

A husband who left premises in wife's possession to be used as a home, and sent money each month for care of wife and family, together with money for taxes and repairs, was not estopped, equitably or by conduct, to attack title of one claiming un-

der forged deeds from husband to wife and from husband and wife to purchaser.

4. Vendor and purchaser Ⓒ239(9)

A forged deed is void and, though recorded, is inoperative, even as respects good-faith claimant, to divest purported grantor's title, to vest any right or title in grantee or claimant, or to create estoppel.

5. Estoppel Ⓒ52

In order to be equitably estopped to assert title, party must have made admissions or declarations or done acts with intention of deceiving or with such carelessness or culpable negligence as to amount to constructive fraud, with knowledge of true state of his own title, and other party must have had no knowledge of title or convenient means of acquiring such knowledge.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action to quiet title by John Gioscio against Fred Lautenschlager and others. From a judgment for plaintiff, defendant F. S. Hyde and others appeal.

Affirmed.

C. V. Caldwell, Prentiss Moore, and M. A. Fleming, all of Los Angeles, for appellants.

E. Llewellyn Overholt, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The action out of which this appeal arose was commenced by the filing of a complaint in the ordinary form to quiet title to the property involved. The answer of appellant Hyde denied plaintiff's allegations of ownership and set up as a special defense that the defendants purchased the property for an adequate and fair consideration and that plaintiff had been guilty of laches in failing to assert his claim to the property within a reasonable time, and further pleaded adverse possession, and that said action was barred by the appropriate sections of the Code of Civil Procedure. Also in addition to a denial of plaintiff's ownership of the property defendants allege ownership in themselves by virtue of certain conveyances by Gioscio and his wife, which conveyances were duly recorded in the office of the county recorder of the county of Los Angeles.

Plaintiff John Gioscio and defendant Beatrice Gioscio are husband and wife, although

for the greater part of their married life they have lived separate and apart.

They came to California sometime prior to 1911, and shortly thereafter plaintiff purchased for cash the property here in question, taking title to the same in his name as grantee.

In June, 1925, Gioscio left California and has never returned to this state. On June 8, 1927, a quitclaim deed dated June 6, 1927, in which Mrs. Gioscio was named as grantee, and purporting to have been signed by plaintiff in Los Angeles on that date, and acknowledged, was recorded in the county of Los Angeles. On June 6, 1927, another deed purporting to have been signed by both Mr. and Mrs. Gioscio was placed on record conveying this property to Mary Emmanuel as grantee. By mesne conveyances the title now appears of record in the name of Mr. Frank Hyde, appellant herein. The defendants Lautenschlagers claimed no interest in the property.

At the trial plaintiff denied the execution of the deeds under which the defendants claim title, alleging said deeds were forged, and in its finding the court found that the purported signatures of the plaintiff appearing on the deeds were forgeries but the signatures of Beatrice Gioscio were genuine, and that plaintiff was not barred by any statute of limitations, and that defendant had acquired no title by adverse possession. Just who was responsible for the forgeries does not appear, Mrs. Gioscio and Emmanuel each accusing the other.

On March 8, 1927, Mrs. Gioscio contracted to sell the property to the Emmanuels. In 1927 the Emmanuels negotiated a loan of \$2,500 on the property to pay the balance due on the contract, securing the same by a deed of trust. This trust deed was not paid when due, and at the foreclosure sale in October, 1929, appellant Hyde became the purchaser of the property. Plaintiff did not learn of said original sale or the trustees' sale until the fall of 1931. Upon discovering this fact plaintiff caused this action to recover title and possession of the property to be filed January 19, 1932.

[1] The first point urged by appellant is that of adverse possession, claiming that from the 8th day of March, 1926, when Mrs. Emmanuel went into possession, to January 19, 1932, when plaintiff filed his action, more than 5 years had elapsed. However, the Emmanuels, purchasing under contract, were not holding adversely to Gioscio, and

therefore the hostile interest necessary to constitute an adverse possession was lacking. The Emmanuels acquired title, if at all, on June 22, 1927, when they made their final payment to Mrs. Gioscio, which would be the inception of the adverse possession, if any. This action by Gioscio was filed January 19, 1932, some 4½ years later.

[2] Section 322 of the Code of Civil Procedure provides that an occupant who enters into possession of property under claim of title, exclusive of other right, such claim being based upon a written instrument, must establish continued occupation and possession of the property under such claim for 5 years, but for a considerable portion of that time the Emmanuels were vendees under the contract of sale, requiring them to hold possession in subordination to the true title. To constitute adverse possession the occupation must be actual, open, notorious and exclusive, continuous in time and interest, and must be under a claim of right to hold the land against him who was seized, and the person against whom it is held must have knowledge or the means of knowledge of such occupation and claim. To thus acquire title all of the elements of adverse possession must exist. *Unger v. Mooney*, 63 Cal. 586, 589, 49 Am.Rep. 100; *Madson v. Cohn*, 122 Cal.App. 704, 10 P.2d 531; *City and County of San Francisco v. Fulde*, 37 Cal. 349, 99 Am.Dec. 278.

Appellants urge that title by adverse possession can be obtained by one holding under a contract to convey, and, among other cases, cites *Love v. Watkins*, 40 Cal. 547, 6 Am.Rep. 624; this case, as well as the other cases of appellant, does not so hold. In *Love v. Watkins*, supra, the vendee under the contract to convey had fully performed, and in that situation it is true the court would in equity regard the vendee as the absolute owner of an indefeasible estate, but in the present instance Mrs. Emmanuel did not fully perform her contract of purchase until about June 20, 1927, less than 5 years prior to the commencement of this action.

[3] Nor is plaintiff estopped by his own conduct to set up his title against appellants. The evidence shows, and the court found, that plaintiff acted with due diligence. He left Los Angeles in 1925 and never returned; he left the premises to be used as a home by defendant Mrs. Gioscio and her children, and through a daughter he sent money each month for the care

of his wife and family, in addition to considerable sums sent for the payment of taxes, assessments, and repairs on the property.

[4] There is no question but what the forged deed is absolutely void, and, even in the case of a person claiming in good faith thereunder, is inoperative, either to divest the purported grantor's title or to vest any right or title in the grantee or claimant (8 R.C.L. 1029; Baisdell v. Leach, 101 Cal. 405, 35 P. 1019, 40 Am.St.Rep. 65, 8 Cal.Jur. 218, § 100), and being a void deed it could not operate as an estoppel (9 Cal.Jur. 218; Holmes v. Salamanca Gold Min. & Mil. Co., 5 Cal.App. 659, 91 P. 160), nor would the fact that it was duly recorded create an estoppel. This was established in the case of Hakes Investment Co. v. Lyons, 166 Cal. 557, 137 P. 911, in which a minor executed a deed to real property which was wholly void, and, although the property had passed into the hands of innocent purchasers for value, the successors in interest of the minor were permitted, several years later, to take the property from the innocent purchasers.

[5] Nor does the doctrine of equitable estoppel apply, first because of the void deed, and secondly, for the further reason that plaintiff personally never received any benefit from the money paid by the Emmanuels; nor did plaintiff ever make any admissions or declarations or do any act with the intention of deceiving defendants with regard to the title. As the court said in Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157: "In order to constitute an equitable estoppel with respect to the title of property, it must appear that the party to be estopped has made admissions or declarations, or done acts with the intention of deceiving the other party with regard to the title, or with such carelessness or culpable negligence as to amount to a constructive fraud, and that at the time of making the admissions or declarations, or doing the act, he was apprised of the true state of his own title, and that the other party was not only destitute of all knowledge of the true state of the title, but also of all convenient or ready means of acquiring such knowledge."

The case of Meley v. Collins, 41 Cal. 663, 10 Am.Rep. 279, deals with a situation somewhat similar to the case at bar, and the court there held in accordance with the contention of appellant here.

An examination of the facts, as presented by the record, and the law, as applied thereto, supports the judgment of the trial court.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



23 Cal.App.2d 686

In re ROSE'S ESTATE.

ROSE v. HAGLER.

Civ. 11656.

District Court of Appeal, Second District,
Division 2, California.

Nov. 29, 1937.

Rehearing Denied Dec. 21, 1937.

Hearing Denied by Supreme Court
Jan. 27, 1938.

1. Descent and distribution ☞62

A wife did not waive her right to inherit from her husband on his death by executing agreement releasing all her interest in described realty and all personalty owned by husband at time of marriage in consideration of his release of all his interest in other realty and wife's personalty.

2. Deeds ☞121

The words "release, devise and quitclaim," commonly used in simple quitclaim deeds, indicate present transfer of any interest transferor may have in property transferred at time of conveyance thereof.

3. Husband and wife ☞39

The court should not construe contracts between husband and wife so as to deprive either of property rights growing out of marriage relation, unless there is clear and unmistakable intention to barter away such rights.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

In the matter of the estate of George H. Rose, deceased. From a judgment denying a petition by Ada M. Rose to determine heirship, opposed by Beatrice I. Hagler, petitioner appeals.

Reversed.

Julian P. Van Dyke, of Long Beach, for appellant.

Henry E. Carter, of Los Angeles, for respondent.

WOOD, Justice.

The appellant, Ada M. Rose, widow of George H. Rose, deceased, filed a petition to determine heirship. The trial court rendered judgment in which it was held that appellant had waived her right to inherit any part of the separate property of the decedent, and from this judgment the appeal is taken. Mr. Rose left no will.

[1-3] George H. Rose and Ada M. Rose were married on October 16, 1931, and they lived together until the death of Mr. Rose on May 11, 1936. At the time of the marriage, Mr. and Mrs. Rose each owned certain real and personal property. The written agreement which is the basis of the trial court's ruling was executed on July 20, 1932, and was not made as a separation agreement. The agreement sets forth:

"Whereas, it is the desire and intention of the parties hereto to keep and maintain said property, and the rents, issues and profits thereof, as the individual and separate property of the respective parties, owning the same at the time of marriage, and that neither shall acquire any interest of the other in the property, and/or the rents, issues or profits thereof, or the proceeds of any such property in case of sale or exchange by reason of their relations.

"Now, Therefore, in consideration of the premises the party of the second part does hereby release, remise and quitclaim unto the said party of the first part all her right, title and interest of every nature and description in and to the following described property, to-wit: [Here are listed and described a number of pieces of real estate] and all right, title and interest in and to the rents, issues and profits of all of the above described real property;

"Also, all personal property of every nature and description, wheresoever situate, owned by the party of the first part at the time of said marriage, together with the rents, issues and profits thereof.

"That said party of the first part in consideration of the premises does hereby re-

73 P.2d—78

lease, remise and forever quitclaim unto the said party of the second part all his right, title and interest in and to that property, particularly described as follows, to-wit [Here are listed and described a number of pieces of real estate] and all right title and interest in and to the rents, issues and profits of all of the above described real property.

"Also, all personal property of every nature and description wheresoever situate, owned by the party of the second part at the time of said marriage, together with the rents, issues and profits thereof."

The trial court erred in holding that by the agreement in question Ada M. Rose waived her right to inherit upon the death of her husband. At the time the instrument was executed, there was no conversation concerning the right to inherit, and the instrument itself does not make reference to inheritance rights. The parties state that it is their "desire and intention" to keep the property theretofore owned by each "as the individual and separate property of the respective parties." No ambiguity appears in the language of the agreement. No reference is made to any future contingency. The operative words used, "release, remise and quitclaim," are the words commonly used in simple quitclaim deeds. *Wholey v. Cavanaugh*, 88 Cal. 132, 25 P. 1112. They indicate a present transfer of any interest the owner might have in the property at the time of the conveyance. As held in *Jones v. Lamont*, 118 Cal. 499, 50 P. 766, 767, 62 Am.St.Rep. 251, a case involving a separation agreement, the court should not construe contracts between husband and wife so as to deprive either party of the property rights growing out of the marriage relation, "except where there is a clear and unmistakable intention to barter away such rights." The instrument now before us bears no indication of an intention to defeat the law of inheritance.

The judgment is reversed.

We concur: CRAIL, P. J.; McCOMB, J.

23 Cal.App.2d 624

CITY OF LOS ANGELES et al. v.**HOWARD.**

Civ. 5932.

District Court of Appeal, Third District,
California.

Nov. 26, 1937.

1. Municipal corporations $\S$ 519(1)

Under statutes authorizing special assessment for street improvements upon "lot, piece or parcel of land," and providing for lien upon the "real estate benefited," words "property," "land," "lots," "pieces," "parcels," and "real estate," were used interchangeably, and Legislature did not intend to create a lien only upon the soil of the assessed property as distinguished from the fixtures or improvements upon such property (Civ.Code, §§ 658-660; Gen.Laws 1931, Act 8198, §§ 15, 16, 33).

2. Municipal corporations $\S$ 519(1)

Under statutes authorizing special assessments for street improvements and providing for lien upon real estate benefited to secure payment, fixed improvements upon the land are included within the terms "property," "land," and "real estate" as used in the statute, and the lien created extends to such improvements as well as to land or realty upon which they are constructed (Civ.Code, §§ 658-660; Gen.Laws 1931, Act 8198, §§ 15, 16, 33).

3. Municipal corporations $\S$ 405

"Special assessments" are charges imposed by statute against particular parcels of real property as distinguished from "taxes" against an individual.

[Ed. Note.—For other definitions of "Special Assessment" and "Tax; Taxation," see Words & Phrases.]

4. Municipal corporations $\S$ 405

Special assessments are imposed to defray the expenses in all or in part of local improvements made by municipality on the theory that the owner of the property will receive special benefits from the improvement in excess of the benefits accruing to the general public (Civ.Code, §§ 657, 658, 660, 2926; Gen.Laws 1931, Act 8198, §§ 15, 16, 33).

5. Municipal corporations $\S$ 408(1)

Statute authorizing special assessments for street improvements would not be enlarged, but its meaning would be determined by consideration of all its provisions on reading entire statute as a whole (Gen.Laws

1931, Act 8198, §§ 15, 16, 33; Civ.Code, §§ 657-660, 2926).

6. Municipal corporations $\S$ 519(1)

Under statutes authorizing special assessments for street improvements, lien created was impressed upon everything that would pass by grant of the property and attached to dwelling houses constructed upon realty which was assessed for street improvements, and owner had no right to remove houses from lots sold to city to satisfy lien (Civ.Code, §§ 657-660, 2926; Gen.Laws 1931, Act 8198, §§ 15, 16, 33).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by the City of Los Angeles, a municipal corporation, and others, against Charles W. Howard. Judgment for the plaintiffs, and defendant appeals.

Affirmed.

Leland S. Bower, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment restraining him from removing five dwelling houses from two lots in Los Angeles which were sold to the city pursuant to law to satisfy a lien to secure the payment of delinquent street assessments levied under the provisions of the California Street Opening Act of 1903 and amendments thereto. Stats.1903, p. 376, 3 Deering's Gen.Laws of 1931, p. 4496, Act 8198. It is contended this act creates a lien upon the land only to the exclusion of the improvements thereon, and that the appellant therefore has a right to remove the dwelling houses.

The appeal is presented on a stipulation of facts which concedes that the defendant is the owner of lots 8 and 9 of the City Boundary tract in block C fronting on Virgil street in the city of Los Angeles, upon which there are five frame dwelling houses; that the improvement district was duly organized for the purpose of opening and widening the street; that special assessments were regularly levied against each of the lots in the sum of \$2,651.84;

that bonds were issued to represent the indebtedness created thereby as provided by the Improvement Bond Act (Stats.1911, p. 1192); and that the lien was foreclosed and the bonds sold for default in the payment thereof. The stipulation concedes that the sole question to be determined on appeal is whether the five buildings which were situated on the lots at the time of the special improvement assessments are subject to the lien which was created by the statutory procedure incident thereto.

We are of the opinion the dwelling houses are a part of the real property against which the special improvement assessments were levied, and that the statutory lien which was created by the provisions of section 20 of the Street Opening Act, *supra*, attached to the dwelling houses as well as to the lots, and that the injunction was therefore properly issued restraining the defendant from removing the buildings therefrom. Stats.1903, p. 376, and amendments; 3 Deering's Gen.Laws of 1931, Act 8198; sections 658 and 660, Civ. Code; Los Angeles Pac. Co. v. Hubbard, 17 Cal.App. 646, 121 P. 306, 308; Ex parte Hill, 194 Ala. 559, 69 So. 598, 600.

[1] A study of the entire Street Opening Act convinces us that the Legislature did not use the term "lot, piece or parcel of *land*" against which the special assessment is authorized to be levied, in the sense or with the limitation indicated by the definition of the word "*land*" as it is found in section 659 of the Civil Code. It seems clear that the Legislature intended by that act to authorize the "opening, extending, widening, straightening, establishment or change of grade, in whole or in part, of any one or more of any public streets, squares, lanes, alleys, courts or places within such municipality" (section 1) when the public interest or convenience requires it, and the levying of a special assessment "in proportion to the benefits to be derived from said improvement" (section 16) against the *real property affected thereby*. Section 20 of that act provides that "each of such assessments shall be a lien *upon the property against which it is made*." The title to that original act and to every amendment thereof provides for the "assessment of *property*" within the assessment district. Throughout the act the term "property" is used more frequently than any other term. Section 21 refers to "the owner of any property assessed." Section 22 authorizes the service of notice of the

proceeding to be made upon "each owner of *real property* within the assessment district." Section 23 provides for publication of notice of sale containing a description of "each *parcel of property* delinquent." Section 24 authorizes payments of assessments to be made prior to the sale of "any piece of property assessed." Section 26a vests a lien for the security of the special assessment in the following language: "It is hereby declared to be the true intent and meaning of this section to make the cost and expense of all local improvements actually made or proposed to be made in the attempted exercise of the powers conferred upon municipalities *under this statute, payable by the real estate benefited*." Section 33, which defines the term "owner" of property involved in the proposed improvement to include the person owning the fee, or "the legal title to *real property*" as it appears from duly recorded deeds thereof, or "any person in *possession of real property*." It is true that in section 15, and elsewhere in the act, it refers to "each separate lot, piece or parcel of *land*" within the assessment district. And section 16 requires the street superintendent of the city to assess the total expense of the proposed improvement "upon and *against the lands* * * * in proportion to the benefits to be derived from said improvement." It is evident that the terms "property," "lands," "lots," "pieces," "parcels," and "real estate," affected by the special assessments, are used interchangeably, and that the Legislature did not intend to thereby create a lien only upon the earth or soil of the assessed property as distinguished from the fixtures or improvements thereon. As it is said in the case of Ex parte Hill, *supra*, which was a similar street improvement proceeding wherein the same limited construction of the term "*land*" was insisted upon: "We do not think that the giving of same (instruction) was reversible error, as the words '*land*' and '*property*' are used interchangeably. The benefits to lands was all that was involved, and the term '*land*' would include the house and everything that was a part of the realty. The word '*land*' included all property that could have possibly been specially benefited as a result of the improvement."

[2] The fixed improvements on the land, for the purpose of a special assessment under the Street Opening Act, are necessarily included within the terms

"property," "land," "real estate," as they are used in the statute, and the lien therefore extends to such improvements as well as to the land or real property upon which they are constructed.

Real property is that which is "immovable." Section 657, Civ.Code, "Real or immovable property consists of: 1. Land; 2. That which is affixed to land." Section 658, Civ.Code. "Fixtures" are defined by section 660 as including buildings which are constructed thereon. It reads in part: "A thing is deemed to be affixed to land when it is * * * imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings."

[3-6] It is true that special assessments are charges imposed by statute against particular parcels of real property as distinguished from taxes against an individual. Special assessments are imposed to defray the expenses in whole or in part of local improvements made by a municipality, on the theory that the owner of the property will receive special benefits from the improvement in excess of the benefits accruing to the general public. 44 C.J. 481, § 2806. The statute authorizing such special assessments will not be enlarged. But in accordance with elementary principles of construction, the meaning of statutes relating to special assessments must be determined by a consideration of all the provisions thereof, which may be done only by reading the entire statute as a whole. In reading the entire Street Opening Act, as we have indicated, we are convinced the phrase, "lots, pieces or parcels of land" was not used by the Legislature to limit the assessment to the bare soil to the exclusion of improvements or fixtures which exist thereon. Like the lien created by a mortgage under section 2926 of the Civil Code, special assessments under the statute in question are impressed upon everything that would pass by a grant of the property.

There is nothing in the case of *Los Angeles Pac. Co. v. Hubbard*, supra, in conflict with our construction of this statute. Both parties to the action rely on that case to support their opposing contentions. The *Hubbard* Case merely held that the superintendent of streets of the city of Los Angeles, under the provisions of the Street Opening Act in question, was not authorized to separately assess "ties, tracks, poles, rails and switches," belonging to the rail-

road property within the district. In other words, it is determined that for the purposes of such special assessments, the real property only is to be assessed. But that does not mean that a levy against land will not also attach to all fixtures and improvements which by law are deemed to be an inseparable part thereof. In speaking of the special assessment in that same case, the court says: "Included in the assessment was the franchise, whereby was granted the right to construct, maintain, and operate plaintiff's railroad along and over that portion of the street within the boundaries of the district. * * * 'This species of property * * * is assessed as real estate in the same manner, and upon the same principles, as land, as if the company owned the land itself upon which the track is laid to the extent of its interest in it. * * * It is as immovably established on the particular portion of the earth as the lot occupied by stores fronting on the same street, and the estate in the one can no more be enjoyed away and apart from its fixed locality than the estate in the other.'"

In deciding that the "ties, tracks, poles and switches" belonging to the railroad company should not be separately assessed, and upon the contrary, that the special assessment against the railroad right of way within the boundaries of the district necessarily included such fixtures, the court further said in the *Hubbard* Case: "Since the easement created constituted a piece or parcel of land, it must follow that the improvements, consisting of poles, wires, ties, rails, etc., constructed thereon and affixed to the land pursuant to the terms of the grant and necessary to the use of the easement for the purpose granted, must be deemed a part of such piece or parcel of land. In *re North Beach & M. R. R. Co.*, 32 Cal. 499, and cases therein cited."

It follows that the lien which was created in the present case attaches to the five frame dwelling houses which were constructed upon and therefore became an inseparable part of the real property which was assessed, and that the injunction to prohibit the owner from removing those buildings was properly issued.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

23 Cal.App.2d 647

McCLINTOCK v. BATHURST et al.

Civ. 10508.

District Court of Appeal, First District,
Division 2, California.

Nov. 29, 1937.

Hearing Denied by Supreme Court
Jan. 27, 1938.

1. Attorney and client ☞124

An instrument in which clients agreed to give their attorneys an undivided 20 per cent. interest in mining property for past and future services, and as "security" assigned to attorneys an undivided 20 per cent. interest in property, conferred only a lien on property as security that interest would vest upon performance by attorneys, precluding attorneys' assignee from claiming ownership of a 20 per cent. interest (Civ. Code, §§ 1641, 2872).

The generally accepted meaning of the term "security," when used in connection with an assumed obligation, is the giving of assurance by means of mortgage, pledge, or other lien that the obligation will be performed.

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

2. Attorney and client ☞124

Where by the insertion of the word "security" attorneys rendered it uncertain whether an instrument executed by their clients vested a present interest in attorneys for services past and future, or interest was security only for payment for such services, uncertainty was construed against attorneys under statute requiring such uncertainty to be construed most strongly against person causing uncertainty (Civ. Code, § 1654).

3. Attorney and client ☞144

In construing contracts for fees between attorneys and clients, any ambiguity must be resolved against the attorney and in favor of the client.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action to quiet title by J. Y. McClintock against W. L. Bathurst and others and Elizabeth Ackerson, who filed a cross-complaint. Judgment for plaintiff, and cross-complainant appeals.

Affirmed.

Marcus L. Roberts, of Los Angeles, for appellant.

William H. Brawner, of Los Angeles (Caryl Warner, of Los Angeles, of counsel), for respondent.

DOOLING, Justice pro tem.

[1] This is an appeal by defendant and cross-complainant Ackerson from a judgment in a quiet title action determining that appellant's rights under a certain instrument are held by way of security only. Appellant is the assignee of the interest held under said instrument by two attorneys at law. The attorneys were engaged by the owners of certain mining claims to handle certain litigation for them. The two attorneys and their clients executed an instrument which after reciting the employment provided that "in Consideration of the services already rendered and hereinafter to be rendered by said attorneys, the clients agree to pay said attorneys therefor, in the following manner, to wit: That said fee for said services shall be an undivided twenty (20%) per cent. interest in and to certain lode mining locations (describing them) and the clients as security for the fee hereinabove mentioned hereby sell, assign, transfer and set over to said attorneys said undivided twenty (20%) per cent. interest in and to the above mentioned mining locations."

It is appellant's contention that despite the use of the word "security" this instrument operated as an outright conveyance. While the word "security" is one of somewhat uncertain meaning when used in connection with an assumed obligation, its generally accepted meaning is the giving of assurance by means of mortgage, pledge, or other lien that the obligation will be performed. This commonly accepted meaning is illustrated in section 2872 of our Civil Code, which reads: "A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act."

[2,3] The instrument in question is probably not strictly a mortgage because the very property agreed to be given in payment of the fee is also made the security; but giving effect to every word in the instrument, as we must if possible (Civ. Code, § 1641), the intent of the parties seems to have been that, while the attorneys would not be entitled to the property until the agreed services were fully performed by them, they were given a lien upon the property immediately, as security

that the interest in the property would become theirs upon the performance of their obligation. Any other construction would make superfluous the word "security," which was inserted in the document by the attorneys themselves and in case of uncertainty must be construed against them. Civ.Code, § 1654. In the construction of contracts for fees between attorneys and clients, any ambiguity must be resolved against the attorney and in favor of the client. *Hollingsworth v. Lewis*, 93 Cal. App. 526, 269 P. 709; *Miller v. Wing*, 9 Cal.App.2d 483, 50 P.2d 470; *Boardman v. Christin*, 65 Cal.App. 413, 224 P. 97; 3 Cal. Jur., p. 686.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.



23 Cal.App.2d 634

**JIMESON v. INDUSTRIAL ACCIDENT
COMMISSION OF CALIFORNIA et al.**
Civ. 10585.

District Court of Appeal, First District,
Division 1, California.

Nov. 27, 1937.

f. Workmen's compensation ☞760

The injuries a farm laborer sustained in traffic accident which occurred while farm laborer was traveling from worksite on employer's ranch toward ranch headquarters for lunch were compensable as "arising out of employment" and as occurring "in course of employment," notwithstanding road on which accident occurred was a public road, that laborer was driving his own automobile, and that employer offered laborer transportation by truck.

[Ed. Note.—For other definitions of "Arising Out of Employment" and "Course of Employment," see Words & Phrases.]

2. Workmen's compensation ☞730, 734

An employee comes under the protection of Compensation Act in going to work when he enters upon employer's premises or upon means provided for access thereto, though premises and means of access are

not wholly under employer's control, and is likewise under protection of Act in leaving employer's premises, provided he does not unnecessarily loiter thereon.

3. Workmen's compensation ☞604

In determining whether injury is compensable as arising out of and in course of employment, each case must be adjudged by its peculiar facts.

Proceeding under the Workmen's Compensation Act by A. J. Jameson, employee, opposed by the California Orchard Company, employer, and the State Compensation Insurance Fund, insurance carrier. To review an adverse decision of the Industrial Accident Commission, the employee brings certiorari.

Decision annulled and proceeding remanded, with directions.

James A. Walker, of Salinas, and J. P. Mandl, of San Francisco, for petitioner.

Everett A. Corten and Elden B. Spofford, both of San Francisco, for respondents.

PER CURIAM.

The petitioner, A. J. Jameson, was employed by the California Orchard Company as farm laborer on its ranch in Monterey county, and while traveling from the worksite on the ranch toward the ranch headquarters shortly before the noon hour, for lunch, he was badly injured in a traffic accident. He suffered a fractured skull, a brain injury, and sundry bruises and abrasions; and being unable to speak or write as the result of said injuries, his wife, in his behalf, filed with the Industrial Accident Commission an application for compensation. The State Compensation Insurance Fund was the insurance carrier, and the commission sustained its contention that Jameson was barred by the so-called going and coming rule from recovering any of the benefits afforded by the compensation act. Thereupon this proceeding was instituted in Jameson's behalf for the purpose of annulling the decision of the commission.

The ranch is situate seven miles north of King City. It contains many hundreds of acres, and a stretch of it extends to the borders on the westerly side of the state highway for a distance of about two-thirds of a mile. Much of the ranch is devoted to the growing of fruit, the orchards being located on different parts of the ranch

some distance from each other. The ranch headquarters are located at the southeasterly corner of the ranch, near the state highway, and consist of an administration building, barns, garages, etc.; also bunk houses and a number of cottages where the employees live. The employees were required to report at headquarters each morning at 7 o'clock for assignment to work; and as part of the employment agreement the company transported the men in trucks from headquarters to the worksite, brought them back to headquarters for lunch, returned them to the worksite after lunch, and brought them in to headquarters at the close of the day's work. However, the men were not obliged to ride in the trucks. If they chose, they could and did with the consent of the company drive their own automobiles; but no allowances were made therefor, the only difference being that if they used their own conveyances and were late for work their pay was docked. Pursuant to this arrangement some of the men, including Jameson, invariably used their own automobiles. The reason therefor was that the trucks were open and not provided with seats, and during the summer months the roads throughout the ranch over which they traveled were dusty, and during the winter season it was too cold to ride in the open trucks.

Under the terms of employment the men were hired and paid and the company was entitled to their services up to 12 o'clock—that is, for five hours morning work. In other words, they were required to report at 7 o'clock each morning at headquarters for assignment to work, and thereafter were subject to the direction of the company until noon. However, the common practice was to call for the men in the fields or orchards where they were working before 12 o'clock so that they would arrive at headquarters for lunch at noon.

On the morning of the accident and before Jameson left the cottage in which he lived on the ranch premises near headquarters, he stated to his wife and his father-in-law that the engine of his automobile was not working satisfactorily, and that he intended to leave the automobile at the headquarters garage to be fixed, and ride the truck to work. But upon arriving at headquarters he found that only one truck was being operated to convey the men to work, and that it had already

started for the worksite. Consequently, either he had to wait at headquarters for the return of the truck from the worksite or use his own automobile; and he decided to drive to work in his own car. The assignment of work that day was to prune an orchard located near the northerly boundary of the ranch, approximately two and three-quarters miles from ranch headquarters; and in order to reach the orchard he took the usual route, westerly along a road referred to in the proceedings as the dirt road, for a distance of about a mile and a quarter, to the intersection of another road called the paved road, which ran in a northerly and southerly direction, and then followed along the paved road for a distance of a mile and a half, both roads being entirely on the ranch property. The company's truck called at the worksite before noon to convey the men back to headquarters for lunch, and it was followed back by three employees' machines, the second behind the truck being Jameson's; and just before Jameson reached the headquarters premises a collision occurred between his machine and another truck belonging to the company, which approached in the opposite direction and was driven by a company foreman. Immediately following the accident Jameson was taken to a hospital in King City, seven miles distant, and the undisputed hospital records proved that he arrived there at 12 o'clock.

[1,2] There is no serious dispute as to the existence of the foregoing facts, and in our opinion they fail as a matter of law to support the commission's finding that Jameson's injuries did not occur in the course and arise out of his employment. It is evident that if he had been injured while returning for lunch in the company's truck there would be little or no question that he would have been entitled to compensation; and under the law as declared in *Department of Public Works v. Industrial Accident Commission*, 128 Cal.App. 128, 16 P.2d 777, the fact that he was traveling in his own machine at the time he was injured does not operate to deprive him of the right to compensation.

Evidently the commission's decision is based upon the theory that the moment Jameson actually ceased work in the orchard he was on his own time; but the case of *Makins v. Industrial Accident Commission*, 198 Cal. 698, 247 P. 202, 49 A.L.R. 411, is sufficient authority for holding to

the contrary. There a distributor of newspapers over a route in a certain district of a city prescribed by his employer was injured in a traffic accident while on his way back to the starting point, after making his last delivery, and it was held that his injuries were received in the course of and arose out of his employment. If the accident here had happened after Jameson had passed headquarters (the point at which the truck delivered the men) and before he reached his place of abode on the premises, it is quite probable the going and coming rule would apply. But such is not the case. It happened, as stated, before Jameson reached headquarters, and within the period of time over which his employer had control of his services.

In our opinion the case cannot be successfully differentiated in principle nor in its essential facts from Department of Public Works v. Industrial Accident Commission, *supra*. There a number of highway laborers, including one Dreyer, were employed by the department of public works to clear a mountain highway of snow and debris. The men were required to report at a toll house at 7 o'clock in the morning, and from there they were transported in the department's trucks to the worksite. But, as here, the men were permitted, if they chose, to drive to the worksite in their own automobile. On the morning in question Dreyer drove his own machine to the toll house, but on arriving there it was cold and windy, and consequently he decided to continue on to the worksite in his own machine, and the foreman volunteered to ride with him. After proceeding up the grade for some distance his automobile, in rounding a curve, ran off the grade and rolled into the gulch below, killing Dreyer and injuring the foreman. Dreyer's widow applied for compensation, and it was there sought, as here, to defeat the claim upon the ground that the injuries were not received while the employee was actually engaged in the course of his employment, it being contended in this regard that he was en route to work; that he was driving his own machine, in the operation of which his employer had no management or control; and that consequently the going and coming rule relieved the employer from liability. But the court held that under the circumstances said rule did not apply; that since the employee was using his own machine with the consent and knowledge of his employer, and the accident happened

during the period of time within which the employee was subject to the employer's control, the widow was entitled to the benefits granted by the compensation act. The only variance between the facts of that case and the present case is that there the employee was going to the worksite, whereas here the employee was coming from the worksite; and obviously such distinction is quite immaterial so far as the question of the application of the going and coming rule is concerned, and does not operate to bring the present situation within the scope of said rule.

A number of years ago said company filed with the county recorder a subdivision map of the ranch, on which certain roads laid out thereon, including the so-called dirt road, were dedicated to the public. However, none of the property was sold, and it was stipulated that ever since the filing of the map the dirt road has been used almost exclusively by the company and its employees for company purposes. In view of the above facts, some mention is made by the insurance carrier that the accident happened on a public county road. But conceding that such was the legal status of the dirt road, the fact that Jameson was traveling thereon at the time of the accident did not serve to defeat his claim to compensation. State Compensation Insurance Fund v. Industrial Accident Commission, 194 Cal. 28, 227 P. 168; Makins v. Industrial Accident Commission, *supra*; Judson Mfg. Co. v. Industrial Accident Commission, 181 Cal. 300, 184 P. 1. Admittedly the dirt road was entirely on the company's ranch, and was the route adopted by the company over which it transported its men to and from the worksite; and as said in the Makins Case, *supra*, the rule is well settled that an employee, in going to work, comes under the protection of the act when he enters the employer's premises or upon the means provided for access thereto, though the premises and such means of access are not wholly under the employer's control or management; and the same rule applies when the employee is leaving such working premises provided he does not unnecessarily loiter thereon.

[3] We have examined the cases cited by respondents in support of the commission's decision, but find nothing therein which in our opinion is contrary to the views herein expressed, nor which could have the effect of altering the conclusion

we have reached. Each case must, of course, be adjudged by the facts which are peculiarly its own (*Makins v. Industrial Accident Commission*, supra); and after considering all the admitted facts of the present case in the light of the decisions hereinabove cited, we are convinced that there is no justification for the application of the going and coming rule.

Therefore the decision of the commission is annulled, and the proceeding is remanded for further proceedings in accordance with the views herein expressed.



23 Cal.App.2d 642

**HANRAHAN-WILCOX CORPORATION
v. JENISON MACHINERY CO.**

Civ. 10544.

District Court of Appeal, First District,
Division 2, California.

Nov. 29, 1937.

1. Appeal and error ⇨854(5)

A nonsuit will be sustained if it can be justified on any ground, whether or not such ground is stated in motion for nonsuit or ruling thereon.

2. Trial ⇨165

The court's failure to pass upon motion to strike out testimony left such testimony in record for court's consideration on motion for nonsuit.

3. Trial ⇨165

In determination of motion for nonsuit, evidence that is inadmissible under some rule of evidence, but is relevant and has been admitted with or without objection, must generally be given its full probative effect.

4. Trial ⇨165

A plaintiff could not rely upon testimony violative of parol evidence rule to defeat motion for nonsuit, even though court neglected to pass upon motion to strike such testimony.

5. Evidence ⇨420(3)

Testimony of circumstances surrounding execution and delivery of written agreements, including agreement that writing

shall not become binding until a future day or until happening of a future event, is not within parol evidence rule unless inconsistent with terms of written agreement.

6. Evidence ⇨420(3)

Evidence of previous oral agreement, whereby subsequent written agreement for rent of road grader was not to be effective unless lessee was satisfied with grader's performance, was properly excluded under parol evidence rule, as being inconsistent with specific terms of written agreement specifying date that rent should be payable and providing that written agreement constituted the entire contract.

7. Stipulations ⇨14(1)

Where stipulation of amounts due under defendant's cross-complaint, made after nonsuit was granted against plaintiff, stated that plaintiff did not concede correctness on nonsuit and that stipulation would not be binding on retrial if order of nonsuit was reversed, judgment for amounts due under cross-complaint was proper, though not providing that award should not become binding until order of nonsuit should become final (Code Civ.Proc. § 577).

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Hanrahan-Wilcox Corporation against the Jenison Machinery Company, wherein defendant filed cross-complaint. From a judgment for defendant, plaintiff appeals.

Affirmed.

Stanley Pedder and Kenneth Ferguson, both of San Francisco, for appellant.

Maurice R. Carey, John A. Gorfinkel, and Lloyd Hummel, all of San Francisco, for respondent.

GRAY, Justice pro tem.

Before the commencement of this action the parties had executed a written agreement by the terms of which plaintiff rented from defendant a road grader for a minimum period of 6½ months at a monthly rental of \$275. Defendant had delivered the road grader to plaintiff and the latter, dissatisfied with its performance after a 90-day trial, had returned it to defendant. Defendant had demanded and plaintiff had refused payment of the rent. Thereupon, plaintiff filed a complaint, alleging as suc-

cinctly stated that, contemporaneously with its execution, the parties had orally agreed that the written agreement was not to be effective unless and until plaintiff was satisfied, after trial, with the performance of the road grader and seeking a declaration that the written agreement, being subject to such contingency, never became effective because of its nonfulfillment.

At the trial the president and vice president of plaintiff each testified that at the execution of the written agreement defendant's president had represented to them that the road grader could perform the work, which they had described and had agreed that if the road grader did not perform such work satisfactorily, plaintiff was not to be obligated under the written agreement. Defendant objected that such testimony was inadmissible because it varied the terms of the written agreement. The court reserved its ruling on the objection and admitted the testimony subject to a motion to strike. Upon the close of plaintiff's case, defendant moved to strike out this testimony and also for a nonsuit upon the grounds of the previous objection. The court neglected to rule upon the motion to strike but granted the nonsuit. Judgment was rendered in favor of defendant for rent in a stipulated amount. Plaintiff appeals, claiming that the nonsuit was erroneously granted and the judgment improperly omitted conditions of the stipulation.

[1] In support of the order of nonsuit, defendant argues that, in passing upon its motion, the court properly ignored the testimony, as violative of the parol evidence rule, and that therefore there was no evidence to prove plaintiff's cause of action. Plaintiff, first, replies that the nonsuit cannot be so defended as this reason was neither urged by defendant in its motion nor stated by the court in its oral ruling. The factual basis of the reply does not coincide with the record, but, even if it did, its legal premise is wrong. The correct rule is that a nonsuit will be sustained, if it can be justified on any ground, whether or not such ground is stated in the motion or ruling. *Anchester v. Keck*, 214 Cal. 207, 4 P.2d 934.

[2] Next plaintiff contends that it was entitled to the benefit of such testimony, though erroneously admitted, as it was not stricken from the record. The failure of the court to pass upon defendant's motion to strike it out, left such testimony in the record for the court's consideration. *Leitch v. Marx*, 21 Cal.App. 208, 131 P. 328.

[3, 4] In the determination of a motion for a nonsuit, evidence which is relevant though inadmissible under some rule of evidence, but which has been admitted with or without objection, must be given its full probative effect. *Archibald Estate v. Matteson*, 5 Cal.App. 441, 90 P. 723. The decisions differ as to whether the parol evidence rule is a rule of evidence or of substantive law and, for that reason, disagree as to the legal effect of evidence admitted in violation thereof. Some cases, treating the rule as one of evidence, hold that an objection to the admissibility of evidence, which varies or adds to the terms of a written agreement is waived if not urged in the trial court, and that such evidence, when admitted, is legally sufficient to support a finding of fact. *Tebbs v. Weatherwax*, 23 Cal. 58; *McCommish v. Kaufman*, 43 Cal.App. 507, 185 P. 476; *Inner Shoe Tire Co. v. Tondro*, 83 Cal.App. 689, 257 P. 211; *Bonner v. Finney*, 110 Cal.App. 518, 294 P. 466. Other cases, considering the rule to be one of substantive law, decide that such evidence, though admitted without objection, must be ignored as of no legal import. *Harding v. Robinson*, 175 Cal. 534, 166 P. 808; *Dollar v. International Banking Corp.*, 13 Cal.App. 331, 109 P. 499; *Rottman v. Hevener*, 54 Cal.App. 474, 202 P. 329; *Middlecamp v. Zumwalt*, 100 Cal.App. 715, 280 P. 1003; *Fogler v. Purkiser*, 127 Cal. App. 554, 16 P.2d 305. The reasoning which leads to the conclusion of the latter decisions is well stated in *Dollar v. International Banking Corporation*, supra, 13 Cal. App. 331, at page 343, 109 P. 499, 504: "By way of illustration of the distinction between the rule declared by this court and that cited by appellant, it may be said that parol or secondary evidence, unobjected to, might supply the terms or purport of a contract which had been reduced to writing, and, in this form, furnish sufficient proof to sustain a finding; but parol evidence would neither be admissible to vary this contract, nor, if admitted without objection, be sufficient to support a finding which was in conflict with or which in any manner varied the original written contract which the parties entered into. The purpose of the rule relating to the varying of a writing by parol evidence is to prohibit this from being done, while the rule relating to the admission of secondary evidence goes only to the form in which the evidence may be introduced." Since, on reason, the latter cases enunciate the true rule, plaintiff may not rely upon the testimony to defeat the

nonsuit, if such testimony violates the parol evidence rule.

[5,6] Lastly, plaintiff claims that the testimony does not come within the prohibition of the parol evidence rule because it does not change the terms of the written agreement but proves a condition precedent to its effectiveness. Testimony of the circumstances surrounding the execution and delivery of a written agreement ordinarily do not vary its terms and is therefore not within the parol evidence rule. *Verzan v. McGregor*, 23 Cal. 339; *P. A. Smith Co. v. Muller*, 201 Cal. 219, 256 P. 411; *Gleeson v. Dunn*, 113 Cal.App. 347, 298 P. 119; *Cooper v. Cooper*, 3 Cal.App.2d 154, 39 P. 2d 820. However, if such testimony conflicts with the terms of the written agreement it falls under the ban of the rule. *Torrey v. Shea*, 29 Cal.App. 313, 155 P. 820; *Langan v. Langan*, 89 Cal. 186, 26 P. 764; *Wolters v. King*, 119 Cal. 172, 51 P. 35. These principles are well expressed in section 241 of Restatement of the Law of Contracts, as follows: "Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith." The oral agreement, by delaying the effective date of the written agreement, is inconsistent with the latter's provisions specifying that the rent began on the day of shipment of the grader to plaintiff, that the first installment of rent was payable thirty days thereafter and that freight, prepaid by defendant, was repayable proportionately out of each installment of rent. The oral agreement, also, by adding a condition contradicts the provision of the written agreement that it constituted the entire contract and that any change or modification must be in writing and signed by both parties. Therefore the testimony came within the interdiction of the parol evidence rule and was properly disregarded by the trial court.

[7] Defendant had cross-complained for the sums due under the terms of the written agreement. After the nonsuit was granted the parties stipulated as to the amount of such sums and thereupon judgment was entered accordingly. Plaintiff now objects that the judgment did not conform to the terms of the stipulation since it was absolute in form and omitted the condition

contained in the stipulation that the award should not become binding until the order of nonsuit should become final. But the stipulation contained no such condition. It clearly stated that plaintiff did not concede the correctness of the nonsuit and that if such order was reversed, the stipulation was not binding on a retrial. As a judgment is a final determination of the rights of the parties (Code Civ.Proc. § 577), the addition of the condition would have nullified the judgment. Since the court correctly decided that the written agreement was not subject to the oral condition, it properly granted judgment against the plaintiff for the obligations of such written agreement.

Judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.



23 Cal.App.2d 696
FISHER et al. v. ZIMMERMAN.
Civ. 1679.

District Court of Appeal, Fourth District,
California.
Dec. 1, 1937.

Hearing Denied by Supreme Court
Jan. 27, 1938.

1. New trial ⇨157

On motion for new trial made on ground of insufficiency of evidence, trial judge should review all evidence, weigh its sufficiency, and judge credibility of witnesses.

2. New trial ⇨157

In passing on motion for new trial for insufficiency of evidence, trial judge may believe and accept in whole or in part testimony of any witness which he concludes is true, he may reject any evidence which he believes false, and he may draw reasonable inferences from the evidence.

3. New trial ⇨157

In passing on motion for new trial for insufficiency of evidence, trial judge is at liberty to disregard findings of jury which are implied from the verdict.

4. Appeal and error ⇨842(4)

Generally, question of existence of willful misconduct of automobile host is usually one of fact addressed to trier of fact

and not one of law addressed to the appellate court.

5. Appeal and error ☞1015(1)

Where evidence would support finding of willful misconduct on part of automobile host, order granting new trial for insufficiency of evidence to support verdict for host was required to be affirmed.

6. Automobiles ☞181(7)

Generally, mere speed, of itself, does not constitute "willful misconduct," but there may be a point at which the speed becomes so excessive, the danger of injury to passenger so probable, that such extreme speed alone might constitute willful misconduct.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

7. New trial ☞140(3)

Evidence that automobile host was traveling at 85 miles an hour when approaching automobile was first seen a mile away, that road had a hard oiled surface with dips and soft shoulders, and that host on observing approaching automobile threw on brakes and lost control of automobile which overturned, sustained order granting new trial for insufficiency of evidence to sustain verdict for host in willful misconduct case.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by A. V. Fisher and another against L. R. Zimmerman. Verdict for defendant. From an order granting a new trial, defendant appeals.

Affirmed.

Mathes & Sheppard and Lloyd Melvin Smith, all of Los Angeles, for appellants.

Wallace P. Rouse, of Indio, for respondents.

MARKS, Justice.

This is an appeal from an order granting a new trial which recited that "plaintiff's motion for a new trial herein be and the same is granted *and* all grounds in the motion for new trial including the insufficiency of the evidence to sustain the verdict." We need only consider the last ground specified in the order.

This is a willful misconduct case. Plaintiffs were guests of defendant on a round

trip from a Metropolitan Water District Camp near Rice, Cal., to the site of Parker Dam on the Colorado river. They were riding in the Chrysler automobile of defendant. The accident happened on the return trip at about 12 o'clock midnight. The road had a hard oiled surface with soft sand shoulders. There was a curve in the road about a mile east of the place of the accident. After leaving this curve the road ran in a straight line for about a mile. As is usual in desert roads it had several dips where its surface departed from the horizontal. The defendant was very familiar with the road.

One of the plaintiffs thus described the accident and the events immediately preceding it:

"I don't know how fast he was going at that time. The fender of Mr. Zimmerman's car came into contact with the other car. We never saw the other car after it passed. After the contact of the two cars the Chrysler traveled, I would say, one hundred fifty feet before it really turned over. When he hit the soft shoulder the first time he turned out, and that is when the cars touched; then he pulled his car back into the shoulder on the right hand side, and then back out of the sand again; and he was comparatively straight across the road; and that was done just as fast as he could do it. I would say in one hundred fifty feet it all happened and then his car rolled and headed back the way we were coming on the other side of the road. The car turned on the side, then up on the top and over on the other side. That is what you would call a three-quarter turn. Whether it made another turn or not, I don't know. The other car never stopped. The Chrysler was going around sixty miles an hour at the time of its contact with the other automobile. At the time when it hit the dirt shoulder he was making around eighty or eighty-five miles an hour. For a mile or two or three miles before the accident the car was swerving and zigzagging across the road. * * * When you would go down on the dip, it just seemed like the sensation it is running out from under you; and when you come up on top, the back end of it just seems to come up. From the time we left that one curve this side of those dance halls, practically all of our conversation was trying to get him to drive steady and slower. During that interval I would say we demanded he drive slower two or three times. He made no response to those demands; only after he came around that

one curve I mentioned he slowed down then for just a little bit, and then went speeding again and he never slowed down any more until he threw on the brakes and tried to slow down when he saw the car coming. When he started speeding up this last time I asked him to drive slower; that there was a car coming; and then is when he threw on his brakes and hit the sand. At that time the car was about a mile away. In a very few seconds after I stated the car was coming we hit the sand. Before we hit the soft shoulder on the road he had not altered the speed of the car enough to notice it. Just as quick as he saw the car approximately a mile away, and my wife stressed the point he should slow down, he threw on his brakes and it seemed like he just hit the sand instantly, and right after that, that is when the accident occurred. * * *

"Q. Will you answer this yes or no: Was he going 55 or 60 when he hit the shoulder? A. When he hit the shoulder?

"Q. Yes. A. I would say he was going faster than 85 or 90, 90 or 95.

"Q. Just a minute. You told us he was going 55 or 60 when he hit the shoulder. What is the correct statement? What do you want to testify? A. I will testify he was going 55 or 60 when the accident happened; and before the accident happened he was making 80 or 85 miles an hour.

"Q. I don't think I quite understand. I understood you a minute or two ago to say when he first hit the shoulder he was going 55 or 60. Is that correct? A. You got me all wrong. I claim that the car was going 55 or 60 when the car hit the shoulder the last time and turned into the other car. We were making 85 miles an hour when he started to slow down, and he threw on his brakes and the car went out of control and he hit the shoulder and then hit the other car. I would say that he slowed down to around sixty miles an hour as he hit that shoulder and hit the other car. As far as I could say, he hit the shoulder only once. He was going sixty miles an hour when he hit the shoulder. A couple of minutes before the accident he was going faster than that. There is only a few seconds in there from the time all this happened, and it was a fast speed of around eighty-five miles an hour; and then he hit the shoulder after he had thrown his brakes on. That is when his car went out of control and it was around sixty miles an hour when he hit that shoulder and directly into the car. That is what I want to swear to. The other car

was about a mile away when I first saw it. When our car hit the shoulder the other car was a hundred and fifty feet from us. It might have been a hundred feet. I won't say it was a hundred and fifty, but it was just a small space in there, both cars coming together. The other car was going as fast as forty miles an hour; maybe a little faster * * *."

In *Meek v. Fowler*, 3 Cal.2d 420, 45 P.2d 194, 197, the Supreme Court defined "willful misconduct" as follows: "We shall not attempt to reconcile the several definitions and applications given to this phrase. It is satisfactorily defined in *Turner v. Standard Oil Co.*, 134 Cal.App. 622, 626, 25 P.2d 988, wherein it is declared that "willful misconduct," within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result."

[1-3] The position occupied by a trial judge in passing on a motion for new trial made on the ground of insufficiency of the evidence to sustain the verdict and judgment has been likened to that of a thirteenth juror. He should review all the evidence, weigh its sufficiency, and judge the credibility of the witnesses. He may believe, and accept, in whole or in part, the testimony of any witness which he concludes is true. He may reject any evidence which he believes to be false. He may draw reasonable inferences from the evidence. In so doing he is at liberty to disregard the findings of the jury which are implied from the verdict. *Olinger v. Pacific Greyhound Lines*, 7 Cal. App.2d 484, 46 P.2d 774.

Moyer v. Dresch, 2 Cal.App.2d 655, 38 P.2d 849, 850, was a willful misconduct case in which the trial judge granted a motion for new trial because of the insufficiency of the evidence to sustain the verdict. In affirming the order this court said:

"The rules governing a trial judge in passing on a motion for new trial upon the ground of insufficiency of the evidence are set forth in 20 California Jurisprudence, 111, as follows: 'A motion for new trial on the ground of the insufficiency of the evidence to justify the verdict or other decision is addressed to the sound legal discretion of the trial court, which has power to set aside a verdict or decision and to grant a new

trial, in whole or in part, in every case where, in its judgment, the evidence is insufficient. Accordingly, it is settled that an order granting or refusing a new trial on the ground of insufficiency of the evidence or where this is one of the grounds set up is conclusive upon the appellate court and may not be disturbed on appeal, unless it appears that there was a manifest abuse of such discretion. Indeed, the action of the trial court in granting a new trial upon the ground of insufficiency of evidence is so far a matter within its discretion that if there is any appreciable conflict in the evidence its ruling is not open to review. Thus it seems that where there is some evidence in favor of the applicant, and especially where he also presents affidavits of newly discovered evidence, the court may grant a new trial, although the only conflict in the evidence consists of doubtful inferences of ultimate facts to be deduced from uncontradicted probative facts, since it is exclusively within the province of the trial court to make all inferences and deductions of fact, where the facts necessary to support the judgment do not naturally follow as a necessary sequence from the probative facts.'

"In *Cookson v. Fitch*, 116 Cal.App. 544, 3 P.2d 27, 29, it is said: A motion for new trial upon the grounds of insufficiency of the evidence to sustain the verdict and judgment is addressed to the sound discretion of the trial court. Its order will not be disturbed on appeal except in a clear case of the abuse of such discretion. As was said in the case of *Smith v. Royer*, 181 Cal. 165, 183 P. 660, 663: "In a jury trial a party is entitled to two decisions on the evidence—one by the jury and one by the trial court, and the trial court is not bound by a conflict in the evidence. *Dickey v. Davis*, 39 Cal. 565; *Curtiss v. Starr*, 85 Cal. 376, 24 P. 806; *Bates v. Howard*, 105 Cal. 173, 38 P. 715; *Condee v. Gyger*, 126 Cal. 546, 59 P. 26; *Green v. Soule*, 145 Cal. 96, 78 P. 337.'"
See, also, *Clippinger v. Reiss*, 17 Cal.App. 2d 604, 62 P.2d 418.

[4, 5] Generally speaking, it is the rule in California that the question of the existence of willful misconduct is usually one of fact addressed to the trier of fact and not one of law addressed to the appellate court. *Del Bosque v. Singh* (Cal.App.) 65 P.2d 951; *Jackie Coogan Productions, Inc. v. Industrial Accident Commission* (Cal.App.) 68 P.2d 750; *Medberry v. Olcovich*, 15 Cal. App.2d 263, 59 P.2d 551, 60 P.2d 281. In the instant case this question as one of fact

was first addressed to the jury at the close of the trial, and next to the trial judge on the motion for new trial. If the evidence which we have quoted would support a finding of willful misconduct on the part of defendant, the order granting the motion for new trial must be affirmed.

[6] It is generally held that mere speed, of itself, does not constitute willful misconduct. This may not always be true. There may be a point at which the speed becomes so excessive, the danger of injury to the passenger so probable, that such extreme speed alone might be held to be willful misconduct. Speed coupled with other circumstances has been held to constitute willful misconduct. *Petersen v. Petersen* (Cal. App.) 67 P.2d 759. In *Hall v. Mazzei*, 14 Cal.App.2d 48, 57 P.2d 948, 950, it is said: "We do not wish to be understood as holding that mere speed may never constitute willful misconduct if indulged in under certain conditions. Willful misconduct, like negligence, must relate to the time, place, person and surrounding circumstances, and must be measured by them. Excessive speed under some circumstances may amount to negligence, under others to gross negligence, and under still others to willful misconduct."

[7] We believe that the evidence we have quoted would support a finding of willful misconduct if one had been made in the trial court. When the approaching automobile was first seen it was a mile away from defendant's car. At eighty-five miles an hour the automobile of defendant would have traveled the intervening mile in less than one minute had the other car been standing still. The speed of the approaching automobile appreciably reduced the time clapsing before the two cars came into contact. The condition of the oiled road with its dips and soft shoulders, coupled with the excessive speed at which defendant drove his automobile in the face of an approaching car, are circumstances which made injury to the passengers not an improbable result.

Plaintiffs complain of an instruction attempting to define willful misconduct. This instruction does not conform to the definition of willful misconduct given in *Meek v. Fowler*, supra. It should not be given again.

The order granting a new trial is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

23 Cal.App.2d 621

AVERRILL v. SUPERIOR COURT IN AND FOR MADERA COUNTY et al.

Civ. 5964.

District Court of Appeal, Third District,
California.

Nov. 26, 1937.

Rehearing Denied Dec. 24, 1937.

1. Highways ☞158

The district attorney, as a law officer of the court, has a right to maintain an action to abate any act which would cause flood waters to overflow public highways on the ground that such an act is a public nuisance.

2. Highways ☞158

An act which causes flood waters to overflow public highways so as to render the same impassable, or to cause injury thereto, authorizes the prosecution of an action by the state to abate such "nuisance."

[Ed. Note.—For other definitions of "Nuisance," see Words & Phrases.]

3. Prohibition ☞5(2)

Prohibition would not lie to obtain continuance of action to abate nuisance upon highway, notwithstanding that county supervisors, who were considering creation of reclamation district, including lands in question, but who were not parties to the action, consented to continuance, where county judge and district attorney opposed such continuance, since district attorney prosecuting action in the name of the people was not under obligation to consent and consent of supervisors was not binding upon the court (Pol.Code, § 4041.22).

4. Prohibition ☞5(3)

Where action to abate a nuisance would lie for flooding highway, whether nuisance was committed in or outside of reclamation district, and action of court in finding either existence or nonexistence of nuisance, would have no effect upon proceedings before board of supervisors in reaching conclusion whether reclamation district, including lands in question, should be organized, prohibition would not lie to prevent county judge from proceeding with trial of the question of nuisance.

restraining order was issued and an order to show cause granted.

Writ of prohibition denied, and temporary restraining order vacated and set aside.

Walter Gould Lincoln, of Los Angeles, for petitioner.

George Mordecai, Dist. Atty., of Madera, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the petition of Roger Averill praying for an order prohibiting the Superior Court of the County of Madera, and Stanley Murray, as the judge thereof, from proceeding with the trial of a certain case pending in said court entitled, "The People of the State of California v. Paris A. Davis and Roger Averill," numbered 5256. Upon the filing of the petition a temporary restraining order was issued, and an order to show cause why the writ should not be granted.

The record shows that action numbered 5256, pending in said court, the trial of which is sought to be restrained, is one to abate a nuisance. The complaint in the action sets forth, in substance, that the said Roger Averill and Paris A. Davis have created and are maintaining a nuisance by filling in and obliterating a certain water course in such manner as to stop up said water course and cause flood waters that would naturally flow down said course to overflow its banks and flood public highways and the lands of numerous persons in the vicinity, and to injure said lands, and to obstruct and prevent travel over said public highways. The record shows that the action does not in anywise interfere with the proceedings before the board of supervisors, having for its purpose the creating of a reclamation district which would include the lands referred to, and also the public highways.

[1] So far as the private lands mentioned in the complaint are concerned, that is an injury for which the owners of private lands would have a right of action against the defendants named in the complaint filed in the action just referred to, if the facts stated therein are found by the court to be true. As to the public highways, the district attorney, as the law officer of the court, has a right to maintain an action to abate any act which would cause flood waters to overflow public highways, on the ground that such an act is a public nuisance.

Petition by Roger Averill for a writ of prohibition directed to the Superior Court of the State of California, in and for the County of Madera, Stanley Murray, judge thereof, and another, wherein a temporary

[2] The fact that the complaint sets out and describes large tracts of land outside of the public highway would be a matter for the trial court to act upon if suitable motions or demurrers thereto are filed, which we need not pass upon in this proceeding. All we need to do is to state that an act which causes flood waters to overflow public highways so as to render the same impassable, or to cause injury thereto, constitutes a foundation sufficient to authorize the prosecution of an action in the name of the people to abate such nuisance.

[3] It appears from the record and the petition filed herein that the petitioner is seeking a continuance of the trial of action No. 5256, *supra*, and that the board of supervisors had consented to such continuance, and that the district attorney and the Honorable Stanley Murray, as the judge of Madera county, presiding in the Superior Court of Madera County, were opposed to such continuance. In the action referred to, being in the name of the people to abate a nuisance, the district attorney was not, and is not, under any obligation to consent to the continuance of the action, nor is the consent of the board of supervisors to a continuance of the trial of the action binding upon the Superior Court. Section 4041.22, Political Code does give the board of supervisors power to control the prosecution of actions, where a county is a party to the action. Madera county is not a party to this action. The people of the state of California are the plaintiffs in this action, seeking to abate a nuisance.

[4] Upon the hearing of this action the petitioner cited to this court, relied, and places his reliance upon the case of *Glide v. Superior Court of Yolo County*, 147 Cal. 21, 81 P. 225. That case, however, we find, upon consideration, not to be in point. In the *Glide Case* the board of supervisors were seeking to establish a reclamation district. A petition was filed in the Superior Court of the County of Yolo to restrain the board of supervisors from establishing a reclamation district, and including the lands of the petitioner, on the ground that the lands referred to in the petition were already reclaimed. A writ of prohibition was granted on the grounds that it was within the exclusive jurisdiction of the board of supervisors in the first instance to establish a reclamation district and determine what lands

should be included therein. In the present case it is clear to us that an action to abate a nuisance would lie, whether that nuisance was committed in or outside of a reclamation district, and that the action of the court in finding either the existence or nonexistence of the alleged nuisance, and ordering or refusing to order the abatement thereof, would have no effect whatever upon the proceedings before the board of supervisors in reaching a conclusion as to whether a reclamation district should, or should not, be organized as described in the records now before the board of supervisors of the county of Madera.

The writ of prohibition is denied, and the temporary restraining order heretofore issued is vacated and set aside.

We concur: PULLEN, P. J.; THOMPSON, J.



23 Cal App.2d 690

HAYS v. TEMPLE et al.

Civ. 11581.

District Court of Appeal, Second District,
Division 2, California.

Dec. 1, 1937.

**Hearing Denied by Supreme Court
Jan. 27, 1938.**

1. Contracts ⇨332(2)

A petition against minor actress, her parents, and motion picture producers, alleging that plaintiff had contracted with parents for exclusive right to actress' services under agreement to split with parents proceeds derived from loan of actress to producers, and that plaintiff received none of compensation paid by producers to parents for actress' services under loans arranged by plaintiff, *held* specially demurrable as being ambiguous, unintelligible, and uncertain, since petition failed to set forth loan agreements between plaintiff and producers with sufficient certainty to show that plaintiff was entitled to any of compensation producers paid parents, and failed to show contractual relation between plaintiff and defendants or that any defendant other than actress' parents made any promise to plaintiff.

2. Money received ⇨17(1)

Where plaintiff is not entitled to recover under count in complaint wherein all

facts are specifically pleaded, common count for money had and received manifestly based on such facts is demurrable.

3. Appeal and error ⇨854(3)

Where demurrer which is both general and special has been sustained, pleader must defend his pleading as against both grounds of demurrer on appeal.

4. Appeal and error ⇨194(6)

Sustaining well-taken special demurrer to complaint without leave to amend is not reversible error, where no application for permission to amend has been made to trial court.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Jack Hays against Shirley Temple and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

William C. Ring and M. G. Gallaher, both of Los Angeles, for appellant.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for respondents Shirley Temple, Gertrude Temple, and G. F. Temple.

Alfred Wright and Gordon Hall, Jr., both of Los Angeles, for respondent Twentieth Century Fox Film Corporation.

Swanwick, Donnelly & Proudfit and Donald O. Welton, all of Los Angeles, for respondents California Trust Co. and California Bank.

McCOMB, Justice.

This is an appeal by appellant from a judgment in favor of respondents after the trial court sustained a demurrer to appellant's first amended complaint without leave to amend in an action for damages and for an accounting, resulting from the breach of a contract.

The complaint as amended contained the following allegations in substance:

Count One

I

Respondent Shirley Temple is a minor under the age of fourteen years.

II

Defendants Gertrude and G. F. Temple are the mother and father, respectively, of respondent Shirley Temple.

III

Respondents Fox Film Corporation, Twentieth Century Fox Film Corporation, California Bank, and California Trust Company are duly organized and existing corporations.

IV

January 23, 1932, appellant entered into a contract with defendants Gertrude and G. F. Temple, by the terms of which he promised and agreed to provide and furnish Shirley Temple with dramatic training, coaching, motion picture experience, exploitation, publicity, and advertising, and defendants Gertrude and G. F. Temple granted unto appellant the exclusive right to the services of Shirley Temple as a motion picture actress in cinema productions from January 23, 1932, to January 23, 1934, with the option to extend this contract for an additional period of two years. It was further agreed that appellant should have the privilege of loaning Shirley Temple to any other studio, producer, manager, or theater, and that, in the event he should receive a compensation for the loan of said Shirley Temple, defendants Gertrude and G. F. Temple should receive 50 per cent. thereof after first deducting the amount of compensation which by the contract appellant had agreed to pay them for the services of Shirley Temple.

V

From October, 1933, to and including January 22, 1936, Shirley Temple was engaged as a motion picture actress by respondents Fox Film Corporation and Twentieth Century Fox Film Corporation with the approval and consent of appellant, who had arranged, pursuant to his agreement with defendants Gertrude and G. F. Temple, for her loan to said respondents.

VI

Said respondents Fox Film Corporation and Twentieth Century Fox Film Corporation have paid to defendants Gertrude and G. F. Temple large sums of money, which they have deposited with respondents California Bank and California Trust Company.

Count Two

I

The allegations contained in *Count One* are incorporated by reference.

II

Additional sums of money in amounts unknown to appellant, but in excess of one

million dollars, have been paid to defendants Gertrude and G. F. Temple by respondents Fox Film Corporation and Twentieth Century Fox Film Corporation.

Count Three

(Count Three is a common count for money had and received.)

This is the sole question presented for our determination:

Were the special demurrers of respondents to the complaint as amended properly sustained on the grounds that the pleading was (a) ambiguous, (b) unintelligible, and (c) uncertain?

This question must be answered in the affirmative. The only allegations in the complaint relative to the agreement by which Shirley Temple was loaned to Fox Film Corporation and Twentieth Century Fox Film Corporation are the following:

"That during the entire period of time between and including the month of October, 1933, and the 22nd day of January, 1936, defendant Shirley Temple, was and she now is engaged by defendants, Fox Film Corporation and Twentieth Century Fox Film Corporation, as a motion picture actress by and with the procurement, consent and approval of plaintiff, and in pursuance of his right to loan the services of said Shirley Temple, as prescribed in said 'Exhibit A', and as more particularly herein-after alleged. * * *

"That in the months of July and August, 1933, plaintiff herein negotiated with and for defendants Fox Film Corporation and Twentieth Century Fox Film Corporation, an agreement whereby plaintiff agreed to loan unto said defendants the services of the said Shirley Temple as a motion picture actress; and notified said defendants of his right to the exclusive services of said Shirley Temple under said 'Exhibit A', and all of the defendants herein had notice and knowledge of such contract; that thereafter, and in the month of September, 1933, as plaintiff is informed and believes and accordingly avers, and to and until the 9th day of December, 1933, the said Shirley Temple was employed by the said defendants Fox Film Corporation and Twentieth Century Fox Film Corporation, as a motion picture actress and defendants Shirley, Gertrude and G. F. Temple received from said Fox Film Corporation and Twentieth Century Fox Film Corporation and the latter paid unto the said Temples for said services the sum of One Hundred Fif-

ty Dollars (\$150.00) per week; that plaintiff is further informed and believes and accordingly avers that during the said time, the said Temples received for the services of said Shirley Temple and the said Fox Film Corporation and the said Twentieth Century Fox Film Corporation paid therefor unto them the sum of Eighteen Hundred Dollars (\$1800.00); that none, or any part of said money was paid by the said defendants, or either of them to plaintiff although the said defendants and each of them had full notice and knowledge then and there of the said 'Exhibit A', and the rights of the plaintiff herein thereunder and in and to said money.

"That plaintiff is informed and believes, and accordingly avers, that commencing with the 9th day of December, 1933, and continuing for the period of approximately one (1) year thereafter, the said Shirley Temple was further employed as a motion picture actress by the said defendants, Fox Film Corporation and Twentieth Century Fox Film Corporation, and that the said defendants, Shirley, Gertrude and G. F. Temple received from said Fox Film Corporation and Twentieth Century Fox Film Corporation and the last two named defendants paid to the first three named defendants, for said services, the sum of One Hundred Fifty Dollars (\$150.00) a week, or approximately Seventy-eight Hundred Dollars (\$7800.00) for said year's services; that none or any part of said sum was paid by said defendants, or either of them to plaintiff, though they had full knowledge and notice of the existence of said 'Exhibit A', and of plaintiff's rights thereunder and in and to said money.

"That plaintiff is informed and believes, and accordingly avers, that commencing with the 1st day of January, 1935, or thereabouts, and continuing for the period of approximately one (1) year thereafter, the said Shirley Temple was further employed as a motion picture actress by the said defendants, Fox Film Corporation and Twentieth Century Fox Film Corporation, and that the said defendants, Shirley, Gertrude and G. F. Temple received from said Fox Film Corporation and Twentieth Century Fox Film Corporation and the last two (2) named defendants paid to the first three (3) named defendants for said services the sum of One Thousand Dollars (\$1,000.00) per week, or approximately Fifty-two Thousand Dollars (\$52,000.00) for said year's services; that none, or any

part of said sum was paid by said defendants, or either of them to plaintiff, though they had full knowledge and notice of the existence of said 'Exhibit A', and of plaintiff's rights thereunder and in and to said money."

[1] It is clear that the foregoing allegations failed to set forth the agreement between appellant and respondents Fox Film Corporation and Twentieth Century Fox Film Corporation with sufficient certainty to show any right upon appellant's part to entitle him to portions of the compensation which they paid to defendants Gertrude and G. F. Temple or respondent Shirley Temple. For aught that appears from the foregoing allegations, appellant by the agreement may have relinquished all of his rights to receive any portion of the compensation paid for Shirley Temple's services for a cash sum or other consideration, or the agreement with respondents Fox Film Corporation and Twentieth Century Fox Film Corporation may have expressly provided that the sums of money paid to defendants Gertrude and G. F. Temple were to be deposited and invested in the manner set forth in the complaint as amended. In addition, there is a total absence of any allegation which shows a contractual relation between appellant and respondents, nor is there any allegation to show that any person other than defendants Gertrude and G. F. Temple made any promise to appellant, and as to these defendants the trial court overruled their demurrer. The demurrers on the grounds of ambiguity, unintelligibility, and uncertainty were therefore properly sustained as to the first and second counts in the complaint as amended.

[2] As to the third count, which was a common count for money had and received, the demurrer was likewise properly sustained. It is the established law of California that, if plaintiff is not entitled to recover under one count in a complaint wherein all the facts upon which his demand is based are specifically pleaded, it is proper to sustain a demurrer to a common count set forth in the complaint, the recovery under which is obviously based on the set of facts specifically pleaded in the other count. *Harris v. Kessler*, 124

Cal.App. 299, 303, 12 P.2d 467; *Powers v. Freeland*, 114 Cal.App. 146, 150, 299 P. 736.

In *Harris v. Kessler*, supra, 124 Cal.App. 299, at page 303, 12 P.2d 467, 468, the court says: "Nor do we find any ground for reversal because of the order of the court sustaining the demurrer to the second count in the cross-complaint without leave to amend. It was a common count for money had and received, the demand being for \$16,636.92, which was the identical amount claimed under the first count, and manifestly was based on the same state of facts set forth in the first count. It follows, therefore, that, if defendant was not entitled to recovery under the first count, wherein all of the facts upon which the demand was based were specially pleaded, he was not entitled to recover the same under a common count."

In the instant case not only is it evident from reading the complaint that appellant relies for recovery under his *Third Count*, i. e., the common count, on the facts specifically pleaded in *Counts One* and *Two*, but in his brief he also bases his argument for recovery under *Count Three* on the facts specifically alleged in *Counts One* and *Two*. Thus the demurrer was properly sustained also to the *Third Count* of the complaint as amended.

[3,4] The law is settled that, after a demurrer which is both general and special has been sustained, the pleader must defend his pleading as against both grounds of the demurrer on appeal (*Haddad v. McDowell*, 213 Cal. 690, 692, 3 P.2d 550), and it is likewise the established law of this state that it is not reversible error to sustain without leave to amend a special demurrer well taken, where, as in the instant case, no application for permission to amend has been made to the trial court. *Haddad v. McDowell*, supra; *Swasey v. L'Etanche*, 17 Cal.App.2d 713, 715, 62 P. 2d 753.

In view of the foregoing, it is unnecessary for us to consider the other arguments presented by appellant.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

23 Cal.App.2d 629

**RICHARDSON, Superintendent of Banks, v.
ABERNATHY et al.**
Civ. 5935.

District Court of Appeal, Third District,
California.

Nov. 26, 1937.

1. Banks and banking Ⓒ63½

The Superintendent of Banks has no power under statute to compromise debts due insolvent bank and accept assets in lieu of such debts except upon court order (St. 1929, p. 471, § 136).

2. Deeds Ⓒ108

The intention of parties is not alone controlling as respects effective time of delivery of deed.

3. Banks and banking Ⓒ63½

Court authority given to Superintendent of Banks to accept deed as compromise of debts due insolvent bank was not retroactive as affecting rights of third parties (St. 1929, p. 471, § 136).

4. Banks and banking Ⓒ63½

Judgment Ⓒ785(1)

Where insolvent bank's debtor mailed deed to special deputy superintendent of banks, to compromise the debt, but court approval of compromise and acceptance of deed was not obtained until 15 months later, compromise and deed were not effective until approved, and hence recording of judgment lien against debtor between date of mailing and time of approval was good against claims of bank and of debtor (St. 1929, p. 471, § 136).

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action to quiet title by Friend W. Richardson, as Superintendent of Banks of the State of California, against David P. Abernathy and others. From a judgment for plaintiff, the named defendant appeals.

Reversed, and judgment directed for defendant.

Stewart & Stewart, of Los Angeles, for appellant.

Clock, McWhinney & Clock and Henry H. Clock, all of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In this action the Superintendent of Banks of the State of California brought an action to quiet title against Abernathy and others affecting certain real property in the county of Los Angeles. The real property here involved was alleged to be a part of the assets of the Belvedere State Bank, a banking corporation, which had been taken over by the Superintendent of Banks for the purpose of liquidation.

The answer denied the ownership of plaintiff, and after a trial, judgment was rendered in favor of plaintiff, from which judgment David P. Abernathy has taken this appeal.

On January 16, 1933, the Ashmun Investment Company, a corporation, was the owner of the real property in question, and on that date mailed a grant deed to the special deputy Superintendent of Banks, who was directly in charge of the affairs of the Belvedere Bank, and who was acting under Edward Rainey, then the Superintendent of Banks in charge of liquidation of the Belvedere Bank, in liquidation.

After the mailing of the deed and prior to its recordation, David P. Abernathy and Rachael J. Abernathy, his wife, on March 5, 1934, recorded a judgment lien against the Ashmun Investment Company in the county wherein this property was situated. On April 30, 1934, the superior court made its order authorizing a compromise and directing the Superintendent of Banks to accept the conveyance of the real property as part of a compromise settlement. On January 26, 1935, this deed was placed on record by the Superintendent of Banks.

The question for determination is, therefore: Did the deed of the Ashmun Investment Company to Superintendent of Banks become effective to convey title as against the rights of the judgment creditor of the grantor when it was mailed to the Superintendent of Banks or when the superior court made its order authorizing the compromise?

The Superintendent of Banks in this instance was acting under authority of the Bank Act (St.1909, p. 87, as amended). Section 136 of that act (St.1909, p. 115, as amended by St.1929, p. 471) provides: "Upon taking possession of the property and business of any such bank the superintendent of banks * * * shall collect all debts due and claims belonging to it, and upon the order of the superior court

may sell or compound any bad or doubtful debts."

It is the contention of respondent, with which the trial court agreed, that the title passed upon the mailing of the deed, which act occurred some fifteen months prior to the court making its order authorizing and directing the composition and the acceptance of the deed, and more than a year prior to the recording of the judgment lien by Abernathy.

It is the claim of appellants that the mailing of the deed did not constitute a delivery but merely a tender, and that the deed did not become effective as such until the proposed compromise had been approved by the superior court.

It is true that one of the elements of conveying title is that there must be a delivery of the deed, but there is another essential element which respondent does not consider, and that is, in addition to delivery by the grantor, there must also be an acceptance on the part of the grantee. 9 California Jurisprudence, p. 150, states that "the law does not force a man to take title of real property against his will. Hence the assent of the grantee is necessary in order to make a delivery effective and the deed operative as such," citing many cases.

That neither the deputy superintendent of banks nor the corporation considered that title had passed when the deed was mailed is evidenced by the fact that the petition filed by the Bank Superintendent for compounding the debt wherein authority was sought to accept the deed, stated:

"The said Ashmun Investment Company is the owner of the real property hereinafter described * * * and has offered to convey said real property and to assign the said claims to your petitioner, provided that your petitioner will accept the same, in full satisfaction and discharge.

"Your petitioner is informed and believes, * * * that it would be to the advantage * * * of said bank * * * that said offer of said Ashmun Investment Company be accepted and consummated.

"Wherefore your petitioner prays for an order of this court authorizing and directing your petitioner to accept conveyance of the real property. * * *"

And upon the hearing of this petition the court made its order by which the court adjudicates:

"That the said Ashmun Investment Company is the owner of the real property hereinafter described * * *; and that the said Ashmun Investment Company has offered to convey the said real property. * * *

"Now, therefore, it is hereby ordered, * * * that this court make its order authorizing, empowering and directing your petitioner to accept conveyance of said real property. * * *"

[1] It is very clear from a reading of section 136 of the Bank Act that the Superintendent of Banks is given no power to compromise debts and accept assets in lieu of such debts except "upon the order of the superior court," and that this provision of the act was fully recognized is evidenced by the foregoing petition of the Superintendent of Banks.

[2] So, too, the intention of the parties is not alone controlling. In the case of Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 P. 106, Mrs. Bailhache attempted to settle an overdraft of her husband, who was cashier of the bank, upon the basis of a conveyance to the bank by her of her separate property. This offer was acceptable to certain of the directors as individuals, but the court held that the minds of the grantor and the grantee never met upon the question of the execution of the deed, for the board of directors, by resolution or otherwise, never authorized a settlement with the cashier upon the basis proposed by Mrs. Bailhache.

Another indication that the Bank Superintendent did not consider the property as belonging to the bank is that by the record of the assets of the bank no such assets were listed as the real property here in question prior to the making of such order of the court.

It must be conceded that it rested with the Superintendent of Banks as to whether or not he would ever ask the court for authority to make a compromise, and after that it rested within the discretion of the court as to whether it would grant such authority if asked, and there was nothing the corporation could do to compel either application to the court for compromise or to require the court to approve the same.

[3] Neither was the authority given by the court to accept the deed retroactive, whereby the rights of third parties might

be affected. In the case of *Taylor v. Robinson*, 14 Cal. 396, considering the retroactive effect of a transaction such as this, it was held that a ratification did not operate retrospectively, so as to overreach and defeat those claims where third parties had acquired rights after the act was done but before it has received the sanction of the principal.

[4] We are, therefore, forced to the conclusion that appellant merely tendered an offer of compromise which did not become effective until reviewed and approved by the court, and that the recording of a judgment lien between the date of the tender and the time of ratification was good as against the claim of the bank and the corporation.

The judgment from which this appeal is taken must therefore be reversed, and the court directed to enter judgment that respondent holds title to the real property subject to the lien of appellant's judgment of record, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.



23 Cal.App.2d 689

PEOPLE v. HAMEY.

Cr. 3030.

District Court of Appeal, Second District,
Division 2, California.

Nov. 30, 1937.

Criminal law — 1159(2)

A judgment of conviction, for reversal of which defendant relies solely on proposition that there was no substantial evidence sustaining court's finding that defendant's acts were committed with specific intent required by statute alleged to have been violated, must be affirmed, where record discloses substantial evidence sustaining such finding and other material fact findings when considered with reasonable inferences

therefrom (Pen.Code, § 288, as amended by St.1933, p. 1028).

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Benjamin F. Hamey was convicted of violating Penal Code, § 288, and he appeals.

Affirmed.

F. H. Whitfield, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., by Warner I. Praul, Deputy Atty. Gen., for the People.

McCOMB, Justice.

From a judgment of guilty on three counts of violation of section 288 of the Penal Code (as amended by St. 1933, p. 1028), after trial before the court without a jury and from an order denying his motion for a new trial, defendant appeals.

It would serve no useful purpose for us to relate in detail the revolting acts of which the testimony shows the defendant was guilty, since he relies for reversal of the judgment on the sole proposition that *there is not any substantial evidence to sustain the trial court's finding that the acts of defendant were committed with the specific intent required by section 288 of the Penal Code.*

This proposition is untenable, since an examination of the record discloses that there was substantial evidence considered in connection with such inferences as the trial judge may have reasonably drawn therefrom to sustain the finding hereinabove mentioned and each and every other material finding of fact upon which the judgment of guilty was necessarily predicated. We therefore refrain from further discussion of the evidence. *Thatch v. Livingston*, 13 Cal.App.2d 202, 56 P.2d 549; *People v. Groves*, 9 Cal.App.2d 317, 321, 49 P.2d 888, 50 P.2d 813; *Leavens v. Pinkham & McKeivitt*, 164 Cal. 242, 245, 128 P. 399.

The judgment and order are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

**OAKS et ux. v. KENDALL et al.
ERWIN v. SAME.****Civ. 5589.**District Court of Appeal, Third District,
California.

Dec. 2, 1937.

Hearing Denied by Supreme Court

Jan. 31, 1938.

1. Judgment $\S$ 780(3)

Purchaser's mere equitable interest in realty under conditional sales contract is not such ownership as will subject it to lien of judgment against purchaser (Code Civ. Proc. $\S$ 674).

2. Vendor and purchaser $\S$ 260(2)

Vendor's lien on realty to secure payment of unpaid portion of purchase price was prior and superior to any subsequent lien, if any, acquired by judgment creditor of vendee (Civ.Code, $\S$ 3046).

3. Vendor and purchaser $\S$ 260(1)

Conditional vendor retaining legal title to land has absolute right to hold property as security for payment of purchase money according to express terms of contract and holds an express lien which may not be impaired by any subsequent act or default of the vendee.

4. Vendor and purchaser $\S$ 299(1)

Conditional vendor of land is authorized, on default of payments under contract, to sell property to satisfy his claim for unpaid portion of purchase price, or he may terminate agreement in proper proceeding and quiet title to land in himself.

5. Vendor and purchaser $\S$ 130(2)

The question regarding whether title to land is merchantable is essentially one of law.

6. Vendor and purchaser $\S$ 299(4)

Deed which was tendered by vendors to purchaser pursuant to decree in ejectment suit subject to payment of balance of purchase price constituted an offer to convey good and merchantable title to property, notwithstanding purchaser's judgment creditor had recorded abstract of judgment, since judgment did not create lien on land (Code Civ.Proc. $\S$ 674).

7. Vendor and purchaser $\S$ 299(4)

When vendors, in compliance with decree in ejectment action, tendered a good and

sufficient deed, but vendees failed to pay the ascertained balance of purchase price, title to land did not pass to vendees but remained in vendors, who were entitled to judgment terminating contract for breach thereof and quieting title in them, notwithstanding judgment against vendees had been recorded (Code Civ.Proc. $\S$ 674).

8. Vendor and purchaser $\S$ 260(2), 265(2)

Vendors' express lien entitles vendors to payment of unpaid balance of purchase price undiminished by any subsequent claim, since lien was superior to all rights of persons except bona fide purchasers for valuable consideration without notice, and it took precedence over all claims and liens of judgment and attaching creditors of purchaser (Code Civ.Proc. $\S$ 674; Civ.Code, $\S$ 3046).

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Suit by G. E. Oaks and wife against Thomas R. Kendall, Evelyn Erwin, and others in which the last-named defendant filed a cross-complaint. From a judgment quieting plaintiff's title to realty subject to the lien of the cross-complainant's judgment against defendant Kendall, plaintiffs appeal.

Judgment reversed, with directions.

Prior opinion, 68 P.2d 252.

L. C. Smith, of Redding (S. Victor Wagler, of Oakland, and Alfred E. Frazier, of San Francisco, of counsel), for appellants.

Carr & Kennedy, of Redding, for respondents.

PER CURIAM.

A rehearing was granted in this case to further consider the question as to whether a conditional judgment which was previously rendered in an ejectment suit between these plaintiffs, G. E. Oaks and wife, as vendors of the real property involved in this action, and Thomas R. Kendall and wife, defendants herein, as conditional vendees of that property, estops the vendors from now asserting title to the property free from a subsequent asserted judgment lien thereon in favor of Evelyn Erwin, who was a stranger to the original transaction and suit. On rehearing it is strenuously asserted the first-mentioned judgment is res judicata and a bar to the vendors' claim of clear title in this suit.

After reconsideration we are convinced that our former opinion correctly determined the law as applied to the record in this case. Our former opinion is therefore adopted as modified by further explanation regarding the asserted bar of the former judgment, as follows:

The plaintiffs have appealed from a judgment which was rendered in a suit to quiet title to real property. The decree quieted title in plaintiffs subject to a lien thereon to secure the payment of a former judgment which was rendered in another suit in favor of Evelyn Brown Erwin, who is a codefendant and cross-complainant in this action. It is contended the court erred in quieting title to the real property subject to the lien to secure the payment of the former judgment for the reason that the judgment debtor in the former action held only an equitable title to the property under a conditional sales contract to purchase the land, which equitable interest under the provisions of section 674 of the Code of Civil Procedure is not subject to a judgment lien.

This is a suit to quiet title to certain real property in Shasta county which was previously sold on an executory contract to Thomas R. Kendall and wife. Evelyn Erwin, formerly Evelyn Brown, who is a party defendant, filed an answer to the complaint, denying the material allegations thereof. She also filed a cross-complaint setting up the judgment of \$853 which she secured against Thomas R. Kendall and claiming a lien upon the real property which is involved in this suit to secure the payment of her judgment. Mr. and Mrs. Kendall failed to appear or answer in this action, and their default was duly entered. Upon trial of this cause the judgment and proceedings in the ejectment suit between Oaks and Kendall, and the judgment in the suit between Evelyn Brown Erwin and Kendall, were received in evidence. The court adopted findings to the effect that plaintiffs are the owners and entitled to possession of the real property as against Mr. and Mrs. Kendall, subject, however, to a lien thereon to secure the payment of the former judgment against Kendall and in favor of the cross-complainant Evelyn Brown Erwin, in the sum of \$853 and interest thereon at the rate of 7 per cent. per annum from March 28, 1930. Judgment was accordingly rendered quieting title to the property in plaintiffs, "subject, however, to the lien of the judgment recovered by the defendant Evelyn Erwin against the defendant Thom-

as R. Kendall in the action entitled 'Evelyn Brown, plaintiff, v. Thomas R. Kendall et al., defendants,' numbered 7553, in the files of this court, which lien is hereinafter described and decreed."

It is asserted the findings and judgment are not supported by the evidence, since it appears without conflict that plaintiffs are the owners of the land in question, and that Thomas R. Kendall and wife merely held a conditional contract to purchase the land which they forfeited for nonpayment of the agreed purchase price thereof, and that they held a mere equitable title which is not subject to lien under the California statute.

The evidence is uncontradicted. The plaintiffs are the owners of the land in question. July 19, 1923, they executed an agreement to sell a portion of the land to the defendants, Thomas R. Kendall and wife, upon specified terms and conditions. The title to the land never passed to the purchasers thereof, but pursuant to the conditional contract of sale, the Kendalls took and retained possession of the property. The Kendalls were in default with respect to certain payments under the contract, and these plaintiffs previously brought a suit of ejectment against them. The Kendalls appeared in that suit and denied the allegations of the complaint, and also filed a cross-complaint therein, claiming damages in a specified sum against the vendors for trespass, and praying that the plaintiffs be required to execute and deliver to them a deed of conveyance to the property subject to the payment of the balance of the purchase price of the land. The court found that the Kendalls were entitled to damages in the sum of \$1,625, and that the unpaid balance of the purchase price of the land then amounted to the additional sum of \$1,506.33. Judgment was thereupon rendered in that suit denying plaintiffs' prayer for ejectment and directing that they execute and deliver to the Kendalls a good and sufficient deed of conveyance to the real property subject to payment of the balance of the purchase price thereof. No appeal was taken from that judgment, and it became final. A deed of conveyance of the property was executed and tendered, but the balance of the purchase price was not paid, and the title to the property never passed to the Kendalls.

In March, 1930, the defendant in this suit, Evelyn Brown, now Evelyn Erwin, recovered judgment in another suit against

Thomas R. Kendall for the sum of \$853. These plaintiffs were not parties to that action. It was brought to recover the value of an automobile which Evelyn Brown earned pursuant to an agreement, with Kendall, as a prize for securing the largest subscription list to a Redding newspaper which he then owned and operated. That judgment also became final. An abstract of that judgment was recorded under section 674 of the Code of Civil Procedure. It is contended the judgment in that suit vested a lien in favor of Evelyn Erwin upon the equitable interest in the land which was then held by Kendall and his wife under the conditional contract to purchase the land. Execution was issued in that case and returned unsatisfied. There was no effort to sell the equitable interest in the land to satisfy the judgment.

[1] The findings and judgment in this case to the effect that the respondent, Evelyn Brown Erwin, is entitled to a lien upon the land which is involved in this suit to secure the payment of a judgment which she formerly recovered against Thomas R. Kendall, and quieting title to the land in plaintiffs subject to that lien, is not supported by the evidence. That judgment is clearly contrary to law. The mere equitable interest in real property which is acquired under a conditional sales contract to purchase land, is not such ownership of real property contemplated by the provisions of section 674 of the Code of Civil Procedure, as will vest a lien thereon to secure the payment of a judgment held by a stranger to the contract. *Belieu v. Power*, 54 Cal.App. 244, 201 P. 620, 621; *Poindexter v. Los Angeles Stone Co.*, 60 Cal.App. 686, 214 P. 241; *People ex rel. Ford v. Irwin*, 14 Cal. 428; 34 C.J. 593, § 909; 2 *Freeman on Judgments* (5th Ed.) 1970, § 937; 3 *Tiffany on Real Property* (2d Ed.) 2782, § 670.

It is true that specific statutes in some other jurisdictions provide that judgment liens may attach to both legal and equitable titles to real property. Section 674 (as amended by St.1935, p. 1017), formerly 671, of the Code of Civil Procedure, which provides that "An abstract of the judgment or decree of any court of this State, * * * may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may

afterwards and before the lien expires, acquire," has been repeatedly construed to limit the vesting of such lien to legal titles to real property to the exclusion of equitable interests therein. In 3 *Tiffany on Real Property*, supra, it is said: "The equitable interest of the vendee of land who has not yet received a conveyance is obviously not subject to the lien in those states in which no equitable interests are so subject."

In 2 *Freeman on Judgments*, supra, it is said in that regard: "At common law a judgment lien did not attach to a mere equity, though the equity was accompanied by possession. This rule of the common law prevails in several of the United States, and is generally applied, in the absence of any statute undoubtedly creating a different rule. Thus though a statute provided that a judgment should 'be a lien on all real property of the judgment debtor, not exempt from execution, owned by him in the county at the time of docketing,' it was held not to make a judgment a lien on the equitable title of the defendant."

In accordance with the rule last announced the *Belieu Case*, supra, in which a hearing by the Supreme Court was denied, specifically determined that a judgment does not attach to the equitable interest in real property acquired by a vendee under a contract to purchase the land, where a part of the purchase price, only, has been paid. It is there said: "While many classes of property may be taken on execution, only two classes are subject to the lien of a judgment—real property owned by the debtor at the time of docketing and real property that he may afterward acquire. While any interest in real property, legal or equitable, may be seized and sold under execution, only real property actually owned by the judgment debtor will support a judgment lien. That a mere equitable interest in real property acquired under a contract of purchase and sale is not such ownership as is contemplated by section 671 [now 674] was clearly decided in the early history of the state."

[2] Moreover, the plaintiffs held an express lien on the land by virtue of the contract to sell the real property to secure the payment to them of the unpaid portion of the purchase price of the land (section 3046, Civ.Code; 25 Cal.Jur. 739, §§ 208 and 209), which was prior and superior to any subsequent lien which might be acquired by a judgment creditor of the vendee of the

property. 66 C.J. 1245, § 1130; 27 R.C.L. 477, § 192. In 66 Corpus Juris, supra, it is said: "The vendor's lien is superior to the rights of all persons, except bona fide purchasers for a valuable consideration without notice, * * * It takes precedence over claims * * * and liens of judgment and attachment creditors of the purchaser, and purchasers at execution sale."

In 27 Ruling Case Law, supra, it is said: "The judgment or execution lien extends only to the interest of the purchaser and is inferior to the claim of the vendor for the purchase money, and likewise the purchaser at the execution sale will take subject to the rights of the vendor."

The respondent, Erwin, contends that Mr. and Mrs. Oaks have no vendor's lien upon the land in question to secure the unpaid portion of the purchase price thereof for the reason that they executed a mere contract to sell the land to the Kendalls, and the legal title remained in the vendors. In support of that assertion the case of *Allen v. Wilson*, 178 Cal. 674, 174 P. 661, 662, is cited. All that case determines is that under the circumstances which were involved a mechanic's lien vested pursuant to section 1192 of the Code of Civil Procedure in favor of the contractor to compensate him for the materials and labor supplied in constructing a building on the premises with the knowledge of the owner. In that case it appears that Wilson owned a lot upon which there were three small houses. He gave one Barrett a contract to sell him the land for a specified price payable in installments. No deed of conveyance was executed. Barrett took possession of the property and hired Allen to wreck the three houses and construct a new dwelling house thereon. This was done with the knowledge of Wilson, the owner, as the court specifically found. Allen completed the structure, but Barrett failed to pay him for the labor and materials supplied. The contractor brought suit, under the provisions of sections 1183 and 1192 of the Code of Civil Procedure, to foreclose the mechanic's lien. Under such circumstances the contractor clearly held a statutory mechanic's lien which was superior to the owner's lien to secure the unpaid portion of the purchase price of his land. Section 1192 of the Code of Civil Procedure specifically so declares. That building was constructed with the knowledge of Wilson, and it was therefore deemed to have been done at his instance. This was equivalent to a waiver of his vendor's lien. The Allen

Case says in that regard: "While it is true that for some purposes under a contract of sale of land the vendee is treated as the owner of the land, and the vendor as having but a lien upon it as security for the unpaid portion of the purchase money, this rule has no application, so as to defeat the assertion of a lien under the mechanic's lien law of this state."

[3] It is true that the *Allen Case* further states that, having merely sold the land to Barrett on contract, Wilson did not hold a vendor's lien, since he retained the legal title to the land. Under such circumstances the owner does not retain what is technically termed a vendor's lien. But he does retain an absolute right to hold the property as security for the payment of the purchase money according to the express terms of the contract. It has been accurately said that the owner then holds an express lien created by the terms of the contract which may not be impaired by any subsequent act or default of the vendee. *Kent v. Williams*, 114 Cal. 537, 46 P. 462. Numerous California authorities support that construction of the law. In 25 California Jurisprudence, page 762, § 230, the author has said in that regard: "In the ordinary executory contract for the sale of real property the vendor retains title as security for the payment of the purchase money and as trustee for the purchaser, who has only an equitable estate in the land. The position of the vendor is similar in some respects to that of a mortgagee. He has no greater rights than he would possess if he had conveyed the land and taken back a mortgage for unpaid purchase money, or than is held by a mortgagee who takes for his security a conveyance absolute in form instead of a formal mortgage, except that he is not restricted to a remedy by foreclosure. A vendor is frequently said to have a lien on the property so long as he retains title, though properly speaking he has no lien, nor any need of one, since he has the complete legal title which he holds as a pledge for payment of the purchase money." *Kent v. Williams*, 114 Cal. 537, 541, 46 P. 462.

Numerous other cases are cited in support of the above-quoted text. The *Kent Case*, last cited, says in that regard: "Where the owner of land contracts to sell it, and to give a conveyance upon the payment of the purchase money, and retains the title in himself, he is sometimes spoken of as holding a vendor's lien, and he may proceed to

sell the property for the payment of the purchase money in like manner as if he had conveyed the title. But as was said in *Avery v. Clark*, 87 Cal. [619], 625, 25 P. 919 [22 Am.St.Rep. 272]: 'Properly speaking, a vendor's lien does not exist until the vendor has parted with his title. So long as he retains the title, he cannot be said to have any implied lien upon the land. The security which he has then for the purchase money is created by express reservation, and cannot be impaired by any act of the vendee. This is an express lien, existing by virtue of a contract executed between the parties. * * * Such a lien is open and manifest to the world. * * * For such a lien equity makes no special provision, but leaves the parties to rely upon the contract which they have executed between themselves.'"

[4] In accordance with the preceding declaration of law, as between the parties to the contract, the owner of the land is authorized to sell the property pursuant to law to satisfy his claim for the unpaid portion of the purchase price, or, for default of payments under the contract, he may terminate the agreement in a proper proceeding and quiet title to the land in himself. The latter remedy is precisely what the owners of the property sought to accomplish in the present action.

[5,6] Since the vendees, Mr. and Mrs. Kendall, took no more than an equitable title to the land under the contract of sale, their judgment creditor, Evelyn Erwin, acquired no lien on the property which will defeat the prior rights of the owners, as we have previously pointed out. It necessarily follows that since the subsequent judgment of Evelyn Erwin, which was rendered against the vendees of the land, created no lien thereon, for the reason that they held merely an equitable title thereto, the deed which was tendered by Mr. and Mrs. Oaks to the Kendalls pursuant to the decree which was rendered in the ejectment action constituted an offer to convey good and merchantable title to the property. It is not asserted there was any cloud on the title except the judgment lien claimed to have been held by Evelyn Erwin. The question as to whether title to land is merchantable is essentially one of law. The finding of the court in the present action, to the effect that the deed which was tendered to Mr. and Mrs. Kendall did not convey a merchantable title to the land, is therefore not supported

by the evidence. There is no evidence in the record to warrant that finding. Erwin held no lien upon that land. The title was therefore good and merchantable.

[7] The court also specifically found in this suit that the Kendalls are still indebted to the vendors for the purchase price of the land in an unpaid sum amounting to \$1,506.33. It is not denied that when the deed was tendered the Kendalls failed and refused to pay appellants any portion of the deferred purchase money. No part of it has yet been paid. It is still due and owing. Legal title to the land never vested in the Kendalls. The decree which was rendered in the ejectment case merely declares that the appellants shall tender to the Kendalls a good and sufficient deed of conveyance within a specified time, whereupon the vendees shall pay to Mr. and Mrs. Oaks the sum of \$1,506.33, "to cover the balance due plaintiffs on the purchase price of said property," and upon failure to so tender the deed, title shall then vest in the Kendalls. The appellants complied with that mandate of the decree by tendering a good and sufficient deed within the time prescribed in the decree, but the Kendalls failed to pay the ascertained balance of the purchase price of the land. It follows that title to the land therefore did not pass by that decree to the Kendalls, but still remains in plaintiffs, who are entitled to judgment terminating the contract for breach thereof, and quieting title in them.

The briefs on appeal contain much controversy over the question as to whether the trial court has correctly construed the provisions of the judgment in the former ejectment case of *Oaks v. Kendall*. The decree in this case does provide that: "The judgment for the sum of \$1,625.00 awarded to the Defendant, Thomas R. Kendall, against the Plaintiff, G. E. Oaks, by the judgment in the action entitled 'G. E. Oaks, plaintiff, v. Thomas R. Kendall, defendant,' numbered 7641, was a separable judgment on a cause of action for tort, * * * That the cross-plaintiff Evelyn Erwin is entitled to have her said judgment against Thomas R. Kendall in the amount of \$853.00 and accrued interest, as aforesaid, paid and satisfied by said cross-defendant G. E. Oaks out of said sum of \$1,625.00 awarded to said cross-defendant Thomas R. Kendall by the Judgment in said action."

The judgment in the ejectment case did provide: "That plaintiff take nothing by

his complaint in said action; that defendant do have and recover judgment for damages against plaintiff in the sum of \$1,625.00," and that "upon the delivery of said deed to defendant, the defendant pay to plaintiff the sum of \$1,506.33 to cover the balance due plaintiff on the purchase price of said real property."

It does appear that the court determined in the ejectment suit that there was an unpaid balance of \$3,131.33 due on the purchase price of the property, upon which Kendall was entitled to a credit of \$1,625 on account of damages, leaving a balance of \$1,506.33 due to the vendor on the purchase price of the land. In view of what has been said regarding the invalidity of a subsequent judgment lien, it is not necessary for us to determine whether the court properly construed the judgment in the ejectment suit. Regardless of the construction of the former judgment, it remains true that Kendall still owed plaintiffs \$1,506.33 on the purchase price of the land, no part of which has been paid, and that Kendall never received a deed to the land, nor held more than an equitable interest therein. Since this equitable interest in the land is not subject to a judgment lien under the California authorities, it is immaterial how the judgment in the ejectment suit should be construed.

[8] Assuming, without so deciding, that the respondent should have a legal right to foreclose her judgment lien upon the equitable interest of Kendall in the real property to satisfy her claim of \$853 and accrued interest, it would be inequitable for her to do so until the vendor of the real property was first paid the ascertained unpaid balance of the purchase price in the sum of \$1,506.33. The specific terms of the contract, an express lien and equity, entitle the plaintiffs to that payment undiminished by any subsequent claim. It is superior to the rights of all persons, except bona fide purchasers for a valuable consideration without notice. It takes precedence over all claims and liens of judgment and attachment creditors of the purchaser. We are therefore of the opinion the respondent's claim by virtue of her assumed judgment lien is without merit.

The judgment is reversed, and the court is directed to render judgment quieting title in plaintiffs to the real property free from the asserted lien of the respondent.

MILES v. A. ARENA & CO. et al.

Clv. 1997.

District Court of Appeal, Fourth District,
California.

Nov. 29, 1937.

Hearing Denied by Supreme Court
Jan. 27, 1938.

1. Appeal and error ⇨931(1)

Appellate court need only consider evidence most favorable to the support of findings and judgment, since all conflicts were directed to trial judge.

2. Appeal and error ⇨1011(1)

Appellate court cannot disturb trial court's findings merely because of conflicting evidence.

3. Master and servant ⇨316(1)

Where owner of airplane, equipped with power dusting attachment for dusting fields of growing vegetables, was engaged to dust tract of honeydew melons with calcium arsenate by owner of melons who furnished compound and directed amount to be used, but left method of application to owner of airplane, airplane owner was an "independent contractor," as regards liability for death of bees killed by drifting dust.

[Ed. Note.—For other definitions of "Independent Contractor," see Words & Phrases.]

4. Animals ⇨44

In action for death of bees killed by drifting poisonous dust spread by means of airplane on tract of honeydew melons, evidence sustained finding that dust floated from melon field to apiary into hives and killed all the bees.

5. Animals ⇨44

In action for death of bees killed by drifting poisonous dust which was spread by means of airplane on tract of honeydew melons, evidence sustained finding that bees were killed by dust which floated into the hives, and not from dust obtained by bees from the flowers of the melon field.

6. Adjoining landowners ⇨8

Dusting vegetables to kill pests is necessary and lawful operation, but owner of vegetables should not do the dusting or have it done under conditions which would indicate to a reasonably prudent person that damage to his neighbor would result.

7. Adjoining landowners ⇨8

A person is not permitted to use his property in such manner that damage to his neighbor is a foreseeable result.

8. Animals ⇨44

Master and servant ⇨320

Where owner of field of honeydew melons engaged owner of airplane equipped with power dusting attachment to dust melon field with calcium arsenate, and the poisonous dust floated from the melon field to an apiary located about one-half mile from the melon field, causing death of bees, owner of airplane and owner of melon field were liable for death of bees.

9. Evidence ⇨117, 378(1)

In action for death of bees caused by drifting poisonous dust spread by means of airplane on field of honeydew melons, admitting in evidence a letter written on stationery of United States Department of Agriculture stating that dead bees contained unusually large amount of arsenic constituted error, in absence of showing of official capacity of writer of letter and that bees examined were bees killed by defendants' dusting operations.

10. Evidence ⇨117, 378(1)

In action for death of bees killed by drifting poisonous dust spread by means of airplane on field of honeydew melons, admitting in evidence letter stating that bees examined were forwarded to Washington by named person, who was not otherwise mentioned in record, constituted error, since statement in letter was based on hearsay, and there was no sufficient foundation laid for introduction of letter.

11. Appeal and error ⇨1170(7)

In action for death of bees killed by drifting poisonous dust spread by airplane on field of honeydew melons, error in introduction of letter dealing with examination which showed that arsenic was found in bees did not require reversal, where there was ample, competent, and material evidence to support finding that bees were killed by poisonous dust that drifted from melon field (Const. art. 6, § 4½).

12. New trial ⇨102(3)

In action for death of bees killed by drifting calcium arsenate dust spread by means of airplane on field of honeydew melons, denying new trial for newly discov-

ered evidence showing result of experiment with hives of bees placed near field being dusted with calcium arsenate was not error, since experiment could have been performed before trial.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by W. C. Miles against A. Arena & Company and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Harry W. Horton and Hickcox & Trude, all of El Centro, for appellants.

C. B. Smith, of El Centro, for respondent.

MARKS, Justice.

[1,2] This is an appeal from a judgment awarding plaintiff damages for 56 hives of bees killed by drifting dust which was spread by M. L. Carberry by means of an airplane on honeydew melons growing on a tract of land being farmed by A. Arena & Co. The evidence in the case is sharply conflicting. We need only consider the evidence most favorable to the support of the findings and judgment, as all conflicts were directed to the trial judge. We cannot disturb his findings merely because of conflicting evidence.

[3] Carberry owned and operated an airplane equipped with a power dusting attachment with which he dusted fields of growing vegetables. A. Arena & Co. had 140 acres of honeydew melons, and had engaged Carberry to dust them with calcium arsenate, which contains a considerable percentage of arsenic, a poison of sufficient potency to kill bees. The company furnished the compound used by Carberry, and also directed the amount to be used. The details of the method of its application were left to Carberry. It seems clear that in performing this work Carberry was an independent contractor.

[4] Plaintiff had his bees on rented property about one-half mile northwest of the A. Arena & Co. property. The trial court found that the poisonous dust floated from the melon field to the apiary, into the hives and killed all the bees. There is ample evidence supporting this finding. There was a light wind blowing from the southeast to the northwest. Witnesses saw

the dust floating in the air, like a "fog," from the field toward the apiary. Carberry himself testified concerning the floating qualities of the dust: "It is a good deal like road dust. There is a certain amount of air float material in any dust used to dust a crop with and this air float material will get in the air and it never comes down. I suppose it might drift that far, or ten miles, or twenty miles."

[5] The trial court further found that the bees came to their death by means of the poisonous dust floating from the field to and into the hives, and not by their going in search of honey to the blossoms on the field which was being dusted. There is ample evidence to support this finding. Plaintiff testified that he found a fine grey dust in the hives and on the dead bees. All of the bees were dead, including the nurse bees and the queen bee. There is evidence that when bees go to a field that has been dusted with calcium arsenate it takes at least three weeks to kill the workers of a swarm; that the nurse bees and the queen bee never leave the hive during the honey making season. The longest period that could have elapsed between the dusting operation and the finding of the dead bees was fourteen days. Three weeks had not elapsed between the dusting operations and the finding of the bees, all dead, including the nurse bees and the queen bee. This evidence supports the inference drawn by the trial judge that the bees were killed by dust which floated into the hives and not from dust obtained by the bees from the flowers of the melon field.

The trial court awarded damages in the sum of \$336.36. No question is raised as to the amount of this award.

[6] We have been cited to no case involving the recovery of damages for the death of bees caused by a poisonous dust floating from a field where vegetables were being dusted to the apiary. It must be conceded that, in itself, dusting vegetables to kill pests that prey upon them is a necessary and lawful operation which the owner of the vegetables may perform, either himself or through his servants, or may have performed by an independent contractor. However, he should not do the dusting, or have it done, under conditions which would indicate to a reasonably prudent person that damage to his neighbor would result.

[7] While we have found no case involving operations factually similar to those before us, we can see no reason why the same rule should not apply here as governs in cases where damage to a plaintiff's property has resulted from drifting smoke, dust, noxious gases or similar substances originating on a defendant's property. No person is permitted by law to use his property in such a manner that damage to his neighbor is a foreseeable result. See Restatement of the Law, Torts, § 364 et seq.

The case of *Hulbert v. California Portland Cement Company*, 161 Cal. 239, 118 P. 928, 930, 38 L.R.A. (N.S.) 436, involved damage to citrus trees and citrus fruit on the plaintiff's property caused by dust floating to it from the cement plant of defendant. It was there said: "It is well settled in California that a nuisance which consists in pouring soot or the like upon the property of a neighbor in such manner as to interfere with the comfortable enjoyment of the premises is a private nuisance, which may be enjoined or abated, and for which, likewise, the persons specially injured may recover pecuniary damages. Code Civ.Proc., § 731; *Fisher v. Zumwalt*, 128 Cal. 493, 61 P. 82; *Melvin v. E. B. & A. L. Stone Co.*, 7 Cal.App. [327], 328, 94 P. 390; *Judson v. Los Angeles Sub. Gas Co.*, 157 Cal. 169, 106 P. 581, 26 L.R.A.(N.S.) 183 [21 Ann. Cas. 1247]. The last-named case was one in which the operation of a gas factory had been enjoined, and the following language was used: 'A gas factory does not constitute a nuisance per se. The manufacture in or near a great city of gas for illuminating and heating is not only legitimate, but is very necessary to the comfort of the people. But in this, as in any other sort of lawful business, the person conducting it is subject to the rule, "sic utere tuo ut alienum non lædas," even when operating under municipal permission, or under public obligation to furnish a commodity. *Terre Haute Gas Co. v. Teel*, 20 Ind. 131; *Attorney-General v. Gaslight & Coke Co.*, L.R. 7 Ch.Div. 217; *Sullivan v. Royer*, 72 Cal. 248, 13 P. 655 [1 Am.St. Rep. 51]. Nor will the adoption of the most approved appliances and methods of production justify the continuance of that which, in spite of them, remains a nuisance. *Evans v. Fertilizing Co.*, 160 Pa. [209], 223, 28 A. 702; *Susquehanna Fer. Co. v. Malone*, 73 Md. [268], 276, 20 A.

900, 9 L.R.A. 737, 25 Am.St.Rep. 595; *Susquehanna Fer. Co. v. Spangler*, 86 Md. 562, 39 A. 270, 63 Am.St.Rep. 533." See, also, *Vowinkel v. N. Clark & Sons*, 216 Cal. 156, 13 P.2d 733; *Judson v. Los Angeles Suburban Gas Co.*, 157 Cal. 168, 106 P. 581, 26 L.R.A.(N.S.) 183, 21 Ann. Cas. 1247; *Fendley v. City of Anaheim*, 110 Cal.App. 731, 294 P. 769; *Williams v. Blue Bird Laundry Co.*, 85 Cal.App. 388, 259 P. 484.

The case of *Centoni v. Ingalls*, 113 Cal. App. 192, 298 P. 47, 48, involved damages resulting from dust floating from defendant's clay bins. It was there said: "A property owner is entitled to the peaceful enjoyment of his property free from an unlawful invasion of his rights of ownership by the act of another. Dust constitutes a nuisance if it 'causes perceptible injury to the property, or so pollutes the air as sensibly to impair the enjoyment thereof.' *Tuebner v. California Street R. Co.*, 66 Cal. 171, 4 P. 1162, 1164; *California Orange Co. v. Riverside Portland Cement Co.*, 50 Cal.App. 522, 195 P. 694; *Hulbert v. California, etc., Co.*, 161 Cal. 239, 118 P. 928, 38 L.R.A.(N.S.) 436; *McIntosh v. Brimmer*, 68 Cal.App. 770, 230 P. 203."

[8] Defendants knew, or should have known, that the light dust projected under pressure onto the melons would float in the air. There is evidence that a light breeze was blowing during the dusting operations. They should have known that the dust would float for a considerable distance when propelled by such a breeze. Dusting material containing a poison that would kill bees was used. Under the conditions prevailing at the time they should have foreseen the ensuing damage to plaintiff. It follows that they must respond in damages.

[9, 10] Plaintiff introduced in evidence a letter written on stationery bearing the heading: "United States Department of Agriculture—Bureau of Entomology—Pacific Coast Bee Culture Field Station," and the signature, "E. L. Sechrist—Associ-

ate Agriculturist." The letter stated that "a reply has been received from the Bureau of Chemistry and Soils on the examination of the dead bees you sent to us, referred to in your letter of August 27. The amount of arsenic in these bees was unusually large, the largest that has yet been found in any bees examined by this bureau."

There is no showing of the official capacity of Mr. Sechrist. There is no showing that the bees examined were the same bees that were killed by defendant's dusting operations. In another letter admitted in evidence it is stated that the bees examined were forwarded to Washington by a "Mr. Vansell." This person is not otherwise mentioned in the record. Plaintiff testified that he shipped some of the bees to the agricultural branch of the state university at Davis and that they were forwarded to Washington. The statements in the letters must, of necessity, have been based on hearsay.

[11] There is no sufficient foundation laid for the introduction of either letter. However, this error is not sufficiently prejudicial to require a reversal of the judgment. There is ample, competent and material evidence in the record to support the finding that plaintiff's bees were killed by the poisonous dust that drifted from the A. Arena & Co. field. There has been no miscarriage of justice from the error. (Section 4½, art. 6, Const.)

[12] Defendants moved for a new trial on the ground, among others, of newly discovered evidence. This newly discovered evidence was the result of an experiment with hives of bees placed near a field being dusted with calcium arsenate. This could hardly be classed as newly discovered evidence which was not available to defendants at the time of trial. There is no sufficient reason shown why this experiment could not have been performed as well before the trial as after it.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

23 Cal.App.2d 713

**BARDINELLI v. CHURCH OF ALL NATIONS, METHODIST EPISCOPAL,
et al.**

Civ. 11338.

District Court of Appeal, Second District,
Division 1, California.

Dec. 2, 1937.

Hearing Denied by Supreme Court.

Jan. 31, 1938.

1. Charities ⇨45(2)

A charity which maintained boys' club for needy children and selected its employees with due care was not liable for death of six year old boy who fell off fire escape on outside of club building, even though only one employee was on duty at time of accident, since a charitable institution is not liable to a beneficiary thereof for negligence of its agents and servants unless it has failed to use due care in selecting them.

2. Charities ⇨45(2)

A person who accepts the benefit of public or private charity exempts, by implied contract, the benefactor from liability for negligence of its servants in administering the charity if benefactor has used due care in selecting those servants.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Queen Bardinelli against the Church of All Nations, Methodist Episcopal, the Los Angeles Missionary and Church Extension Society of the Methodist Episcopal Church, and others. From a judgment for plaintiff, the second named defendant appeals.

Reversed.

George L. Greer, of Los Angeles, for appellant.

Gerald E. Marks, of Los Angeles, for respondent.

YORK, Presiding Justice.

This action for damages for the death of a six year old child, brought by the mother of said child against defendant corporation Los Angeles Missionary and Church Extension Society of the Methodist Episcopal Church, and its individual agents and employees, was tried by the court sitting without a jury upon a stipulated statement of facts. It appears therefrom that the said defendant corporation owned and operated the All Nations Boys Club and admitted thereto the children of the poor and needy

of that section of the city of Los Angeles adjacent to the said club, and allowed them the use of its gymnasium, workshops, and shower rooms and furnished entertainment to large groups of young children in order to keep them off the city streets. On February 29, 1936, while plaintiff's young son was playing about the club, he climbed upon a fire escape, maintained on the outside of the club building and extending from the second floor thereof to the roof, and fell to his death upon the sidewalk below.

Judgment for \$2,500 was rendered against appellant corporation, the individual defendants being absolved from liability. Its motion for new trial having been made and denied, appellant corporation seeks a reversal of the judgment on the ground that it is an eleemosynary institution and therefore exempt from liability for negligence.

[1,2] Respondent admits, and it was found by the court, that appellant corporation was organized and existing solely for charitable and nonprofitable purposes and that all of its servants were selected with due care, but she maintains that the negligence of appellant in failing to employ sufficient employees to properly discharge its duties and obligations, and its negligence in failing to make proper use of the employees which it had in its employ to meet and discharge its obligations is the negligence of the corporation itself in the discharge of its administrative duties which cannot be attributed or charged to its employees. This contention is based on the admitted fact that at the time the accident occurred only one employee was on duty, and respondent argues that this was not a sufficient number to properly supervise the boys then and there attending the institution.

No authority is cited in support of this last contention, nor does any reason appear for attaching liability under such circumstances. Especially is this true when it appears to be the settled law that an eleemosynary and charitable institution is not liable to a beneficiary thereof for the negligence of its agents and servants unless it has failed to use due care in the selection of such agents (*Young v. Boy Scouts of America*, 9 Cal.App.2d 760, 764, 51 P.2d 191, citing *Thomas v. German Gen., etc., Soc.*, 168 Cal. 183, 141 P. 1186; *Stewart v. California Medical, etc., Ass'n*, 178 Cal. 418, 176 P. 46; *Ritchie v. Long Beach Community Hospital Ass'n*, 139 Cal.App. 688, 34 P.2d 771); and where one accepts the benefit of public or private charity he exempts, by

implied contract, the benefactor from liability for the negligence of the servants in administering the charity if the benefactor has used due care in the selection of those servants. *Lewis v. Y. M. C. A.*, 206 Cal. 115, 116, 273 P. 580; *Baker v. Board of Trustees*, 133 Cal.App. 243, 245, 23 P.2d 1071. In the late case of *Hallinan v. Prindle*, 17 Cal.App.2d 656, at page 669, 62 P.2d 1075, 1081, the court said: "A liberal construction of the rule exempting charitable institutions from liability for the negligent acts of their employees, when due care is exercised in their selection and retention, works no injustice, since the principal ground upon which such liability is founded, namely, that the employer is using the services of the employee for his own profit, convenience, or pleasure, is, in the case of a charitable institution, entirely lacking."

The judgment is reversed.

I concur: DORAN, J.



23 Cal.App.2d 639

NEWMAN v. CAMPBELL et al.

Civ. 10372.

District Court of Appeal, First District,
Division 1, California.

Nov. 29, 1937.

Rehearing Denied Dec. 29, 1937.

1. Trial ⇨260(8)

In patient's action against dentist for injuries allegedly caused by negligent administration of anaesthetic, refusal of instruction that verdict must be for dentist, if preponderance of evidence did not show that dentist or his employees were negligent, was not prejudicial where court correctly defined proximate cause and charged that, if there were two or more possible causes of injury for one or more of which dentist was responsible, patient must show that injury resulted from that cause and that patient could not recover if injuries were due to a cause beyond dentist's control or were not caused by his act or omission.

2. Physicians and surgeons ⇨18(10)

In patient's action against dentist for injuries allegedly caused by negligent administration of anaesthetic, instruction that

patient's life expectancy might be considered in determining patient's damage, if any, was not improper on ground that patient was not in normal health at time of injuries, where evidence on question of patient's health was conflicting, and jury might have found that patient was in ordinary health for a person of her age.

3. Evidence ⇨364

In patient's action against dentist for injuries allegedly caused by negligent administration of anaesthetic, mortality table was admissible and, though not conclusive, was evidence of probable duration of patient's life.

4. Physicians and surgeons ⇨18(10)

A patient suing dentist for injuries allegedly caused by negligent administration of anaesthetic by dentist's employee was entitled to instruction based on her theory of case under evidence that anaesthetic was injected into infected parts of patient's gums with too great frequency and that injections so made tended to spread infection.

5. Appeal and error ⇨216(2)

A dentist appealing from judgment for patient in action for injuries allegedly caused by negligent administration of anaesthetic could not complain of instruction on patient's life expectancy where dentist had offered no instruction explaining in more detail weight to be given elements fixing life expectancy.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Esther Newman against Dr. J. A. Campbell and another. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Myron Harris, William H. Older, and John Jewett Earle, all of Oakland, for appellant.

A. W. Hollingsworth, of Santa Rosa, and Lewis E. Lercara and James R. Agee, both of Oakland, for respondent.

PER CURIAM.

An appeal by defendant J. A. Campbell, a dentist, from a judgment entered against him in an action to recover for personal injuries alleged to have been caused by the negligent administration of an anaesthetic by his employee.

It was shown by the evidence, although conflicting and subject to different inferences, that the anaesthetic was injected into infected parts of plaintiff's gums and this with too great frequency. According to the medical testimony injections so made tended to spread the infection, and it supports the jury's implied finding of negligence and the damage alleged.

Appellant claims that the trial court erred by refusing an instruction on the question of proximate cause, and also by an instruction to the jury with regard to the expectancy of life of persons of plaintiff's age.

The court by its instruction correctly defined the terms "negligence," "burden of proof," "preponderance of the evidence" and "proximate cause"; but appellant complains that the refusal of his proposed instruction was prejudicially erroneous.

[1] The material portion of the instruction refused reads as follows: "If you are unable to ascertain from a preponderance of the evidence in this case that the defendant or his employees were negligent—negligence measured as heretofore defined for you and proximately causing the condition complained of—then your verdict must be for the defendant." Although the proposed instruction was not improper, nevertheless the other instructions sufficiently covered the issue in this particular. As stated, the court correctly defined "proximate cause," and the jury was told in substance that, if there were two or more possible causes of the injury, for one or more of which defendant was responsible, the plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause; and that, if they found that the injuries were due to a cause over which the defendant had no control, or were not caused by his act or omission, the plaintiff could not recover. These instructions were sufficient, and the refusal of that offered by plaintiff was not prejudicial. See *Wirthman v. Isenstein*, 182 Cal. 108, 187 P. 12; *Weaver v. Carter*, 28 Cal.App. 241, 152 P. 323.

[2-5] As stated, the court instructed as to plaintiff's life expectancy, and that the jury might take this into consideration in determining her damage, if any. It is urged that she was not in normal health at the time of her injury, and that consequently the instruction was improper. On this question also the evidence was conflicting, and the jury might have found that the plaintiff was for a person of her age in

ordinary health. The mortality table was admissible and, although not conclusive, was evidence of the probable duration of her life. Under the evidence she was entitled to an instruction based upon her theory of the case. *Groat v. Walkup Drayage, etc., Co.*, 14 Cal.App.2d 350, 58 P.2d 200; *Morrow v. Mendleson*, 15 Cal.App.2d 15, 58 P.2d 1302. If the appellant desired an instruction explaining in more detail the weight to be given the elements fixing her life expectancy, as was the case in *Groat v. Walkup Drayage, etc., Co.*, supra, such an instruction should have been offered. This was not done, and in the circumstances appellant has no ground for complaint. *Murphy v. National Ice Cream Co.*, 114 Cal.App. 482, 300 P. 91.

In view of the injuries which plaintiff has suffered the award was not excessive.

The conclusions reached on the issues are fairly supported, and no error which would justify the reversal of the judgment has been shown.

The judgment is affirmed.



23 Cal.App.2d 649

PINGREE et al. v. REYNOLDS.

Civ. 10447.

District Court of Appeal, First District, Division 2, California.

Nov. 29, 1937.

1. Judgment ☞160

Affidavit supporting motion to set aside default judgment was insufficient, where it alleged that defendant had fully and thoroughly stated his defense to his attorney rather than that he had fully and fairly stated facts of the case to attorney.

2. Judgment ☞160

On motion to set aside default judgment, an affidavit of merits must show that defendant has fully and fairly stated facts of the case to his counsel before advice of counsel can amount to prima facie showing of merits on behalf of defendant, and for defendant to say that he has fully and fairly stated the facts of his defense to his attorney is not a compliance with the rule.

3. Judgment ☞161

On motion to set aside a default judgment, unverified answer of defendant did not

supply the place of an affidavit of merits, since, though a verified answer may be equivalent to an affidavit, an unverified answer is not equivalent.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by L. W. Pingree and another against F. A. Reynolds. From an order setting aside a default entered in favor of plaintiffs, the plaintiffs appeal.

Order reversed.

Kenneth R. McDougall, of Palo Alto, and Charles Carlstroem, of Sunnyvale, for appellants.

F. E. Hoffmann, of San Mateo, for respondent.

DOOLING, Justice pro tem.

This is an appeal by plaintiffs from an order setting aside a default entered after failure to appear and plead within the time allowed by law. The motion was supported by the affidavit of defendant's attorney. The sufficiency of the affidavit to support the order is attacked on the grounds that the facts set out do not show any legal justification for defendant's failure to appear in time, and that they are hearsay as to affiant attorney. We pass these questions because the affidavit of merits is clearly insufficient under the settled practice. The affidavit of merits reads: "That defendant in the above entitled matter has fully and thoroughly stated his defense to affiant herein and affiant alleges that said defendant has a good defense to said action."

[1] Passing, likewise, the objection that the assertion that "defendant * * * has fully and thoroughly stated his defense to affiant" is obviously hearsay as to affiant (Bailey v. Taaffe, 29 Cal. 422; Andrews v. Jacoby, 39 Cal.App. 382, 178 P. 969; Jenkins v. Gamewell, etc., Tel. Co., 3 Cal.Unrep. 655, 31 P. 570), and treating the affidavit as though made on the personal knowledge of affiant, it would still be insufficient as an affidavit of merits.

[2] "An affidavit of merits must show that the defendant has fully and fairly stated the facts of the case to his counsel, before the advice of counsel can amount to a prima facie showing of merits on behalf of the defendant. For a defendant to say that he has fully and fairly stated the facts of his defense to his attorney is not a com-

pliance with the rule requiring that he shall state the facts of the case." Ross v. San Diego Glazed C. P. Co., 50 Cal.App. 170, 172, 194 P. 1059, 1060; Nickerson v. California Raisin Co., 61 Cal. 268; Morgan v. McDonald, 70 Cal. 32, 11 P. 350; Slater v. Selover, 25 Cal.App. 525, 144 P. 298; Forrest v. Knox, 21 Cal.App. 363, 131 P. 894; Cooper-Power v. Hanlon, 7 Cal.App. 724, 95 P. 678.

[3] Respondent's claim that the unverified answer of defendant supplies the place of an affidavit of merits cannot be sustained. It has frequently been held that a verified answer may stand in place of an affidavit of merits (14 Cal.Jur. pp. 1057, 1059, and cases cited), but we have found no case applying the rule to an unverified answer. Obviously, a verified answer, being sworn to, is the equivalent of an affidavit. An unverified answer, not being sworn to, just as obviously is not such equivalent.

The order appealed from is reversed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.



23 Cal.App.2d 608

In re MATTHIESSEN'S ESTATE.

JONES v. MATTHIESSEN.

Civ. S. C. 56.

District Court of Appeal, Second District,
Division 1, California.

Nov. 26, 1937.

Hearing Denied by Supreme Court
Jan. 24, 1938.

1. Statutes ⇄ 200

The addition of a comma on the re-enactment of a statute was insufficient to show a change of legislative intention from that previously found by Supreme Court (Probate Code, § 78).

2. Statutes ⇄ 226

Ordinarily, statute adopted from that of another state is presumed to have been adopted with construction placed upon it by courts of such state, but presumption is overcome by long-standing decisions of adopting state favoring contrary interpretation.

3. Wills Ⓒ822

A devisee of specific realty was entitled to payment from residuary estate of mortgage created after execution of will, and to amount of rents collected by executrix and applied on mortgage, where estate was solvent, notwithstanding statute providing that such a charge or encumbrance should not revoke the disposal, "but the property, subject to such charge or encumbrance, or the remaining interest therein, passes by the will" (Probate Code, § 78).

4. Wills Ⓒ488

In proceeding on accounting of executrix, where testatrix, after executing will, executed mortgage of realty specifically devised, mortgage was silent as to whether it should be paid from residuary estate, and will was free of ambiguity, other evidence of testatrix' intention on execution of will and mortgage was inadmissible (Probate Code, § 78).

5. Wills Ⓒ440

In absence of uncertainty or ambiguity, a testator's intent must be gathered from the will.

6. Executors and administrators Ⓒ314(11), 501

In proceeding on accounting of executrix, who was also residuary legatee, decree denying distribution to executrix, declining to pass on application for extraordinary fees and commissions for executrix and her attorneys, and placing application "off calendar," until compliance with order for exoneration from residuary estate of mortgage of realty specifically devised, was discretionary (Probate Code, § 78).

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Proceeding in the matter of the estate of Maude C. Bush Matthiessen. From an order and a decree settling the first and final account of Mabel Chapman Jones, executrix, and ordering partial distribution of the estate, Mabel Chapman Jones appeals as executrix and individually, opposed by Frank Matthiessen.

Affirmed.

Potter & Potter, of Los Angeles, for appellant.

Hawkins & Hawkins, of Los Angeles, for respondent.

DORAN, Justice.

Appellant Mabel Chapman Jones, as executrix of the estate of Maude C. Bush Matthiessen, and individually, as the residuary legatee of said estate, appeals from certain portions of an order and decree settling first and final account and ordering partial distribution of the estate of Maude C. Bush Matthiessen, deceased.

The facts, briefly, are as follows: After his marriage to decedent in August, 1927, respondent Frank Matthiessen conveyed to her a residence then owned by him in Beverly Hills, Cal. During the early part of the year 1932, said Frank Matthiessen separated from his wife and took up his residence in another state. The property in Beverly Hills, together with all the furniture and furnishings therein contained, was left, under the terms of decedent's will admitted to probate, to respondent. All the rest, residue, and remainder of the estate were devised and bequeathed to said Mabel Chapman Jones, decedent's sister (appellant herein), who was named and later appointed, and who qualified as, executrix.

At the time of the execution of the will, in July, 1932, the afore-mentioned residence property was unencumbered, but upon the death of decedent it developed that about fourteen months after the execution of the will, and about six months prior to her death, she had borrowed the sum of \$12,000, evidenced by her promissory note in favor of the lender in that amount, payable in installments, to secure the payment of which she had mortgaged said Beverly Hills property. The will, however, contained no reference to this mortgage lien or encumbrance on the Beverly Hills residence.

In due course of the administration of the estate, the assignee of the note and mortgage presented to appellant, in her capacity as special administratrix, its claim based on the full unpaid balance of the mortgage note, but the claim was rejected by her, although she did pay the installments of principal and interest when they became due by appropriating for this purpose rents paid to her by tenants who had leased the Beverly Hills property. The executrix in her final account charged herself with rents collected, and credited herself, among other items, with the amounts paid toward principal and interest on the mortgage.

The court held that the rents were not properly applied toward the payment of the mortgage and that the residuary estate should be charged with the payment of the mortgage lien in exoneration of the said devised real property, and to provide the necessary cash by a present sale of sufficient of the property comprising the residuary estate. As to the rents, the court held respondent to be entitled to a cash balance in the sum of \$2,508.71.

The appeal herein is from those portions of the decree wherein the court directed that the executrix of the estate (1) discharge out of the residuary portion of the estate the mortgage placed upon the Beverly Hills property, and (2) pay to respondent the sum of \$2,508.71 in cash representing a balance due respondent for rents collected; also, (3) from the order refusing to adjudicate the question of whether executrix and her attorneys are entitled to extraordinary fees for services rendered, and in ordering the petition therefor "off calendar" until the order to discharge said mortgage is complied with.

Section 78 of the Probate Code (formerly sections 1302 and 1303 of the Civil Code) provides as follows: "Neither a charge or encumbrance placed by a testator upon property previously disposed of by his will, for the purpose of securing the payment of money or the performance of any covenant or agreement, nor a conveyance, settlement, or other act of a testator, by which his interest in any such property is altered, but not wholly divested, is a revocation of the disposal; but the property, subject to such charge or encumbrance, or the remaining interest therein, passes by the will."

Appellant contends that the effect of the concluding words of this section is to abrogate the common-law rule that the devisee of specific real estate which has been encumbered by the testator in his lifetime may require that it be freed from the burden of such encumbrance at the expense of the residuary estate. In effect, it is argued that the words "subject to such charge or encumbrance" limit the estate to which the devisee is entitled as between such devisee and the residuary legatee. It may be conceded that by statutes, and judicial decisions construing them, in many states it is now the rule that the devisee of mortgaged property in all cases takes it cum onere and without right of exoneration from the residuary estate, unless a different intent is ex-

pressed in or can be gathered from the will. In this state, however, the courts have followed the ruling in *Estate of Woodworth*, 31 Cal. 595, in which precisely the same contention as that here advanced by appellant was rejected. The court there said: "And it is also the settled rule of English and American law, that this order" (of payment of debts of the testator) "is not to be disturbed by the fact that lands are devised subject to the mortgage or incumbrance thereon. The personal estate is first to be applied and exhausted, even for the payment of the debts charged upon the real estate by mortgage, or other incumbrance, if the debt so charged upon it was a personal debt of the testator; for the mortgage is regarded as merely a collateral security for the personal obligation. * * *

It is further claimed that section fifteen of the 'Act concerning wills' requires the devisees of lands incumbered by mortgages to take them cum onere without any right to have them exonerated out of the personal estate. The section is as follows: 'A charge or incumbrance upon any estate for the purpose of securing the payment of money or the performance of any covenant or agreement shall not be deemed a revocation of any will relating to the same estate which was previously executed, but the devises and legacies therein contained shall pass *subject to such charge or incumbrance*.' (Belk.Prob.Act, p. 209.) It is plain, however, that no such object was contemplated or provided for in this section. The object was simply to provide in express terms that a subsequent mortgage should not be construed as a revocation of the will as to the mortgaged land—that it should still go to the devisees, but subject to the mortgage. That is to say, that, as to the mortgagee and devisee, neither the mortgage nor the devise should fail, unless the entire mortgaged estate should be required to satisfy the debt secured. This is a provision affecting the rights of the parties to the mortgage and devise. It has no reference whatever to the order of priority as between legatees, devisees and heirs. The words 'subject to such charge or incumbrance' mean no more nor less, in this connection in a statute, than in the same connection in a will. And the signification of these words, in a similar connection in wills, had long been settled by an unvarying line of decisions. Says Jarman: 'Thus it is settled that a devise of lands subject to the mortgage or incumbrance thereupon, does not

so throw the charge on the estate as to exempt the funds, which by law are preferably liable.' * * * It was with reference to this settled construction of similar language in wills that these words were used in the statute. Like many of the provisions already cited, it only enacted in express terms the rule of the common law upon the subject. In fact, if any other specific intent can be inferred from the adoption of this provision, it would seem to be to avoid by express provision, rather than effect, the result claimed for it by the respondent; for, at common law, any change in the condition, any alteration or new modeling of the estate in lands after the making of the will, was a revocation, except in case of mortgages and charges on the estate for debts, which were only a revocation quoad the special purpose, and were taken out of the rule on the ground that they were securities only. * * * *Thus far we have seen that the long-established rule of priority in marshaling the assets, as between legatees, devisees and heirs, has not been disturbed by our statute.* It follows that as between the legatee of the personalty, and the devisees of the realty, the executor was not authorized to appropriate the rents of the real estate accrued subsequent to the decease of the testator, to the satisfaction of the mortgage debt in exoneration of the personalty." (Italics added.)

Neither reference nor research reveals any subsequent California case wherein the conclusion of the Woodworth Case, supra, has been overruled; nor, in the various reenactments of the statute there considered has the Legislature indicated that the court in that case misunderstood its intent.

Appellant, however, argues as follows, quoting from appellant's brief: "The punctuation of the last clause of Section 78 of the Probate Code is significant. The intention of the Legislature is plainly shown by the addition of the phrase 'or the remaining interest therein'; also by having placed a comma after the phrase 'but the property', and a comma after the phrase 'subject to such charge or encumbrance.' * * * If the Legislature had intended that this was to be construed as a description of the condition of the property which passes to the specific devisee, it would not have used a comma after the word 'property.'"

Section 1302 of the Civil Code originally was as follows: "A charge or encum-

brance upon any estate, for the purpose of securing the payment of money or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed; but the devise and legacies therein contained must pass, subject to such charge or encumbrance." Section 78 of the Probate Code, which, in substance, is the reenactment of section 1302 and section 1303, has been hereinbefore quoted.

[1] Appellant, as above noted, attaches considerable significance to the use of the comma and, in that connection, it is true that the presence or absence of a comma may, in some circumstances, effect a vital change in the meaning of a statute, but, from an examination of the history, as well as the substance and form, of these sections, the reasonable and logical conclusion appears to be that the Legislature intended them to have no different meaning in their re-enacted form than they had before. Especially is this true in the light of the fact that the re-enacted provisions above referred to were adopted by the Legislature after the decision in the Woodworth Case, supra, under which circumstances, had such a vital change been contemplated, plain language would have been employed rather than the use of a mere comma. The language in its present form still states only the obvious fact that the property passes, encumbered. It could pass no other way, without depriving the mortgagee of his lien.

Estate of Woodworth, supra, was cited in Estate of Phinney, Myr.Prob. 239; Estate of Heydenfeldt, 4 Coffey's Pro.Dec. 510; Estate of De Bernal, 165 Cal. 223, 131 P. 375, 380, Ann.Cas.1914D, 26; and the principle was followed in Estate of Morse, 95 Cal.App. 652, 273 P. 130. In Estate of De Bernal, supra, it was said: "The mortgage was a mere incident of the debt evidenced by such note. Her" (decedent's) "liability on account thereof was just as much a 'debt,' within the meaning of the word as used in the provisions regarding payment of debts contained in our probate act, as any of her unsecured liabilities. * * * We find no dissent in the authorities on the proposition that where the mortgage lien was created by the testator himself to secure his own debt, and at the time of his death the mortgage is simply collateral security for the personal obligation, it is to be paid, as between executors,

devises, legatees, and heirs, in the same manner as the general unsecured debts of the deceased, in so far as the question from what property of deceased it is to be paid is concerned, unless the will discloses a different intent on the part of the testator. This principal was stated as 'the settled rule of English and American law' in *Estate of Woodworth*, 31 Cal. [595], 600."

[2] Appellant asserts that sections 1301 and 1303 of the Civil Code were adopted from provisions of the New York Code (Decedent Estate Law, book 13, art. II, § 38), which uniformly have been construed by New York courts as depriving the devisee of the right to exoneration from the residuary estate. Respondent calls attention, however, to section 250 of the Real Property Law of that state, which provides that when real property, subject to a mortgage executed by any ancestor or testator, descends to an heir or passes to a devisee, such heir or devisee must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will that the mortgage be otherwise paid. This enactment has been in effect in one form or another in the state of New York since at least as far back as 1842, and although it is not mentioned in the case cited by appellant (*Langdon v. Astor's Ex'rs*, 10 N.Y. Super. Ct. [3 Duer] 477), it is cited, with the Decedent Estate Law, in *Halsey v. Reed* (1842) 9 Paige 446; *Wetmore v. Peck*, 66 How. Prac. 54; and *In re Watson*, 101 App. Div. 550, 92 N.Y.S. 195 (cited in *In re Dell's Estate*, 154 Misc. 216, 276 N.Y. S. 960) in support of the holding that the devisee is not entitled to exoneration. Further, granting that ordinarily a statute adopted from that of another state is presumed to have been adopted with the construction placed upon it by the courts of that state, that presumption is here overcome by the long-standing decisions of this state favoring a contrary interpretation.

[3] The foregoing impels the conclusion that the trial court properly ordered that the mortgage be paid out of the residuary estate. The court also was correct in ordering the rents of the property which

had been collected by appellant be paid to respondent; the estate being solvent. *Estate of Woodworth*, supra; *Washington v. Black*, 83 Cal. 290, 23 P. 300; *Estate of De Bernal*, supra.

[4, 5] Nor did the court err, as contended by appellant, in rejecting an offer by appellant to prove "intent." In this connection appellant sought to prove the intent of the testatrix at the time the will was executed as well as the intent at the time the mortgage was executed, contending that such intention contemplated that the mortgage should not be paid from the residuary estate. It should be noted here that the mortgage is silent on this subject. It should also be noted that the will is free of ambiguity. Under such circumstances, the intention of the testatrix is evidenced by the mortgage and by the will, for whatever might have been the actual intent of the testatrix at the time of the execution of the mortgage, the will continued in effect thereafter and now states her intent as of the date of her death. *Estate of Babb*, 200 Cal. 252, 252 P. 1039. In the absence of uncertainty or ambiguity, her intent must be gathered from the will. *Estate of Woodworth*, supra; *In re Hodgkin's Estate*, 110 Or. 381, 221 P. 169, 223 P. 738; *Estate of Willson*, 171 Cal. 449, 153 P. 927; *Estate of De Bernal*, supra.

[6] Appellant's final contention, that the lower court erred in denying distribution to appellant as residuary legatee until its order for exoneration of the mortgage should be obeyed and that it abused its discretion in declining to pass upon the application for extraordinary fees and commissions and placing such application "off calendar" until the main question should be settled, cannot be sustained. As to these issues the court acted with authority, and there is nothing in the record to justify the asserted claim that such action on the part of the court was an error of judgment or an abuse of discretion.

For the foregoing reasons, the order and decree appealed from is in all respects affirmed.

I concur: YORK, P. J.

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SECOND SERIES

10 Cal.2d 198

PEOPLE v. RANKIN et al.
Cr. 4116.

Supreme Court of California.

Nov. 26, 1937.

Rehearing Denied Dec. 23, 1937.

1. Criminal law $\Rightarrow$ 1144(13)

Evidence will be viewed most favorably to the prosecution on appeal from a conviction.

2. Criminal law $\Rightarrow$ 511(2)

Conviction on accomplice's testimony cannot be sustained under statute unless testimony is corroborated by other evidence which of itself and without aid of accomplice's testimony connects defendant with offense (Pen.Code, § 1111).

3. Criminal law $\Rightarrow$ 511(1)

Abortion convictions on accomplice's testimony, which were not corroborated by other testimony as required by statute, would be reversed (Pen.Code, § 1111).

4. Criminal law $\Rightarrow$ 511(2)

Abortion conviction was proper where accomplice's testimony was corroborated as required by statute by other evidence tending to connect defendant with abortion (Pen. Code, § 1111).

5. Criminal law $\Rightarrow$ 13

Statute prohibiting procuring of miscarriage is not unconstitutional as failing to inform defendant accused thereunder with reasonable certainty as to acts prohibited, since phrase "procuring miscarriage" is sufficiently explicit to inform persons of common intelligence and understanding of acts which are prohibited (Pen.Code, § 274).

"Miscarriage" is the expulsion of the ovum or embryo from the uterus within the first six weeks after conception. Between that time, and before the expiration of the sixth month, when the child may possibly live, it is termed abortion. When the delivery takes place soon after the sixth month, it is denominated premature labor. But the criminal act of destroying the fetus at any time before birth is termed, in law, procuring miscarriage.

[Ed. Note.—For other definitions of "Miscarriage," see Words & Phrases.]

6. Criminal law $\Rightarrow$ 1186(4)

Abortion count which failed to allege that woman on whom abortion was perform-

ed was pregnant did not constitute prejudicial error, where evidence adduced on trial established pregnancy of woman involved (Pen.Code, § 274; Const. art. 6, § 4½).

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

William A. Byrne, Valentine St. John, James Beggs, Jesse C. Ross, and others were convicted of abortion, and the named defendants appeal.

Affirmed in part, and reversed in part.

Prior opinion, 67 P.2d 703.

Clarence W. Hull and Sherman & Sherman, all of Los Angeles, for appellant James Beggs.

Charles A. Thomasset, of Los Angeles, for appellant Valentine St. John.

R. E. Parsons, and Jerome O. Hughes, both of Los Angeles, for appellant William A. Byrne.

Abe Richman, of Los Angeles, for appellant Jesse C. Ross.

Rosecrans & Emme and Bayard R. Rountree, all of Los Angeles, for appellants R. L. Rankin and William A. Byrne.

Anna Zacek, of Los Angeles, for other appellants.

U. S. Webb, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Verne L. Ferguson, Deputy Dist. Atty., both of Los Angeles, for the People.

WASTE, Chief Justice.

This cause was taken over after decision in the District Court of Appeal of the Second Appellate District, Division 2, in order that we might more fully examine the record and certain issues raised upon the appeal. An examination of the evidence, covering 1,742 pages of the reporter's transcript, compels us to agree with the conclusion of the Appellate Court that as to the appellants Beggs, Ross, and St. John there is a dearth of corroborating evidence within the meaning of section 1111 of the Penal Code as interpreted in *People v. Kempley*, 205 Cal. 441, 271 P. 478, and *People v. Davis*, 210 Cal. 540, 293 P. 32. However, we cannot accept the conclusion announced by that court with reference to the contention of the appellant Byrne directed against count VII of the indictment. This point will be discussed later.

Therefore, with such additional comment as shall hereinafter appear, we adopt the following portions of the opinion of Mr. Justice McComb as and for the decision of this court:

"Defendants were accused by the grand jury of the county of Los Angeles of the crime of conspiracy to violate section 274 of the Penal Code, a felony, and in eight separate counts of having committed abortions. Defendants were tried jointly before a jury, whose verdicts were:

"(1) Guilty:

R. L. Rankin	}	—Counts I, II, V, VII and IX
George E. Watts		
J. O. Shinn		
William A. Byrne		
Grace Moore		
Lillian Wilson		
James Beggs		
Jesse C. Ross		

John A. Creeth	}	—Counts I and V
Valentine St. John		

Violette Pellegrini	}	—Counts I, II and V

"(2) Not guilty:

Jessie Radcliffe	}	—All counts
J. C. Perry		

"Defendants H. L. Houston, Bessie McCarthy, and Beatrice Bole were not apprehended, and defendant W. Norman Powers entered a plea of guilty to count I of the indictment, and testified on behalf of the state.

"Defendants James Beggs, William A. Byrne, R. L. Rankin, Jesse C. Ross, and Valentine St. John alone appeal from the judgments and orders denying their motions for a new trial.

"The appeal of defendant R. L. Rankin has heretofore been dismissed at his request.

[1] "Viewing the evidence most favorable to the prosecution (*People v. Dukes*, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

"Defendants R. L. Rankin and George E. Watts owned, operated, and directed a series of offices, extending from Seattle, Wash., to San Diego, Cal., for the purpose of illegally performing abortions. The remaining defendants, with the exception of those who were acquitted by the jury, were employed by them in various capacities in connection with the conduct of their illegal business. In the course of their business and in pursuance of their conspiracy abortions were performed upon Gladys Duckworth, Peggy Nowell, and

Josephine Peacock, as alleged in counts II, V, and IX of the indictment.

"A.

"Each appellant urges reversal of the judgments on the ground that there is no substantial corroboration of the testimony of his accomplices to show his participation in or connection with any of the crimes of which he was convicted.

[2] "The law is settled in California that a conviction cannot be sustained upon the testimony of an accomplice, unless it be corroborated by other evidence which tends to connect defendant with the commission of the offense charged in the indictment (section 1111, Pen.Code), and it is equally clear that the corroborative evidence necessary to comply with this requirement must of itself without the aid of the accomplice's testimony connect or tend to connect defendant with the commission of the offense charged. *People v. Kempley*, 205 Cal. 441, 455, 271 P. 478; *People v. Janssen*, 74 Cal.App. 402, 406, 240 P. 799; *People v. Rokes*, 18 Cal.App. 2d 689, 64 P.2d 746.

[3] "Applying the foregoing rules to the instant case, we find with reference to the appellants Beggs, Ross, and St. John, that, after eliminating entirely the testimony of their accomplices, the record is completely devoid of any evidence even slight, which connects or tends to connect any of them with any of the crimes of which they were convicted. Since the judgments as to these appellants must be reversed for the foregoing reason, it is unnecessary for us to consider the other contentions which they have advanced.

[4] "With reference to appellant William A. Byrne, we find a different situation. An examination of the record discloses that, after eliminating the testimony of his accomplices, there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to connect him with the commission of the offense charged, thus furnishing the necessary corroboration to the testimony of his accomplices. One example of such corroborative evidence is found in the testimony of Geraldine Gerding, secretary to the manager of the Ocean Center Building in Long Beach, who it is conceded was not an accomplice, to the effect that appellant Byrne, about July 29, 1936, paid rent for rooms used by some of his coconspirators in that city for the purpose of performing abortions.

There is ample evidence of a similar nature; however, since no useful purpose would be subserved by setting the same forth in extenso, we refrain from further discussion of it. *Thatch v. Livingston*, 13 Cal.App.2d 202, 56 P.2d 549; *Koeberle v. Hotchkiss*, 8 Cal.App.2d 634, 48 P.2d 104; *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 245, 128 P. 399.

"B.

"Appellant Byrne relies for reversal of the judgments upon these additional propositions:

"First. Count VII of the indictment did not charge a public offense.

"Second. Section 274 of the Penal Code is unconstitutional in that it fails to inform a person charged thereunder with reasonable certainty as to what acts or actions are prohibited by it. * * *

[5] "Appellant Byrne's final proposition is untenable. His entire argument is directed to the point that the words 'procure the miscarriage of such woman' do not convey a definite and certain meaning. 'Miscarriage' is thus defined in *Bouvier's Law Dictionary*, volume II, page 2221: 'The expulsion of the ovum or embryo from the uterus within the first six weeks after conception. Between that time, and before the expiration of the sixth month, when the child may possibly live, it is termed abortion. When the delivery takes place soon after the sixth month, it is denominated premature labor. But the criminal act of destroying the foetus at any time before birth is termed, in law, procuring miscarriage.'

"An almost identical definition will be found in *Cyclopedic Law Dictionary*, page 662, and substantially the same definition is given in each of the modern dictionaries of the English language. It is therefore evident that the phrase as used in the statute was sufficiently explicit to inform persons of common intelligence and understanding of the acts which were prohibited."

[6] Even if we concede for present purposes that count VII of the indictment, as urged by the appellant Byrne, is deficient because of its failure to charge the aborting of a "pregnant" woman, we are of the opinion that no prejudice resulted therefrom inasmuch as the evidence adduced upon the trial established the pregnancy of the woman involved. Therefore, under section 4½ of article 6 of the Constitution,

74 P.2d—5½

*Rehearing denied 74 P.2d 535.

the assumed defect is insufficient to warrant a reversal of the judgment. *People v. Bonfanti*, 40 Cal.App. 614, 181 P. 80; *People v. Buttulia*, 70 Cal.App. 444, 233 P. 401. In the *Bonfanti* Case, supra, the defendant was charged with assault with intent to commit rape, but the information failed to allege, as specified in section 261 of the Penal Code, that the woman whom the defendant had assaulted was not his wife. The evidence, however, definitely indicated that she was not his wife. Under the circumstances, it was held that the defect in the information was not prejudicial in the light of section 4½, supra. The reasoning of that case is applicable here and the contention of the appellant Byrne with respect to count VII of the indictment does not call for a reversal of the judgment thereon.

The judgment and orders denying the motions for new trial relative to the appellants James Beggs, Jesse C. Ross, and Valentine St. John are, and each is, reversed, and a new trial is ordered.

The judgments and orders relative to William A. Byrne on counts I, II, V, VII, and IX are, and each is, affirmed.

We concur: HOUSER, J.; SHENK J.; CURTIS, J.; EDMONDS, J.; SEAWELL, J.



23 Cal.App.2d 570

GALLICHOTTE v. CALIFORNIA MUT.
BUILDING & LOAN ASS'N et al.

(two cases). *

Civ. 10377.

District Court of Appeal, First District,
Division 1, California.

Nov. 24, 1937.

Rehearing Denied Dec. 23, 1937.

I. Appeal and error ¶1212(3)

Unqualified reversal of judgment by appellate court set case at large for retrial on all issues, so that judge presiding at second trial thereof was not concluded by such decision in his determination of disputed fact issues, where testimony, emphasized in appellate court's opinion as an important factor in leading it to different conclusion than that of trial court, was not given at second trial.

2. Appeal and error ⇨933(1)**Evidence** ⇨588

The trial court was not bound to believe explanatory testimony, introduced by plaintiff to refute defendants' theory as to origin of fire alleged to have been caused by defendants' unlawful and negligent acts, and presumption on appeal from order granting defendants new trial after judgment for plaintiff is that such court did not accept such testimony as true.

3. Insurance ⇨606(1)

Evidence, in insured's action on insurer's behalf for amount of insurance paid after destruction of plaintiff's property by fire, alleged to have been caused by defendants' unlawful and negligent acts, *held* insufficient to establish as matter of law that fire originated in fire set by defendants on lot adjoining plaintiff's premises.

4. New trial ⇨6

The granting or refusal of new trial rests very largely within trial court's discretion, which is extremely wide.

5. Appeal and error ⇨977(1)

The trial court's ruling granting or refusing new trial will not be disturbed on appeal, in absence of clear affirmative showing of gross, manifest, or unmistakable abuse of discretion, especially where new trial was granted for insufficiency of evidence to sustain judgment.

6. Appeal and error ⇨979(2)

In considering motion for new trial, trial court may draw inferences opposed to those drawn by it in trial, and its decision will not be set aside on appeal, where reasonable or even fairly debatable justification therefor appears, though reviewing court might not disapprove contrary order or might be inclined to take different view.

7. Building and loan associations ⇨42(17)

The statute requiring that all claims against building and loan association, taken over by building and loan commissioner, be presented to latter in writing within period limited by his notice to present claims, does not include demands made subject of actions pending when he took over association's affairs, in view of amendment of such statute (Gen.Laws Supp.1935, Act 986, § 13.16).

8. Statutes ⇨230

A. change in phraseology of law by amendment will be deemed as intended to change the law; change of legislative pur-

pose being presumed from material change in wording of statute.

9. Statutes ⇨220

Generally, courts will consider and give weight to legislative construction of statute in ascertaining meaning thereof.

10. Statutes ⇨230

Any essential change in wording of statute by Legislature indicates intention to change meaning thereof rather than to interpret it.

11. Insurance ⇨606(1)

Insured's action in insurer's behalf against building and loan association and employees thereof for amount of insurance paid after destruction of insured property by fire, alleged to have been caused by defendants' unlawful and negligent acts, was not barred by plaintiff's omission to file verified claim with building and loan commissioner in charge of association's affairs (Gen.Laws Supp.1935, Act 986, § 13.16).

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Bud Gallichotte against the California Mutual Building & Loan Association, F. C. Howard, L. G. Pilgram, and others. From an order granting named individual defendants and plaintiff a new trial after judgment against such individual defendants and in favor of defendant association, plaintiff and the association appeal.

Affirmed.

Long & Levit, and George H. Hauerken, all of San Francisco, for Gallichotte.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, for Howard and Pilgram and California Mut. Building & Loan Ass'n.

KNIGHT, Justice.

Plaintiff's property was destroyed by fire. It was insured, and the insurer paid the loss. Thereafter plaintiff, in behalf of the insurer, brought this action for damages against the defendants to recover the amount of insurance so paid, alleging that the fire which destroyed the property was proximately caused by the unlawful and negligent acts of the defendants. The trial took place before the court sitting without a jury, and judgment was entered against the individual defendants Howard and Pilgram, but in favor of the corporate de-

fendant California Mutual Building & Loan Association. Howard and Pilgram moved for a new trial as to themselves, and plaintiff moved for a new trial as against the association. Both motions were granted, the order specifying as ground therefor insufficiency of the evidence. Thereupon plaintiff appealed from the order so made in favor of Howard and Pilgram, and the association appealed from the order so made in favor of plaintiff. The two appeals are presented in one record.

The property destroyed consisted of house painters' equipment, paints, oils and other supplies, an automobile, and furniture. It was housed in a paint shed, a garage, and a dwelling on plaintiff's premises abutting a vacant lot belonging to the association. The fire was first observed in the roof of the paint shed shortly before 2 o'clock in the afternoon. During the morning of that day Howard and Pilgram, employees of the association and acting under its instructions, went upon the association's lot for the purpose of burning the grass thereon. First they cut the grass on said lot along the rear of plaintiff's premises for a width of some eight feet and threw the cut grass towards the center of the lot; then they set fire to the stubble on the eight-foot cut strip, and with wet sacks beat out the fire whenever it approached within a foot or thereabouts of plaintiff's premises, or came too close to the uncut body of the grass. After thus burning the stubble area, they went to lunch, and returned about 1 o'clock to burn the main body of the grass. Before starting the fire, however, they notified the adjoining owners of their intentions and borrowed some hose from the neighbors with which they wet down the strip already burned along the rear of plaintiff's buildings; and after the fire was started Pilgram walked back and forth along the line next to plaintiff's premises, with a bucket of water and a wet sack to extinguish any fire which threatened to communicate with the plaintiff's buildings. However, within an hour after the grass fire was started and while it was in progress a fire broke out in the outbuildings on plaintiff's premises, which ignited the dwelling, and before the fire was extinguished it destroyed plaintiff's two outbuildings and their contents, and damaged his dwelling and a portion of the furniture therein.

An existing municipal ordinance made it unlawful to burn grass or brush on private

lots within the district embracing the association's property, except between the hours of 9 o'clock in the morning and noon of the same day, and even then if the fire would cause a dense smoke or offensive odor; and the judgment in plaintiff's favor and against the individual defendants was based on findings to the effect that they violated the provisions of said ordinance by starting the fire on the association's lot after the noon hour, and carelessly and negligently allowed the same to spread to plaintiff's buildings and thus destroy his property. But the association was exculpated from liability upon the ground that subsequent to the commencement of the action the state building and loan commissioner took over the affairs of said association, and that plaintiff failed to comply with the requirements of the Building and Loan Act by omitting to file a claim for damages with said commissioner.

[1] This was the second trial of the action. The first took place also before the court sitting without a jury, but before a different judge; and judgment was rendered in favor of all defendants. That judgment was based on a finding to the effect that the evidence failed to establish any connection between the grass fire set on the association's lot and the one which broke out in plaintiff's shed or garage; but on appeal by plaintiff the judgment was reversed upon the ground that the only reasonable inference deducible from the undisputed facts was that the fire which destroyed plaintiff's property was proximately caused by the one unlawfully set by defendants on the association's lot. *Gallichotte v. California Mutual Building & Loan Association et al.*, 4 Cal.App.2d 503, 41 P.2d 349. Plaintiff now contends that the decision rendered on the former appeal with respect to the question of the origin of the fire which destroyed his property became the law of the case and therefore was controlling on the same issue at the second trial.

The reversal of the former judgment, being unqualified, evidently set the case at large for retrial on all issues. *Ferran v. Mulcrevy*, 9 Cal.App.2d 129, 48 P.2d 984; 2 Cal.Jur. 996, 997, and cases there cited. That being so, the judge presiding at the second trial was not concluded in his determination of the disputed issues of fact by the decision rendered on the former appeal unless, as plaintiff contends, the evidence given at the second trial was not materially different from the evidence given

at the first trial. Defendants contend that it was, and this would seem to be true in the following respect: At the first trial the assistant fire chief, who was qualified by twenty-five years' experience in the fire department, and who arrived at the scene of this fire while it was in full progress, testified that in his opinion the fire which destroyed plaintiff's property had its origin in the fire set by defendants on the adjoining vacant lot; but at the second trial, no such testimony was given by him, nor was any testimony of similar import given by any other witness. As will be noted from an examination of the decision rendered on the former appeal, the testimony so given by the assistant fire chief was emphasized by the court in its opinion as one of the important factors which led the court to the conclusion that the evidence proved as a matter of law and contrary to the finding of the trial court that the fire unlawfully started on the association's lot was the proximate cause of the fire which burned plaintiff's property. It would seem, therefore, that in the absence of such factor it cannot be successfully maintained that the evidence adduced at the present trial measured up to the standard of conclusive proof upon which the court based its decision on the former appeal.

In their briefs the parties have evidently assumed that the reason for the absence of such testimony was that it was excluded on objections of the defendants; but the record does not so show. It does appear that the trial court sustained defendants' objections to several questions propounded to the witness by plaintiff, such as whether under the conditions prevailing at that particular time it was proper or prudent to start and attempt to control a grass fire in the manner followed by Howard and Pilgram; but the record discloses also that at no time was the witness asked, as at the first trial, to give his opinion as to the origin of the fire which destroyed plaintiff's property.

[2] Moreover, at the first trial, no circumstances whatever were developed from which it might be reasonably suspected that the fire which broke out in plaintiff's outbuildings had its origin in any other source than the fire on the association's lot; whereas at the present trial evidence was adduced from which it is claimed such an inference might reasonably be drawn. In this regard it was shown that following the

first trial the paint shed was rebuilt; that after it was rebuilt a fire broke out therein which admittedly was ignited by sparks emitted by a gasoline air-compressor engine housed therein; and defendants then went on to prove that shortly before 1 o'clock on the day of the first fire plaintiff started the engine of his automobile truck by means of the self-starter, while the truck was standing inside the paint shed near much inflammable material, including open cans of paint and oils, and oil cloths; and that after starting the engine he drove the truck out of the shed. Defendants argue, therefore, that the inference may be drawn from these newly developed circumstances that the first fire originated from a cause other than the grass fire, namely, from sparks emitted by the engine of the truck. To refute such theory plaintiff introduced testimony to the effect that the truck was backed out of the shed, so that the muffler and exhaust pipe, through which any sparks from the engine would necessarily have to be emitted, was pointed toward the open doors of the shed and away from the inflammable material. The explanation so given, if true, would to all intents and purposes serve as a negative answer to defendants' theory as to the origin of the fire; but the trial court, as judge of the credibility of the witnesses, was not bound to believe the explanation so offered, and on appeal, all intendments being in favor of the trial court's order, the presumption is that it did not accept the same as true.

[3] In view of the different factual situations above pointed out, we are not prepared to hold, as plaintiff contends we should, that the trial judge on the second trial was concluded in his determination of the main disputed facts by the decision on the former appeal; and we are of the opinion that for the same reason it cannot be held that the evidence adduced at the present trial, when considered as a whole, establishes as a matter of law, as it did on the first trial, that the fire which destroyed plaintiff's property had its origin in the fire set on the association's lot by Howard and Pilgram.

[4-6] There is, of course, no way of ascertaining from the record just how much weight, if any, the trial court gave to the new theory advanced by defendants as to the origin of the fire; and it may be that, as plaintiff argues, the additional evidence introduced on this point, standing alone,

would not be of sufficient importance to take the case out of the scope of the decision rendered on the former appeal. Furthermore, it is quite obvious that the evidence adduced at the present trial, as a whole, would have been legally sufficient to sustain the trial court's finding as to the origin of the fire, had it allowed said finding to stand. But when the newly introduced evidence as to the origin of the fire is considered along with the more important variance in the factual situation created by the absence of the testimony of the assistant fire chief, we are unable to escape the conclusion that the decision on the former appeal is not here controlling as to the facts. And that being so, we are precluded, by well-settled rules, from interfering with the trial court's ruling granting a new trial on the merits. As repeatedly declared by the decisions dealing with the subject, the granting or refusal to grant a new trial in any case rests very largely within the discretion of the trial court—a discretion which is extremely wide—and its ruling will not be disturbed, especially where, as here, a new trial has been granted on the insufficiency of the evidence, unless there is a clear and affirmative showing of a gross, manifest or unmistakable abuse of the discretion it is called upon to exercise. Furthermore, in considering such a motion it may draw inferences opposed to those drawn by it in the trial; and its decision in ruling upon the motion will not be set aside where there appears to be a reasonable or even a fairly debatable justification therefor, notwithstanding that a contrary order might not be disapproved or the reviewing court might be inclined to take a different view. 20 Cal.Jur. pp. 27-31.

[7-10] Forty-two days after the filing of the action and the service of process, the building and loan commissioner took over the affairs of the association pursuant to the authority granted by the Building and Loan Association Act of 1931 (Deering's Gen.Laws 1931, Act 986, St.1931, p. 483), which was in force at the time these transactions took place; and the appeal taken by the association involves the question of whether under the circumstances plaintiff was required by the provisions of section 13.16 of said act to file with the commissioner a verified claim for the loss he claims to have suffered by the fire. The association contends he may, and that his failure so to do bars recovery against the association.

This defense was neither pleaded nor urged at the first trial. It appears from the record that the commissioner was aware of the pendency of the action, and was served with a memorandum to set the cause for trial; and at the commencement of the second trial the court found that the commissioner carried on the defense of the action at the first trial in the name of the association. But the special defense now being urged was not interposed until shortly before the second trial. It was then pleaded by way of amended answer, and the trial court on the merits held it to be good; but in granting the new trial the association was brought back into the case.

The second paragraph of said section 13.16 of the 1931 act provided in substance that upon determining to liquidate an association, the commissioner shall prepare in duplicate and file an inventory of its assets, and shall publish notice "to all persons having claims against it as creditors or investors or otherwise, to present and file same" within a time specified in the notice; that within ten days after the first publication of said notice he shall mail a copy thereof "to all persons whose names appear of record upon its books as creditors or investors." In this connection it was stipulated that the commissioner published such notice, but that he did not mail a copy of the notice to plaintiff. Continuing, said paragraph provided that upon the expiration of time from presentation of claims the commissioner shall prepare in duplicate and file a schedule of all claims presented, specifying those approved and those disapproved, and within five days shall mail notice to all claimants whose claims have been rejected; and that any action to enforce a rejected claim shall be brought and service had within four months of the date of the filing of such schedule; otherwise all actions thereon shall be forever barred. The third paragraph of said section provided: "All claims of creditors, investors or other persons against the association * * * must be presented to the commissioner in writing verified by the claimant or someone in his behalf within the period limited in the above mentioned notice for the presentation of claims; and any claim not so presented shall be forever barred," and the sixth paragraph of said section read as follows: "The determination by the commissioner to liquidate any association, evidenced by filing written notice of

such determination with the court, shall operate to stay or dissolve any or all actions or attachments instituted or levied within thirty days next preceding the taking of possession of such association by the commissioner, and pending the process of liquidation as herein provided no attachment or execution shall be levied or lien created upon any of the property of such association."

It is plaintiff's contention that since the action herein was filed more than thirty days prior to the date on which the commissioner took over the affairs of the association, the provisions of the above section were and are inapplicable; and that in any event the service upon the commissioner of the memorandum to set the cause for trial, which stated among other things the title of the cause and that it was an action to recover damages for negligently setting a fire, was legally sufficient to satisfy the purposes of said section.

As will be seen, we are not here concerned with those provisions of the second paragraph of said section dealing with the matter of rejected claims, because admittedly, plaintiff presented no verified claim. Nor do the provisions of the sixth paragraph appear to be helpful in solving the problem of whether or not it was necessary to file a verified claim, for the reason that the provisions of that paragraph do not pertain to the subject of filing claims. They provide merely for the stay of any action brought and the dissolution of any attachment levied within thirty days preceding the date on which the commissioner takes over the affairs of the association; also for the prevention from and after that date of the levy of any attachment or execution against the association's property. Therefore the issue narrows down to the question of whether that portion of the opening clause of the third paragraph of said section reading "all claims of creditors, investors or other persons against the association" was intended by the Legislature to include demands which have been made the subject of actions pending at the time the commissioner takes over the affairs of the association; and it is quite clear that the Legislature did not so intend, because in 1935 (St.1935, p. 1500 [Gen.Laws Supp.1935, Act 986]) it recast said opening clause so as to include therein the additional express provision embracing all such demands. As re-enacted, said paragraph was made to read as fol-

lows: "All claims, demands or causes of action of whatever nature, and regardless of whether or not a suit shall be pending to enforce the same at the time of the taking possession of the assets of the association by the commissioner, of creditors, and persons other than investors against the association or against any property owned or held by it *in trust or otherwise*, must be presented to the commissioner in writing, verified by the claimant, or someone in his behalf, within the period limited in the above mentioned notice for the presentation of claims." We have italicized the words constituting the amendment. As said in Meyerfeld v. South San Joaquin Irr. Dist., 3 Cal.2d 409, 417, 45 P.2d 321, a change in the phraseology of a law by amendment will be deemed as intended to make a change in the law. In other words, "A change of legislative purpose is to be presumed from a material change in the wording of a statute" (Lundquist v. Lundstrom, 94 Cal.App. 109, 270 P. 696, 697); and it is a general rule that in the ascertainment of the meaning of a statute courts will consider and give weight to legislative construction. Rutledge v. Dominguez, 122 Cal.App. 680, 684, 10 P.2d 1027. Therefore, in view of the new subject-matter embodied in the 1935 amendment, it is apparent that the Legislature itself construed the third paragraph of section 13.16 of the act of 1931 as excluding from its operation claimants whose demands or causes of action had been sued upon and whose suits were pending at the time the commissioner took control of the affairs of the association; otherwise there would have been no necessity for the amendment. It is suggested in behalf of the association that the purpose of the 1935 amendment was merely to clarify the provisions of the 1931 act. But the rule is that any essential change in the wording of a statute by the Legislature indicates an intention to change the meaning thereof, rather than to interpret it. 23 Cal.Jur. p. 778.

[11] Therefore, following the obvious legislative construction limiting the operation of that portion of the 1931 act under discussion, it is our conclusion that plaintiff's action was not barred by the omission to file a verified claim with the commissioner; and such conclusion makes it unnecessary to inquire into plaintiff's second point as to the effect of the service upon the commissioner of the memorandum to

set the cause for trial. The order granting the new trial as to Howard and Pilgram, and as to the association, is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



23 Cal.App.2d 708

In re KLEIN'S ESTATE.

OLSEN v. MARTIN et al.

Civ. 10650.

District Court of Appeal, First District,
Division 2, California.

Dec. 2, 1937.

Rehearing Denied Dec. 31, 1937.
Hearing Denied by Supreme Court
Jan. 31, 1938.

Wills §634(6)

Where testatrix devised residue of her estate to her two daughters share and share alike in trust, and throughout will referred to the estate bequeathed to her daughters and did not make a direct devise to trustees or provision for disposition of estate in event daughters survived mother, but died before time specified for obtaining possession of estate, testatrix' estate vested in two daughters at time of testatrix' death subject to trust, and, on daughter's death, following testatrix' death, undivided one-half interest in testatrix' estate was properly distributed to executors of daughter's estate (Probate Code, § 28).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding in the matter of the estate of Mae E. Klein, deceased, wherein Leonard L. Martin and another were appointed executors. From the decree of distribution Lila M. Klein Olsen appeals.

Affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellant.

Ralph H. Wight, of Martinez, for respondents.

SPENCE, Justice.

This is an appeal upon the judgment roll from the decree of distribution in the above-entitled estate.

The deceased died testate in 1935 leaving two daughters, namely, Barbara M. Klein and Lila M. Klein Olsen, the latter being the appellant herein. The third and fourth paragraphs of the will read as follows:

"Third: I give, devise and bequeath all the rest, residue and remainder of my estate of whatsoever kind, character and nature, and wherever situated, to my beloved daughters, Barbara M. Klein and Lila M. Klein Olsen, they surviving, share and share alike, in trust, as hereinafter provided.

"It is my will, and I order and direct that in the event that my said daughter Barbara M. Klein has not attained the age of Twenty-five (25) years at the time of my death, that the estate so bequeathed to my said daughter, Barbara M. Klein, she surviving, as aforesaid, be converted into a Trust Fund and be held in Trust as a Trust Fund by the Executors hereinafter named as trustees or the survivor thereof, giving and granting unto said Trustees full power and authority to manage and control said Trust Fund for the sole use and benefit of said Barbara M. Klein, until she shall have attained the age of Twenty-five (25) years.

"The said Trustees of said Trust Fund shall in the event that the said Barbara M. Klein has not attained the age of Twenty-five (25) years pay over and allow the said Barbara M. Klein, the entire net income from said Trust Fund, or so much thereof as may be deemed necessary for her proper care, support and maintenance and also any portion of the principal of said Trust Fund which the said Trustees shall deem necessary in any emergency for the proper care, support and maintenance of the said Barbara M. Klein; and the said Trustees of said Trust Fund shall at the time that the said Barbara M. Klein attains the age of Twenty-five (25) years make a full and complete accounting to the said Barbara M. Klein and pay over to her the entire Trust Fund remaining or on hand and in their possession including any and all interest, profits and income belonging thereto; and the receipt of said Barbara M. Klein, for any sum or sums so paid and allowed her hereunder during the term of said trust and final settlement thereof shall be a full and sufficient release and acquittance thereof to the said Trustees.

"Fourth: It is also my will, and I order and direct that my Executors hereinafter named convert the estate so bequeathed to

my daughter, Lila M. Klein Olsen, into a Trust Fund, to be held in Trust for the sole use and benefit of said Lila M. Klein Olsen, she surviving, so long as she shall remain the wife of William B. Olsen, her present husband. It is my will that the said William B. Olsen, husband of my said daughter Lila M. Klein Olsen, shall not receive any part or portion whatever of the estate so bequeathed to said Lila M. Klein Olsen, his wife.

"Giving and granting unto said Trustees full power and authority to manage and control said Trust Fund: and said Trustees shall during the term of this trust, pay over and allow the said Lila M. Klein Olsen, she surviving, the net income from said Trust Fund, or so much thereof as the Trustees may deem necessary for the proper care, support and maintenance of said Lila M. Klein Olsen, and any part of the principal of said Trust Fund, which the said Trustees may deem necessary for the proper care, support and maintenance of the said Lila M. Klein Olsen, the said Trustees being sole judge of what sum or sums shall be necessary for the proper care, support and maintenance of said Lila M. Klein Olsen, during the term of the Trust herein created.

"In the event that the said Lila M. Klein Olsen shall become divorced, or widowed from said William B. Olsen, the said Trustees shall make a full and complete accounting of said Trust Fund, and pay over and allow to the said Lila M. Klein Olsen, she surviving, all of said Trust Fund, including any and all interests, profits and income therefrom; and make a full and complete accounting of said Trust Fund, and pay over to the said Lila M. Klein Olsen, the entire principal, interest, profit and income belonging to said Trust Fund to the said Lila M. Klein Olsen. The receipt of said Lila M. Klein Olsen for any sum or sums so paid and allowed to her as aforesaid either during the existence of said Trust or the final settlement thereof, shall be a full and sufficient release and acquittance to the said Trustees."

Both daughters survived the deceased. Barbara M. Klein was born on September 3, 1914, and died on July 15, 1936 at the age of 22 years. Her death occurred after the death of her mother but prior to the distribution of her mother's estate. Said daughter had married Joseph M. Christen-

sen after the death of her mother and had thereafter died testate. Under the decree of distribution the probate court distributed an undivided one-half interest in the residue of the mother's estate to the executors of Barbara M. Klein Christensen, deceased. The remaining undivided one-half interest was distributed to Lila M. Klein Olsen subject, however, to the terms of the trust set forth in the will.

Appellant contends that said court erred in distributing one-half of the estate to the executors of Barbara M. Klein Christensen, deceased, but we find no merit in this contention. The situation presented here is quite similar to that presented to the court in *Estate of Reith*, 144 Cal. 314, 77 P. 942, and we are of the opinion that the decision in that case is controlling here. See, also, *Williams v. Williams*, 73 Cal. 99, 14 P. 394; Probate Code, § 28. It will be noted that the testatrix devised and bequeathed the residue of the estate "to my beloved daughters, Barbara M. Klein and Lila M. Klein Olsen, they surviving, share and share alike, in trust, as hereinafter provided." Throughout the will the testatrix referred to "the estate so bequeathed to my said daughter" Barbara M. Klein or Lila M. Klein Olsen and there was no direct devise or bequest to the trustees. It will be further noted that there was no provision in the will making disposition of the estate in the event that the daughters survived the mother but did not live until the time specified for obtaining possession of the estate. Under the authorities cited, we believe that the trial court correctly concluded that the estate of the mother vested in the two daughters at the time of the mother's death subject only to the terms of the trust and that, upon the death of Barbara following the mother's death, an undivided one-half interest in the mother's estate should be distributed to the executors of Barbara's estate. All of the authorities cited by appellant are distinguishable on their facts and the language of one of the authorities so cited tends to support the views herein expressed. See *Estate of Blake*, 157 Cal. 448, at page 464, 108 P. 287.

The decree is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

23 Cal.App.2d 651

74 P.2d

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. BUTTON et al.

Civ. 10359.

District Court of Appeal, First District,
Division 2, California.

Nov. 29, 1937.

1. Landlord and tenant ⇨291(1)

In unlawful detainer action, statutory notice to tenant to pay accrued rental within three days or surrender premises held sufficient in form (Code Civ.Proc. § 1161, as amended by St.1933, p. 1315).

2. Pleading ⇨376

In unlawful detainer action, where service of purported notice to quit was admitted by answer, further proof of service was unnecessary.

3. Landlord and tenant ⇨291(1)

A notice to tenant to pay accrued rental within three days or surrender premises constituted sufficient demand for payment of rent (Code Civ.Proc. § 1161, as amended by St.1933, p. 1315).

4. Landlord and tenant ⇨291(4)

A grantee under trust deed executed after grantor executed lease was entitled to maintain action of unlawful detainer as successor in interest of lessor, where lessor assigned lease to grantee as further security.

5. Evidence ⇨43(3)

Court will generally not take judicial notice of other actions, even though pending in same court, but may do so in exceptional cases, in its discretion, if unreasonable hardship would otherwise result.

6. Evidence ⇨43(3)

Defendant was not entitled to have court take judicial notice of pending prior action in support of plea in abatement, as exception to general rule against judicially noticing other actions, where conduct of defendant's counsel at trial was such as to constitute practical abandonment of defense of prior action pending.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Bank of America National Trust & Savings Association against R. L. Button and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

74 P.2d—6

John E. Manders, of San Francisco, for appellants.

Keyes & Erskine, of San Francisco (J. Benton Tulley, of San Francisco, of counsel), for respondent.

DOOLING, Justice pro tem.

Defendants appeal from a judgment for plaintiff in an action in unlawful detainer. Defendant R. L. Button was the lessee of the real property involved holding under a lease executed by one Crary. Subsequent to the execution of the lease Crary gave a deed of trust of the property covered by this lease to plaintiff and respondent bank to secure the payment of a loan. The lease was assigned to the bank as further security. Default having been made in the payment of the rent, respondent served the statutory notice (Code Civ.Proc. § 1161, as amended by St.1933, p. 1315) upon appellant R. L. Button to pay the accrued rental within three days or surrender the premises.

[1-4] Appellants urge various grounds for reversal which we dispose of as follows:

1. The notice was sufficient in form. *Berryman v. Gibson*, 7 Cal.App. 679, 95 P. 671.

2. The service of a "purported notice" to quit was admitted by the answer and the "purported notice" is set out in the answer in *hæc verba*. The admission made unnecessary any further proof of service.

3. The notice was itself a sufficient demand for payment of the rent. No other demand was necessary. *Wickstrom v. McGrath*, 86 Cal.App. 651, 261 P. 326.

4. The assignment of the lease and a trustee's deed of the premises to respondent bank were introduced into evidence. Respondent, as successor in interest of the lessor, was entitled to maintain the action. *Wayland v. Latham*, 89 Cal.App. 55, 264 P. 766.

Appellants pleaded in abatement a prior action pending. No proof of this action was introduced. Appellants ask us to take judicial notice of this prior action in order to reverse the judgment on the authority of *Woods-Drury, Inc., v. Superior Court*, 18 Cal.App.2d 340, 63 P.2d 1184.

[5,6] It is the general rule that courts will not take judicial notice, of other actions even though pending in the same court. *Estate of Fulton*, 8 Cal.App.2d 423, 48 P.2d 120; *Brown v. Brown*, 83 Cal.App.

74, 256 P. 595; *Ralphs v. Hensler*, 97 Cal. 296, 32 P. 243. This rule has been made subject to exception, in the discretion of the court. *Sewell v. Johnson*, 165 Cal. 762, 134 P. 704, Ann.Cas.1915B, 645; *City of Los Angeles v. Abbott*, 217 Cal. 184, 17 P.2d 993. The exception is only invoked in unusual cases where unreasonable hardship would otherwise result. This does not appear to us to be such a case. Not only was no evidence of another action introduced, but, so far as the record shows, the matter was not urged upon the trial court in any way. Counsel's conduct at the trial was such as to constitute a practical abandonment of the defense.

Judgment affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.



23 Cal.App.2d 737

**INVESTMENT BUILDING & LOAN ASS'N
v. SEELY et al.**
Civ. 11576.

District Court of Appeal, Second District,
Division 2, California.
Dec. 8, 1937.

Appeal and error ⇨773(2)

Where clerk's transcript was filed but appellant filed no brief and was thereupon cited to show cause why appeal should not be dismissed for want of prosecution, to which appellant filed typewritten answer but gave no sufficient excuse for failure to file opening brief, appeal was dismissed.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Investment Building & Loan Association against Howard Seely and others. Judgment for plaintiff, and defendants appeal.

Appeal dismissed.

Caesar A. Roberts, of Hollywood, for appellants.

Flint & MacKay, of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from a judgment of the superior court. The clerk's transcript was filed August 16, 1937. No briefs having been filed, appellant was regularly cited to show cause on December 8, 1937, why appeal should not be dismissed for want of prosecution. In response to this order to show cause, the appellant filed a typewritten answer in which he admits that the question involved on appeal has been decided against him, but contends in his said answer that it should not have been. No sufficient excuse is given for failure to file appellant's opening brief, and therefore the order is made dismissing the appeal.

Appeal dismissed.



23 Cal.App.2d 738

CULVER v. BARRETT.
Civ. 11572.

District Court of Appeal, Second District,
Division 2, California.
Dec. 8, 1937.

1. Appeal and error ⇨434

Where clerk's transcript and reporter's transcript were filed and appellant had made no appearance, either orally or by brief, and due service was made on appellant of court's order to show cause why appeal should not be dismissed for want of prosecution, order was granted and appeal dismissed.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Kathryn Culver, also known as Kathryn Riggs, against Enid P. Riggs Barrett. From a judgment, plaintiff appeals. Appeal dismissed.

Kenneth N. Chantry and Mitchell, Silberberg, Roth & Knupp, all of Los Angeles, for appellant.

W. I. Gilbert and David L. Sefman, both of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from the superior court. The clerk's transcript and reporter's tran-

script were filed August 16, 1937. No appearance has been made by the appellant, either by brief or orally. The case comes before us on the court's own order to the appellant to show cause why the appeal should not be dismissed for want of prosecution. Due service of the order having been made, the order is granted.

Appeal dismissed.



23 Cal.App.2d 733

INDERKUM v. GERMAN OLD PEOPLE'S HOME.

Civ. 10556.

District Court of Appeal, First District,
Division 2, California.

Dec. 8, 1937.

Hearing Denied by Supreme Court
Feb. 3, 1938.

1. Contracts ☞10(1)

A contract for maintenance between woman and old people's home, a nonprofit corporation, was not invalid for lack of mutuality because it contained provision that maintenance should be in accordance with present or future rules and regulations of home and subject to constitution and by-laws as they existed or might be amended, since right reserved by home extended merely to administrative or regulative amendments (Civ.Code, §§ 1643, 3541).

2. Contracts ☞191

Woman who paid \$3,500 to old people's home under maintenance contract for maintenance during the rest of her life was not entitled to abandon contract because it was not specifically enforceable, and recover consideration paid, subject only to claim for damages for breach.



Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Sophie Inderkum against the German Old People's Home, generally known and called The Altenheim. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Weinmann, Quayle & Berry, Rode & Rode, and Howard S. Rode, all of Oakland,

and George Olshausen, of San Francisco, for appellant.

Phillip M. Carey, of Oakland, and Henry Conlin, of Berkeley, for respondent.

SPENCE, Acting Presiding Justice.

Plaintiff brought this action seeking the return of the consideration paid by her for admission to the German Old People's Home less the reasonable value of her maintenance during the time that she remained in said home. From a judgment in favor of plaintiff, defendant appeals.

Defendant is a nonprofit corporation engaged in maintaining a home for aged persons of German descent. In January, 1935, plaintiff entered into a written contract with defendant and, pursuant to the terms thereof, plaintiff paid to defendant the sum of \$3,500. Defendant agreed thereby to admit plaintiff to the home and to maintain her during the term of her life. The contract provided: "Said maintenance shall include comfortable lodging, good board, medical treatment and nursing in case of illness, except that if said Resident shall require any extraordinary or special medical, nursing or other care, the expense thereof shall be paid by Resident." The defendant also agreed to defray funeral expenses in an amount not exceeding \$150 in the event that plaintiff's estate should be insufficient to defray such expenses. Plaintiff was admitted to the home and remained there until August 30, 1935, at which time she voluntarily left the home and thereafter brought this action.

Plaintiff's second amended complaint was in five counts. We may omit discussion of said counts other than the fourth count, as the findings of the trial court were in favor of defendant on all of the material allegations of the remaining counts. The fourth count was a common count for money had and received. In the answer thereto, defendant denied the allegations thereof and set forth the contract between plaintiff and defendant as an affirmative defense. Defendant further alleged that, pursuant to said contract, plaintiff was admitted to the home; that she was maintained there by defendant until she voluntarily left the home on or about August 30, 1935; that defendant had performed, and was ready and willing to perform, all of the terms and conditions of said contract on its part provided. These affirmative allegations of defendant's answer were found to be true by the trial court. In finding

XVIII, however, the trial court found as follows with respect to the fourth count and the answer thereto:

"That the allegations contained in paragraph II of the fourth cause of action, set forth in plaintiff's second amended complaint are true; and in this respect the court finds that by reason of the following clause contained in the said agreement, said agreement was and is illusory, and without mutuality of obligation:

"'And to maintain said resident during the term of her life in accordance with the rules and regulations of said home as may now or hereafter be established by first party's Board of Directors, this agreement in all respects being subject to the Constitution and By-Laws of first party as the same now exist or may be hereafter amended, which said Constitution and By-Laws are hereby referred to and made a part of this contract as though set out at length herein.'"

In its conclusions of law, the trial court likewise concluded that the contract "is without mutuality of obligation on the part of the defendant in its essential terms and provisions and is not therefore obligatory upon or of binding force against the plaintiff." Judgment was entered in favor of plaintiff upon said findings of fact and conclusions of law for the sum of \$3,130.27, being the sum of \$3,500 paid by plaintiff to defendant less the sum of \$369.73 which was found by the trial court to be the reasonable value of the services rendered to plaintiff during her residence at the home.

Appellant attacks the last-mentioned findings of fact and conclusions of law, and it is apparently conceded by all parties that there is but one main question to be determined on this appeal. Respondent states: "The question to be answered on this appeal is: Did the trial court correctly construe and hold that exhibit A is lacking in mutuality, unenforceable, and invalid as a matter of law?" Appellant contends that the trial court erred in this regard, and in our opinion this contention must be sustained.

[1] The mere fact that the contract purported to incorporate appellant's constitution and by-laws and its rules and regulations, together with any amendments thereto which might be subsequently made, did not render said contract invalid for lack of mutuality. It is not unusual to find similar provisions in contracts and numerous authorities involving contracts of this type are cited and discussed in *Bornstein v. Dist. Grand Lodge*, 2 Cal.App. 624, 84 P. 271. The rule established by said authorities appears to be that such contracts are not void for lack of mutuality as the right reserved extends merely to the making of reasonable administrative or regulative amendments and does not extend to the making of any amendments which would impair the substance of the contract. This is the reasonable construction, and should be adopted as against the unreasonable construction, claimed by respondent which would render the contract void. Civ.Code, § 1643; Civ.Code, § 3541. We therefore conclude that the contract in question was a valid contract and that the findings and conclusions of the trial court to the contrary cannot be sustained. It may be stated that there was no evidence to show that any amendment whatever had been made to appellant's constitution, by-laws, rules, or regulations after the contract in question had been executed.

[2] Respondent apparently makes the further contention that, even if the contract was valid, it was not one which could be specifically enforced and that she therefore had a right to abandon it and recover the consideration paid subject only to a claim by appellant for damages for its breach. It is a sufficient answer to this contention to state that such is not the rule in this jurisdiction. *Norris v. Lilly*, 147 Cal. 754, 82 P. 425, 109 Am.St. Rep. 188; see, also, *Husheon v. Kelley*, 162 Cal. 656, 124 P. 231.

The judgment is reversed.

We concur: STURTEVANT, J.;
GOODELL, Justice pro tem.

10 Cal.2d 389

In re STRONG'S ESTATE.

STRONG v. BURNS et al.
L. A. 15933.Supreme Court of California.
Dec. 20, 1937.

1. Appeal and error ⇐417(2)

That notice of appeal appended a designation opposite name of appellant, who was both executrix and residuary legatee, that appellant was executrix of testatrix' will, did not preclude consideration of appeal of appellant in individual capacity, since designation after name might be considered as mere descriptio personæ.

2. Wills ⇐584(5)

Inheritance tax on contingent interest created by will was payable by executrix out of corpus of trust fund and not deductible from contingent reversioner's legacy, under statute in effect at testatrix' death (St.1929, p. 1842, § 8, subd. 3; St.1921, p. 1510, § 9, subd. 1).

3. Wills ⇐671

Where will provided that if, after payment of debts, etc., notes and mortgages or other interest-bearing securities in an amount equal to or in excess of \$5,000 remained, such sum should go to establish certain trust, and at death of testatrix notes had value in excess of \$5,000, trust would be established, notwithstanding that at time of distribution value of remaining notes, due to foreclosures, was less than \$5,000.

4. Conversion ⇐6

A sale of realty in administration proceedings will not, for purposes of distribution, effect conversion of proceeds therefrom into personality.

5. Conversion ⇐6

The foreclosure of a mortgage in administration proceedings will not, for purposes of distribution, effect conversion into realty.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Proceeding in the matter of the estate of Alice B. Strong, deceased, wherein Georgia Lacey Burns and others filed objections to the petition of Hattie Strong, executrix of the Estate of Alice B. Strong,

deceased, for distribution of the estate. From specific parts of the decree determining certain matters with respect to distribution and to payment of inheritance taxes, the executrix appeals.

Decree affirmed.

Prior opinion, 65 P.2d 845.

Le Compte Davis and MacDonald & Thompson, all of Los Angeles, for appellant.

Bradner & Weil and Jerold E. Weil, all of Los Angeles, for respondents Georgia Lacey Burns and Alice L. Lacey.

SHENK, Justice.

Hattie Strong, as executrix of the last will and testament of Alice B. Strong, deceased, filed her second account and petition for distribution of the entire estate of the decedent with the exception of sufficient funds to pay balances due on account of inheritance and estate taxes, attorneys' fees, and commissions. The court entered its decree of final distribution. This decree provided that Alice L. Lacey, one of the legatees, should be reimbursed for the inheritance tax of \$103.71 on the contingent remainder devised to her, which amount had been deducted by the executrix from her cash legacy. The court also decreed that Georgia Lacey Burns was entitled to payment of a legacy of \$5,000 provided by clause 7 of the will, and designated certain properties out of which said legacy should be paid. From these two specified portions of the decree of distribution "Hattie Strong, executrix of the estate of Alice B. Strong," has appealed.

Hattie Strong is a surviving sister of the decedent and the residuary legatee under her will. The respondents urge that Hattie Strong, as executrix, is not a proper party to appeal from the decree of distribution. Estate of Murphy, 145 Cal. 464, 467, 78 P. 960; Estate of Babb, 200 Cal. 252, 255, 252 P. 1039.

[1] We may assume that if, as such executrix, Hattie Strong had appealed, her appeal should be dismissed. But the notice of appeal does not necessarily preclude the propriety of considering the appeal as having been taken by her as an individual. The notice merely appends opposite her name a designation which indicates that she is the executrix, but it does not necessarily state that she prosecutes such appeal as executrix. Such designation may be considered as mere descriptio personæ (Burling v. Thompkins, 77 Cal. 257, 19

P. 429; *Scott v. Remley*, 119 Cal.App. 384, 386, 6 P.2d 536; 47 Cor.Jur., p. 177), and will not defeat the appeal if it may be prosecuted by the appellant in her individual capacity. The appeal may therefore be considered to have been taken by her in that capacity.

[2] Alice B. Strong died on February 19, 1933. By her will she left the sum of \$5,000 to Alice L. Lacey. In connection with the portion of the decree appealed from directing that Alice L. Lacey be reimbursed in the sum of \$103.71 deducted from her cash legacy, it is pertinent to consider the provisions of clause 10 of the will. By that clause the testatrix devised a certain described parcel of real property to a trustee to pay the income therefrom to Hattie Strong in her lifetime. The trust was to terminate upon her death, and the trust property distributed to the living issue of Hattie Strong, and if there were none, then one-half thereof to go to Helen McCreery, and the other half share and share alike to certain named persons, including Anna Carlat, Catherine Carlat, Alice L. Lacey, and Georgia Lacey Burns, or the survivors of them. The decree provided that: "The inheritance taxes on the contingent interests of Helen McCreery, Alice L. Lacey, Georgia Lacey Burns, Anna Carlat and Catherine Carlat under clause ten of the will should be paid by the executrix out of the corpus of the hereinafter described property devised and bequeathed in trust under clause ten of the will, and should not be collected by the executrix from the said contingent beneficiaries; that said Alice L. Lacey should be reimbursed for the amount of said tax on the contingent interest of Alice L. Lacey heretofore deducted from the cash legacy of Alice L. Lacey and paid to the State of California in the amount of \$103.71." It should be noted that Hattie Strong appealed only from that portion of the foregoing order following the semicolon to the end of the quotation. If she is content with the payment out of the trust property of the inheritance taxes on the contingent interests other than that of Alice L. Lacey, she should not be heard to complain of the payment from the same source of the amount assessed against the portion of the contingent remainder devised to Alice L. Lacey. However, the direction to pay the taxes from the trust property is in accordance with subdivision (3) of section 8 of the Inheritance Tax Act, Stats.1921, pp. 1500, 1507, as amended

by Stats.1929, pp. 1834, 1842, in effect at the time of the death of the testatrix. By that section and subdivision the tax imposed on the interests or estates which are dependent upon contingencies whereby they may be defeated are payable forthwith by the executors or trustees out of the property transferred; namely, in this case the property distributed to the trustee under clause 10 of the will. The court was therefore not in error in ordering that Alice L. Lacey be reimbursed for the amount of the tax on the contingent interest deducted from the cash legacy bequeathed to her. The provisions of subdivision 1 of section 9 of that act, Stats. 1921, p. 1510, relied upon by the appellant, are in harmony with this conclusion and do not compel a different holding.

Clause 7 of the will provided: "If, after paying all my just debts, funeral expenses and costs of administration of my estate and after the distribution of the personal property hereinbefore bequeathed, there still remain notes and mortgages or other interest bearing securities in an amount equal to or in excess of" \$5,000, that sum should be transferred to a trustee to pay the income therefrom to Georgia Lacey, now Georgia Lacey Burns, until she attain the age of twenty-five years, and then to pay to her the principal sum; but "that in the event the amount of such securities so remaining does not exceed" \$5,000 the trust should be void and of no effect. At the time of the decree of distribution, Georgia Lacey Burns had passed her twenty-fifth year.

The court found that at the time of her death the testatrix was the owner of eleven secured notes, having an aggregate face value of \$50,662.50, and an aggregate appraised value of \$44,162.50. Since the commencement of her administration as executrix of the will, Hattie Strong had caused foreclosure proceedings to be prosecuted as to all except two of said securities. Pursuant to foreclosure sales the estate became the owner of the real property which had served as the security for the payment of the notes, and such parcels were still a part of the estate at the time the decree herein was entered. The total appraised value of the two remaining secured notes did not exceed \$2,100, which was also their aggregate face value. The appraised value of the real property derived from the foreclosure proceedings, plus the two remaining secured notes, after payment of all debts, funeral ex-

penses, costs of administration, taxes, and attorney's fees, was \$41,100, subject to incumbrances of \$6,250 placed against two of said parcels of real property. Sufficient, therefore, remains after payment of debts, administration expenses, and personal property bequests, without reference to the present character of the property, to pay the legacy to Georgia Lacey Burns. The court found that it was the intention of the testatrix that Georgia Lacey Burns should not be deprived of the legacy provided in clause 7 of the will by reason of the foreclosure proceedings mentioned; but it was her intention that except only as the securities may be reduced below \$5,000 by the payment of debts, funeral expenses, and costs of administration, Georgia Lacey Burns should receive the legacy provided by said clause, regardless of whether the securities should be converted to the form of real property at the time of distribution.

[3-5] The appellant objects to the portion of the decree based upon the foregoing findings and ordering distribution to Georgia Lacey Burns of the \$5,000 legacy from enumerated parcels of property in the converted as well as from those in the original form. The appellant contends that the will is to be read as though it stated that if, at the time of distribution, there does not remain in the estate sufficient secured notes to be applied to the payment of the legacy to Georgia Lacey Burns, the legacy as to her is defeated. But such an interpretation of clause 7 of the will is neither necessary nor permissible. The testatrix expressly made the legacy operative out of the designated properties remaining after payment of debts, funeral expenses, and costs of administration, and distribution of certain personal bequests. She provided that in the event the amount of securities so remaining did not exceed \$5,000, the legacy should be void. She did not say, nor can we discern from anything stated in the will, that she intended the legacy to be payable from such property remaining after payment of the charges specified and any foreclosure proceedings. It is quite apparent that she intended the legacy to be effective if there was sufficient property remaining from the original source after payment of debts and the other specified charges. It is well recognized that a sale of real estate in administration proceedings will not, for purposes of distribution, effect a conversion of the proceeds therefrom into per-

sonal property. Estate of Hills, 176 Cal. 232, 168 P. 20; Estate of Gracey, 200 Cal. 482, 253 P. 921. The converse of this proposition should likewise be true and make the rule applicable in the present case to prevent the foreclosures of the securities during administration from changing the form of the securities so as to defeat the obvious intent of the testatrix. It is true, as found by the court, that the foreclosure proceedings were initiated after defaults had occurred; but it was also found that not all of said foreclosures were necessary in the interest of the estate and that some of them were had at an actual loss to the estate. It is to be assumed also that the testatrix intended that the disposition of the securities should include the power to enforce their collection. Estate of McLaughlin, 97 Cal.App. 485, 489, 275 P. 875; 69 Cor.Jur. p. 398.

The decree is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.



10 Cal.2d 341

MITCHELL v. DILBECK.
L. A. 15589.

Supreme Court of California.
Dec. 10, 1937.

Hearing Denied by Supreme Court
Jan. 6, 1938.

1. Contracts ⇐113(3)

An agreement by secretary-treasurer of benefit association to cause its directors and officers to resign for monetary consideration would be void as contrary to public policy.

2. Contracts ⇐113(3)

An agreement by secretary-treasurer of benefit association to sell his right to all benefits owned by him as such officer in consideration of stated sum per thousand dollars of insurance in force and buyer's agreement to perform his attached proposals, one of which was that four of association's directors should resign in favor of directors selected by him, was not contrary to public policy as agreement to cause such directors to resign for monetary consideration.

3. Contracts ⇐141(3)

The buyer being in pari delicto with seller of right to benefits, owned by latter as

secretary-treasurer of benefit association, after receiving such right, if contract was illegal as obligating seller to cause association directors to resign for monetary consideration, as claimed by buyer in seller's action for balance due under agreement, buyer was bound to show clearly and unequivocally that plaintiff obligated himself to perform such acts.

4. Assignments ⇨4

The secretary-treasurer of nonprofit foreign benefit association, constitution and by-laws of which, approved by board of insurance commissioners of state of its domicile, provided that he should own "property right" to such office and be entitled to annual dues and certain percentage of assessments, with right to assign them, had valuable right, which he could sell, as against contention that association and its members owned all its assets or property rights (Vernon's Ann.Civ.St.Tex. art. 4875a—1 et seq.).

5. Insurance ⇨693

The Supreme Court will not go behind approval of foreign benefit association's by-law by board of insurance commissioners of state of its domicile in order to declare such by-law illegal and invalid (Vernon's Ann.Civ. St.Tex. art. 4875a—1 et seq.).

6. Assignments ⇨82

One agreeing to sell his right to benefits, owned by him as secretary-treasurer of foreign benefit association, was entitled to recover unpaid balance of purchase price as against contention that agreement was not to be effective until board of insurance commissioners of state of association's domicile approved agreement and reinsurance contract mentioned in buyer's attached proposals, in absence of provision in agreement obligating seller to procure such approval (Vernon's Ann.Civ.St.Tex. art. 4875a—1 et seq.).

In Bank.

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Action by T. W. Mitchell against W. D. Dilbeck. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion 66 P.2d 1261.

Sherman & Sherman and Austin Sherman, all of Los Angeles, and Marvin Roberson, of Fort Worth, Tex., for appellant.

Richard F. Bailey and Ralph C. Curren, both of Los Angeles, for respondent.

CURTIS, Justice.

This is an appeal by defendant, W. D. Dilbeck, from a judgment against him in the sum of \$13,275.77, found by the trial court to be the balance due from him to plaintiff upon a certain agreement between them. Plaintiff, T. W. Mitchell, the secretary-treasurer of the Home Benefit Association, a local mutual aid association operating under the laws of the state of Texas, with headquarters at Hillsboro, Tex., on November 28, 1932, entered into the following agreement with the defendant:

"State of Texas, County of Hill.

"T. W. Mitchell, first party, and W. D. Dilbeck, second party, make the following agreement:

"1. First party agrees to and does hereby sell to the second party all of his right, title and interest to all of the monies, assessments, dues and other benefits owned by him as Secretary-Treasurer of the Home Benefit Association, of Hillsboro, Texas.

"2. Second party agrees to pay as consideration for the above property, \$5.00 per thousand of insurance in force at this date payable as follows: \$2,955.00 cash representing \$1.00 per thousand of insurance, the receipt of which cash is hereby acknowledged; \$11,820.00 representing \$4.00 per thousand of insurance, said \$11,820.00 to be paid out of 50% of all premiums collected from members of the Home Benefit Association who transfer to the Equitable Mutual Life Insurance Company, Dallas, Texas, said 50% of said premiums to belong to first party until said amount is fully paid. It is understood that the above figures are based upon an estimate of the insurance at this date in force but it is agreed that such insurance is sufficient in amount to equal said figures combined and it is further agreed that additional payment upon the same basis, viz., \$1.00 cash per thousand, and \$4.00 per thousand, out of said 50% of premiums collected from members so transferred shall be made for any insurance in addition to the amount used as an estimate upon which to base the above figures, viz., \$2,955.00 and \$11,820.00. It is further agreed by second party that the payments out of premiums shall not be less than \$1,000 per month, beginning with thirty days from this date and second party hereby personally guarantees that said payments out of said premiums shall be at

least \$1,000 per month, said guarantee to be in full force and effect and recoverable upon, regardless the amount of premiums collected or the length of time for which collected, and said agreement and guarantee that first party shall receive said \$1,000.00 per month, shall be and is continuous until the full amount of the consideration out of premium has been paid. Second party further agrees to have issued to first party and fully paid for at second party's expense stock in the Equitable Agency Finance Corporation, sufficient to equal \$1.00 per thousand of insurance in force at this date, said stock to be not less than \$2,955.00 in amount, said stock to be valued at \$10.00 per share.

"3. Second party in consideration hereof agrees to carry out and perform the proposals which are substantially set forth in the attached paper marked 'Proposals of W. D. Dilbeck,' which proposals are made a part hereof just as tho written herein.

"Witness our hands at Hillsboro, Texas, this 28 day of November, 1932.

"T. W. Mitchell

"W. D. Dilbeck."

"Proposals of W. D. Dilbeck:

"Satisfactory arrangements to be made with T. W. Mitchell, as Secretary of the Home Benefit Association, as to remuneration and working arrangements.

"Four members of the Board of Directors of the Home Benefit Association to resign in favor of four directors to be selected by Mr. Dilbeck.

"After Equitable Mutual Life Insurance Company has received permanent licenses then the Equitable is to reinsure for the face amount of the policies all members in Classes A and C, with the opportunity of each member in Classes A and C to transfer for like amount of insurance to the Equitable Mutual Life Insurance Company at the Equitable rate at the attained age at the time of transfer.

"Home Benefit Association to remain intact and operate Class B with the understanding that Mr. Dilbeck and the officers of the Equitable Mutual Life shall put forth every effort and means to build up Class B by placing members therein in groups or individually from time to time, with the understanding that any member in Class A or C who does not desire a policy in the Equitable that said member shall have the right and opportunity to be placed in Class B in the Home Benefit Association.

"The limit of time in which the members of Class A and C shall have to transfer to the Equitable shall be fixed by agreement of the Board of Directors of the Home Benefit Association and the Board of Directors of the Equitable, contract to be effective when approved by the Board of Insurance Commissioners of Texas."

Plaintiff had been secretary-treasurer of the Home Benefit Association since 1916, and during that time had received "anywhere from \$5,000 to \$15,000 a year" from the fees and commissions allowed him as secretary's expense on death assessments paid by the members of the association. The schedule of rates, benefits and expenses were set out in detail in the by-laws of the association. These by-laws and the constitution of said association had been officially approved by the board of insurance commissioners of the state of Texas which in 1929 by statute had been given control over the local mutual aid associations. Title 78, art. 4875a—1 et seq., Vernon's Ann. Rev.Civ.Stats. Article III, section 3, of the by-laws of the Home Benefit Association provided as follows:

"The Secretary-Treasurer shall be T. W. Mitchell, and he shall remain in office until he shall die, resign or be removed from office in the manner for some one or more of the causes specified in Article 2, Section 4 of the By-Laws of this Association.
* * *

"It is agreed and understood that the property rights of the office of the Secretary-Treasurer are and shall be both legally and equitably vested in the said T. W. Mitchell, and he is and shall be entitled to all the fees, emoluments, and perquisites thereof prescribed by the Constitution and By-Laws of this Association, and any amendments thereto which may hereafter be adopted. In the event charges are filed against the said T. W. Mitchell, to remove him from office he shall have the right, after such charges are filed and even after removal from office, to transfer and assign the equipment and property of said office and the fees, perquisites and emoluments thereof prescribed by the Constitution and By-Laws of this Association and any amendments thereto, which may hereafter be adopted."

Plaintiff received from the defendant the sum of \$3,183 at the time of the execution of the agreement, but never thereafter received any payment on the balance due.

In his amended complaint, plaintiff alleged that he had performed all the terms upon his part to be performed, and prayed for a judgment for \$11,820, together with interest, and for the further sum of \$2,955, the alleged reasonable value of certain stock in the Equitable Agency Finance Corporation which defendant was to deliver to plaintiff under the terms of the agreement. Upon the trial of the case, which was heard in the superior court in and for the county of Los Angeles, as the defendant was a resident of said county, the trial court found in favor of the plaintiff to the effect that he had performed each and every obligation undertaken and agreed to be performed by him under the terms of the contract above set forth. It further found that the reasonable value of the stock agreed to be delivered by defendant to plaintiff was on November 28, 1932, and continuously thereafter, valueless; and that there remained due and unpaid from the defendant the sum of \$11,820, with interest from the dates upon which the various installments became due, which amounted to the total sum of \$13,275.77. Judgment was entered accordingly.

Appellant admits the execution of the written agreement by him and the nonpayment of the \$11,820, the balance due under the agreement, but sets up as grounds for the reversal of the judgment three main contentions. We shall discuss them in the following order:

(1) Appellant and respondent agreed for a monetary consideration to cause the directors and officers of a nonprofit benefit association to resign, thereby rendering void the entire agreement between the parties on the ground that it was contrary to public policy;

(2) Respondent owned nothing which he could sell to appellant; and

(3) The agreement was not to be effective until it had been approved by the board of insurance commissioners of the state of Texas, which approval was never had, and was subject further to the approval of a reinsurance agreement between two companies, which was never approved by the board of insurance commissioners of the state of Texas.

[1-3] There can be no question that if the respondent actually agreed for a monetary consideration to cause the directors and officers of the association to resign, the agreement to do so was void as contrary

to public policy. While directors may resign when they please, they must not make a profit to themselves in the matter of their resignation, and to be bought out of office would be a violation of their trust. See authorities collected in 12 A.L.R. 1071. Appellant cites *Forbes v. McDonald*, 54 Cal. 98, as strongly supporting his position with reference to this contention. That case does undoubtedly contain language supporting appellant's contention. It should be pointed out, however, that that case was decided in department, and that only two justices concurred in the opinion; the other justice concurring merely in the decision. However, while we are of the opinion that such an agreement would be contrary to public policy, we are of the opinion that the rule is not applicable to the instant case for the reason that the written instrument plainly shows on its face that respondent never agreed for a consideration or otherwise to procure the resignation of the directors of the association. There is not a single statement in the written agreement of the parties which can be construed as an obligation on the part of the respondent to procure the resignation of any of the directors. A most cursory examination of the document shows that the paragraph having reference to the resignation of the directors is contained in the "Proposals of W. D. Dilbeck," and that in paragraph 3 of the agreement itself, it is Dilbeck, the appellant, who as the "second party" obligates himself to perform the proposals set forth in the attached "Proposals of W. D. Dilbeck," and not the respondent. It is only by going completely outside the agreement of the parties, and by saying that because appellant could not possibly perform such obligation, the duty must perforce have been upon the respondent to perform it, that such an obligation can be "read into" the written agreement. In view of the fact that appellant, who is in *pari delicto* with respondent if the agreement was an illegal agreement, after receiving from respondent the valuable property rights agreed to be transferred, is attempting to escape his obligations to pay therefor by claiming the contract to be void by reason of the agreement of respondent to perform an act contrary to public policy, we deem it to be incumbent upon appellant to show clearly and unequivocally that respondent did obligate himself to perform such act. Under the circumstances, we see no good reason for going outside the contract to im-

pose an obligation upon respondent to which he did not assent, and, by virtue of that asserted obligation, deprive him of the right to recover the consideration for valuable property rights transferred by him to the appellant. According to the plain terms of the agreement, all the respondent ever agreed to do was to sell his right, title, and interest to all of the moneys, assessments, dues, and other benefits owned by him as secretary-treasurer of the association. There was nothing contrary to public policy in this obligation. It may be that the respondent took some part in securing the resignation of the directors, but such action was entirely gratuitous on his part, for he was under no legal obligation so to do. Such acts on his part were wholly outside the written agreement of the parties, and could not, therefore, affect the legality of such agreement.

[4,5] Appellant's second contention that respondent owned nothing which he could sell is untenable. The constitution and by-laws of the association made specific provision that the respondent as secretary-treasurer should own the property right to such office, and be entitled to the fees, emoluments, and perquisites of the office prescribed by the constitution and by-laws, and that he had the right to assign them. These fees referred to in the by-laws were the annual dues and a certain percentage of each assessment. The by-laws specifically designated the right of the secretary-treasurer to the office as a "property right." That such a right is valuable is shown by the fact that respondent received from \$5,000 to \$15,000 per year by virtue of such ownership. These by-laws had been approved by the board of insurance commissioners of the state of Texas. In view of this provision of the by-laws, the argument of appellant that the association being a nonprofit one and the members as such constituting the association, therefore, the association and its members owned all of the assets or property rights of the association, and that respondent owned nothing, is not, in our opinion, sound. The association by its by-laws carved out of all money coming into the association a certain percentage which it declared was to belong to respondent as secretary-treasurer, and declared such interest to be assignable by him. This being so, respondent did own a valuable right which could be sold by him. At least, appellant, who was an experienced insur-

ance man and who was fully conversant with the affairs of the association, considered it sufficiently valuable to offer him over \$10,000 for it. Appellant severely criticizes the by-law, designating it as a "vicious set-up." Obviously, the answer to any such criticism is that the by-law was approved by the board of insurance commissioners of the state of Texas, and we do not deem it incumbent upon us to go behind that approval to declare such a by-law illegal and invalid.

[6] Appellant attempts to read into the agreement a provision that the agreement was not to be effective until approved by the board of insurance commissioners of Texas, and a provision that respondent obligated himself to procure the approval of the board of insurance commissioners of Texas to a reinsurance contract mentioned in the "Proposals of W. D. Dilbeck." An examination of the written agreement demonstrates that there is no merit in this contention. Nowhere in the agreement did respondent obligate himself to procure such approval.

It appears from the record that appellant, at the time the agreement herein discussed was entered into, was desirous of building up a large volume of business for the Equitable Mutual Life Insurance Company in order that the temporary permit of that company should be made permanent. It also appears from his own testimony that he derived a definite benefit from the written agreement with respondent, in that certain members of class A and C of the Home Benefit Association transferred to the Mutual Life Insurance Company, thus swelling the volume of business of that company and aiding in the securing of the permanent permit for that company. It further clearly appears that respondent by the execution of this agreement and the performance of the obligation therein imposed upon him of turning over the office of secretary-treasurer to the appellant suffered a definite detriment.

The appellant, in addition to his answer, filed a cross-complaint seeking recovery of the sum of \$3,183, the down payment made by him at the time of the execution of the agreement, upon the theory that, the whole agreement being illegal, he was entitled to recover back that part of the consideration which he had already paid. In view of what we have said, it is clear that he is not entitled to any recovery upon his cross-complaint.

The judgment of the trial court should be, and it is hereby, affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; EDMONDS, J.; SRAWELL, J.



10 Cal.2d 395

In re MARTENS' ESTATE.

TRAIN v. SHERER.

L. A. 16080.

Supreme Court of California.

Dec. 20, 1937.

Rehearing Denied Jan. 17, 1938.

1 Wills ⚡296

Where testator directed son-in-law to draw line with typewriter through words of will appointing executors and directed insertion of other names, and then directed him to write at bottom of will that such article was changed by testator himself on date stated, and testator then signed his name, memorandum written by son-in-law and signed by testator constituted competent evidence of testator's intent, although ineffective for purpose of legally appointing executrix and executor desired by testator, and from such evidence arose presumption that cancellation was act of testator, and that it was performed with intent and purpose of revoking that portion of will relating to appointment of executors (Probate Code, § 74, par. (2)).

2. Wills ⚡170

It is the animus which must govern extent and measure of operation to be attributed to the act where testator directed son-in-law to draw line with typewriter through names of executors in will and to substitute other persons as executors and added memorandum, which he signed, that such article of will was changed by himself (Probate Code, § 74, par. (2)).

3. Wills ⚡306

Where testator directed son-in-law to draw line with typewriter through names of executors in will and to insert names of daughter and son as executors, and then directed him to write memorandum which he signed and which was witnessed by son-in-law to effect that such article was chang-

ed by himself on date stated, court properly found that portion of will relating to executors was canceled with intent to revoke it, and that remainder of will was entitled to probate (Probate Code, § 74, par. (2)).

4. Wills ⚡174

Where testator directed son-in-law to strike out names of executors in will and to insert names of others as executors, insertion of new names was illegal appointment, and was not execution of a codicil.

5. Wills ⚡174

Where testator directed son-in-law to strike out names of executors named in will and to insert names of others as executors, such revocation of portion of will was valid, even though substituted persons named could not act because of defect in execution of change, and effect was that office of executor was left vacant (Probate Code, § 74, par. (2)).

6. Executors and administrators ⚡21(1)

Persons are entitled to appointment as administrators with will annexed in same order of priority as in appointment of administrators, and son and daughter of testator were entitled to be appointed administrators with the will annexed as against another person who had originally been nominated as executor, but whose name was later stricken from will (Probate Code, §§ 409, 422).

In Bank.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Petition by Henry E. Sherer for probate of the will of John D. Martens, deceased, and for letters testamentary, opposed by Pearl E. Train and another, as contestants. From a judgment admitting the will to probate and granting letters testamentary to petitioner, the contestant named appeals.

Reversed and remanded, with directions. Prior opinion, 68 P.2d 737.

Marshall & Farnham, of Long Beach, for appellant.

Ben A. Hill, of San Pedro, for respondent.

WASTE, Chief Justice.

The decedent, John D. Martens, executed a last will and testament dated October 17, 1929, by which he devised and be-

queathed his entire estate to his son and daughter in equal parts. Paragraph 5 of the will, relating to the appointment of an executor, read: "Fifth: I hereby appoint and nominate Sylvester Rocco of San Pedro, California, as Executor of this my Last Will and Testament, and in the event he cannot or does not act as such executor, then and in that event, I nominate Henry E. Sherer of San Pedro, California, as executor in his place and stead."

The will was placed in the custody of a bank in San Pedro, with which institution Rocco and Sherer were associated, and there remained until some time in March, 1933, when the testator secured it. It thereafter remained in his possession. The evidence, beyond dispute, shows that on May 10, 1933, Martens, in the presence of his daughter, Pearl E. Train, and her husband and son, requested the husband to draw a line by means of a typewriter through the words in paragraph fifth "Sylvester Rocco of San Pedro" and "in the event he cannot or does not act as such executor, then and in that event, I nominate Henry E. Sherer of San Pedro, California, as executor in his place and stead." After some general conversation at this time as to who should be named as executor, Martens requested that the names "Pearl E. Train and Arthur R. Martens," his daughter and son, respectively, be inserted in paragraph 5. The testator then directed the husband of Mrs. Train to write at the bottom of the will the following: "Article No. 5 above was changed by myself on this ten day of May, 1933." Martens then signed his name to the memorandum written by Train, and Train witnessed his signature.

On Martens' death, the daughter and son filed their petition for probate of the will and for their appointment as executors thereof. Henry E. Sherer also filed a petition for probate, asking that letters testamentary be issued to him, setting forth in his petition that Sylvester Rocco had declined to act as executor, and had filed his waiver to that effect. Pearl E. Train and Arthur R. Martens thereupon filed their written opposition and contest to Sherer's petition for probate, and by separate petition sought appointment as administrators with the will annexed. After due hearing, the trial court admitted the will to probate and granted letters testamentary to Henry E. Sherer. Pearl E. Train, the decedent's daughter, alone appeals.

[1,2] Paragraph (2) of section 74 of the Probate Code provides that a written will, or any part thereof, can be revoked by being burnt, torn, canceled, defaced, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction. We are of the view that the action of the testator and what was done when he directed the witness Train to draw a line, using a typewriter, through the words indicated in the foregoing recital, effected a sufficient revocation of the provisions of the will relating to the appointment of the executor originally named in the will. As in *Re Estate of Wikman*, 148 Cal. 642, 645, 84 P. 212, the only question is whether the evidence sustains the conclusion that the cancellation was done by the testator with the intent and purpose of revoking that part of the will by which Sherer was appointed executor.

The facts of the *Wikman Case* are closely parallel to the facts here. The testator had obtained possession of the will before executing the cancellation, and it remained in his possession until his death. The facts here are stronger than those held sufficient in *Re Estate of Wikman*, for, in this case, the action of the testator was testified to by a number of witnesses who were present at the time the obliteration marks were made by the typewriter in the hands of witness Train. Furthermore, the memorandum written by Train at the bottom of the will and signed by the testator constituted competent evidence of the testator's intent, although ineffective for the purpose of legally appointing the executrix and executor desired by the testator. From this evidence there arises the presumptions: (1) "That the cancellation was the act of the testator; and (2) that it was performed with the intent and purpose of revoking" that portion of the will relating to the appointment of Rocco and Sherer. In *re Estate of Wikman*, supra. In *re Estate of Olmsted*, 122 Cal. 224, 232, 54 P. 745, cited approvingly in the *Wikman Case*, supports the contention of the appellant here. The acts here taken by the testator fall squarely within what was held sufficient in *Re Estate of Streeton*, 183 Cal. 284, at page 291, 191 P. 16, in which it was said that the slightest act with intent to revoke a will is sufficient for the purpose. It is the animus which must govern the extent and measure of operation to be attributed to the

act. In the Wikman Case, *supra*, when the will there in question was produced in court there were black ink lines through and over the words designating the executrix. "By these lines," said the court (148 Cal. 642, at page 643, 84 P. 212, 213), "the said words were nearly, although not entirely, obliterated, but they were, beyond doubt, sufficient as a physical fact to constitute a cancellation of the words over which they appear if they were put there by the testator or at his direction for the purpose of cancellation."

[3-5] In view of these authorities, we are of opinion that the trial court was correct in finding that the portion of the will relating to executors had been canceled with intent to revoke it and the balance of the will was entitled to probate. The insertion of the names of an executrix and executor in the will at the instance of the testator amounted merely to an empty and illegal appointment. It did not amount to the execution of a codicil. There was, therefore, a sufficient revocation of a portion of the will relating to an executor, but an illegal effort to nominate other persons. The authorities hold that such a revocation, under the circumstances here existing, is valid, even though the substituted persons named cannot act because of a defect in the execution of the change. *Watson v. Hinson*, 162 N.C. 72, 77 S.E. 1089, Ann.Cas.1915A, 870. It was there held that the erasure from a will of the name of a person therein designated as executor, and an insertion in place thereof of another name, had no effect on the instrument as a whole and the testator died testate without naming an executor. The insertion being inoperative because not properly made or witnessed, the office of executor was left vacant.

[6] Therefore, while the court was correct in its appraisal of the effect of the cancellation, it was in error in the appointment of Sherer as executor. Persons are entitled to appointment as administrators with the will annexed in the same order of priority as in the appointment of administrators. Probate Code, § 409. Under section 422 of the same Code, the appellant Pearl E. Train, daughter of the testator, and Arthur R. Martens, his son, are entitled to be appointed administrators with the will annexed.

The judgment of the trial court granting letters testamentary to Henry E. Sher-

er is reversed. The cause is remanded to the trial court, with directions to cancel the order and in lieu and place thereof to enter its order appointing Pearl E. Train and Arthur R. Martens, daughter and son, respectively, of the testator, administrators with the will annexed of John D. Martens, deceased.

We concur: SHENK, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.



UNION BANK & TRUST CO. OF LOS ANGELES v. LOS ANGELES COUNTY
et al.*

DAVIES v. LAMPTON et al.
L. A. 16274.

Supreme Court of California.
Nov. 26, 1937.

Rehearing Granted Dec. 23, 1937.

1. Clerks of courts ☞74

A county clerk and sureties on his bond are liable thereon for any dereliction of duty by him as *ex officio* clerk of superior court, as in embezzling money received in evidence at criminal trial (Pol.Code, §§ 954, 996, 4022, 4152, 4178; Const. art. 6, §§ 5, 14).

2. Clerks of courts ☞74

A county clerk and sureties on his statutory bond, containing condition that all his deputies shall faithfully perform all their duties, are liable for deputies' torts, as in embezzling money received in evidence at criminal trial, though such deputies are independent statutory officers not employed by clerk or subject to his personal control (Pol.Code, §§ 958, 959, 4022).

3. Clerks of courts ☞74

A surety, expressly assuming liability on county clerk's bond in consideration of premium demanded, cannot claim that any condition thereof, such as condition that all of principal's deputies shall faithfully perform all their duties, is without consideration (Pol.Code, §§ 959, 4022).

4. Estoppel ☞98(1)

A bankruptcy trustee was not estopped to intervene in executor's action on county

*For subsequent opinion see 81 P.2d 919.

clerk's bond for money embezzled by his chief deputy in order to recover portion of embezzled fund, assigned to bankrupt by testator, because latter's attorney learned of certain improprieties in such deputy's handling of money while still in safe deposit box; such trustee being wholly innocent party (Pol.Code, §§ 959, 4022).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by the Union Bank & Trust Company of Los Angeles, as executor of the estate of Charles H. Crawford, deceased, against the County of Los Angeles, L. E. Lampton, as clerk of such county, and others, in which Alfred E. Davies, as trustee in bankruptcy for the estate of A. C. Waggy & Company, Incorporated intervened as a party plaintiff. Judgment for defendants, and plaintiff in intervention appeals.

Reversed.

For prior opinion, see (Cal.App.) 64 P. 2d 1135.

A. I. McCormick and Guy R. Crump, both of Los Angeles, for appellant.

Everett W. Mattoon and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondents.

Hill, Morgan & Bledsoe and Kenneth K. Wright, all of Los Angeles, for respondent L. E. Lampton.

Joe Crider, Jr., and A. F. Mack, all of Los Angeles, for Fidelity & Deposit Co. of Maryland.

PER CURIAM.

This action was brought against the defendant Lampton, as county clerk of Los Angeles county, and the sureties on his official bond, to recover certain money deposited with the said clerk and embezzled by his chief deputy.

In 1930 a criminal trial was in progress in Los Angeles county, in which two persons were charged with an attempt to extort \$75,000 from Charles H. Crawford. With his consent, 75 bills of \$1,000 denomination were received in evidence at the trial. Thereafter the deputy clerk of the trial department delivered them to Liberty A. Hill, chief deputy in the county clerk's office. The practice of the defendant Lampton was to have such ex-

hibits kept in a bank safe deposit box. He entrusted the keys of the box to his chief deputy, and delegated to him the care and custody of the exhibits. Hill put the bills in the box, but later withdrew them and embezzled the money.

Thereafter plaintiff, executor of the estate of Crawford, brought this action. Prior to his death, Crawford had assigned the sum of \$10,000 out of such fund, and plaintiff in intervention seeks the recovery of that sum. The trial court held that neither the defendant Lampton, county clerk, nor his sureties, could be held liable for the loss. From this judgment plaintiff in intervention appealed.

[1] The first theory advanced to absolve defendants from liability is that the bond of the county clerk does not cover dereliction of duty in the separate office of clerk of the superior court, held *ex officio*. It is contended that these are separate and distinct offices; that defendant Lampton received the money in question as clerk of the superior court and not as county clerk; that, therefore, the bond which he furnished as *county clerk* does not cover the present loss. See *City of San Bruno v. National Surety Co.*, 119 Cal.App. 27, 31, 5 P.2d 951; *People v. Burkhardt*, 76 Cal. 606, 18 P. 776.

In examining this contention, it may be well to bear in mind the consequences thereof. Defendant Lampton has given but one official bond, the only one required of him by law, that as county clerk. It appears, however, that in his capacity as *ex officio* clerk of the superior court he received during 1929 and 1930 over \$3,000,000 in trust funds, fees, and fines. Under defendants' theory this large sum was handled by a public officer with no security whatever for his faithful performance. In the case of defendant Lampton, this would be true for some eighteen years. Moreover, plaintiff points to section 996 of the Political Code, providing that an office becomes vacant upon the refusal or neglect of an officer to file his official bond within 30 days after notice of his election or appointment. The view of defendants, therefore, leads inevitably to the conclusion that either the office of clerk of the superior court in and for the county of Los Angeles is wholly without the protection of a surety bond, or the office is vacant. These alternatives are so startling, and the results so manifestly contrary to the public interest, that they must be re-

jected if it is possible to do so, and a brief examination of our Constitution and statutes makes it clear that the law is not as defendants assert it to be.

The county clerk is by the Constitution made ex officio clerk of the superior court (article 6, § 14), and the Legislature is given power to prescribe the duties of the county clerk. Article 6, § 5; see, also, Pol.Code, § 4152. These duties are set forth in the Political Code. In section 4178 of said code, the duties of the *county clerk* are stated, and it is therein provided that he must act as *clerk of the superior court*. Specific duties as clerk of the superior court are thus described as duties of the county clerk. Elsewhere the Political Code provides for the giving of a bond by the county clerk. Pol.Code, § 4022. The condition of an official bond is that the principal will faithfully perform "all official duties then required of him by law, and also all such additional duties as may be imposed on him by any law of the state of California." Pol.Code, § 954. Defendant Lampton filed a bond providing that he should faithfully perform all official duties "imposed upon or required of him by law, ordinance or the charter of the county of Los Angeles. * * *

It follows that in his activities as clerk of the superior court defendant Lampton was carrying out the duties imposed by law upon him as county clerk, and for any dereliction in such activities, his surety is responsible. This conclusion is compelled by the terms of the statute, and needs no citation of other authority. However, there is support for the general doctrine that where a surety becomes responsible for the defaults of a principal with respect to a particular office, and the principal also holds a second office, the duties of which are by law made a part of the duties of the first, the surety is responsible for defaults in performing the duties of the second. See *Redwood City v. Grimmerstein*, 68 Cal. 512, 9 P. 560; *Mechem, Public Officers*, § 285; *Throop, Public Officers*, § 236.

[2] The second theory of defendants is that since the county clerk did not himself commit any wrongful act, it is necessary, as a basis of liability of the surety, to establish liability of the clerk for the wrongful act of his deputy; and they argue that the said clerk is not liable generally for torts of his deputies, who are themselves public officers, holding offices

created by the charter adopted pursuant to constitutional authority, and serving under civil service regulations.

It may be conceded that in the absence of statute the modern view is opposed to making public officers civilly liable for torts of deputies, where the latter are themselves statutory officers and not under the superior's unrestricted control or right of hiring and discharging. See *Michel v. Smith*, 188 Cal. 199, 205 P. 113 (municipal police officer); *Van Vorce v. Thomas*, 18 Cal.App.2d 723, 64 P.2d 772 (deputy marshal of municipal court); *Pavish v. Meyers*, 129 Wash. 605, 225 P. 633, 34 A.L.R. 561 (police officer); note, 43 Harv. L. Rev. 327. The other view is usually grounded upon the identity of the officer and his deputy or the unrestricted right of control. See *Foley v. Martin*, 142 Cal. 256, 71 P. 165, 75 P. 842, 100 Am.St.Rep. 123; *City of Duluth v. Ross*, 140 Minn. 161, 167 N.W. 485; *New York v. Fox*, 232 N.Y. 167, 133 N.E. 434. In the instant case the clerk's deputies are independent statutory officers within the rule of such cases as *Michel v. Smith*, supra, and *Van Vorce v. Thomas*, supra. But this does not dispose of our problem. We are satisfied that defendant Lampton and his sureties are not liable under common-law principles of tort or agency. But liability may exist by reason of the language of the statute and the surety bond. See *Grays Harbor Const. Co. v. Paulk*, 179 Wash. 300, 37 P.2d 584; *City of Chicago v. Southern Surety Co.*, 239 Ill.App. 628, 640. And upon an examination of the statute and the bond, it becomes clear that defendants are liable under their terms.

Political Code, § 958, requires all official bonds to contain "such conditions as required by this chapter, or the law creating or regulating the duties of the office." Section 959 provides: "Every official bond executed by any officer pursuant to law is in force and obligatory upon the *principal* and *sureties* therein for any and all breaches of the conditions thereof committed during the time such officer continues to discharge any of the duties of or hold the office, and whether such breaches are committed or suffered by the *principal officer, his deputy, or clerk*." In defendant Lampton's bond one of the conditions reads: "and further that if all *deputies, assistants, clerks and employees* appointed by him, or otherwise, and all and each of

them, shall faithfully perform all of the duties that are now, or hereafter may be lawfully imposed upon or required of them, and all and each of them as such deputies, assistants, clerks or employees, then this obligation to be void; otherwise to remain in full force and effect." And the bond recites, in conformity with the statute, that "we, L. E. Lampton" and the named surety, "are jointly and severally bound."

The purpose and effect of these provisions are entirely clear; the liability imposed upon Lampton and his surety is one expressly required and fully contemplated by the parties; and the defendant surety has been compensated for the assumption thereof. Defendants suggest that section 959 of the Political Code was adopted at a time when the deputies of a public officer were not statutory officers, but were employed by him and subject to his personal control, and that consequently the words "his deputy" must be deemed to refer only to persons so controlled. There is no force in this argument. If the present "deputies" of the county clerk are not "his deputies," then what positions do they hold? His deputies did not cease to be such when they came under civil service regulations. The express terms of the statute are clearly applicable here, and the language requires no construction.

[3] It is true that in *Lorah v. Biscailuz*, 12 Cal.App.2d 100, 54 P.2d 1125, the court held that neither the sheriff nor his surety was liable for torts of a deputy, even though the bond expressly covered acts of the deputies. The opinion is based upon two theories: First, that the plaintiff's right of action was derived solely from Political Code, § 961, which mentions the officer but not his deputies; and, second, that since the sheriff is not liable in tort for acts of his deputies, the bond was in this respect given without consideration. Upon careful study we are convinced that neither theory is sound. Political Code, § 961, was not intended to limit liability, but rather to give a right of action; and it does not nullify the express provisions of section 959, placing the liability for acts of deputies upon "the principal and sureties." Under section 959 and the joint and several bond executed by defendant Lampton and his sureties, defendant Lampton is liable for the acts of his deputies in the sum mentioned in the bond. And the surety, hav-

ing expressly assumed the liability of its bond for the premium demanded, cannot claim that any condition of the said bond is without consideration. We are therefore of the opinion that the case of *Lorah v. Biscailuz* is, on the question of liability under the bond, wrongly decided, and must be overruled.

It may be observed that the Legislature in 1933 recognized the problem arising from unbonded subordinates and provided that appointed deputies may be required by the officer to give individual bonds, or be covered by a "master official bond." See Pol.Code, § 985 (as amended by St. 1933, p. 1525). This statute offers the innocent officer a means of protection against such liabilities as considered herein.

[4] Defendants also raise the defense of estoppel, based on some evidence tending to show knowledge by Crawford's attorney of certain improprieties in the handling of the money by Hill, the deputy; but at the time such knowledge was acquired, the entire sum was still in the safe deposit box. Not only is the evidence inconclusive on this issue, but there is nothing therein which would justify an estoppel against plaintiff in intervention, a wholly innocent party, who is the only appealing plaintiff.

The judgment is reversed.



10 Cal.2d 350

JACKSON et al. v. SUPERIOR COURT
IN AND FOR SAN DIEGO COUNTY
et al.

L. A. 16376.

Supreme Court of California.

Dec. 10, 1937.

I. Prohibition ☞3(5)

Writ to prohibit court from proceeding with trial of petitioners on an indictment to which they plead former jeopardy held to lie as against contention that remedy by appeal was speedy and adequate, where trial would take several weeks and preparation of the record and perfection of appeal would

take several more, especially since issue raised by writ was jurisdiction of trial court to again place petitioners on trial for offenses charged in indictment.

2. Criminal law ⇨165, 183

A person is in legal "jeopardy" when he is put on trial, before a court of competent jurisdiction, on an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, and a jury is thus charged when it is impaneled and sworn, and a dismissal of the case thereafter without the consent of the defendant is equivalent to an acquittal and is a bar to a subsequent indictment for same offense.

[Ed. Note.—For other definitions of "Jeopardy," see Words & Phrases.]

3. Criminal law ⇨172

Where both prosecution and defense had exercised same number of peremptory challenges and court then directed a reversal of the statutory order of exercising, and later, names in the jury box having been exhausted, additional names of jurors who were on the panel but were serving in another department at opening of trial were put in, whereupon jury was completed before peremptories were exhausted and was sworn, defendants were placed in jeopardy, since such errors were not sufficiently substantial to cause a reversal of conviction if defendants were convicted (Pen.Code, §§ 1070, 1088, 1098).

4. Criminal law ⇨172

As respects claim of former jeopardy, in selection of jury for a trial under an indictment, error of court, without objection from defendant, in reversing the statutory order of exercise of peremptory challenges, held waived by defendant in accepting the jury before his peremptory challenges were exhausted (Pen.Code, §§ 1070, 1088, 1098).

5. Criminal law ⇨172

As respects claim of former jeopardy, where names in jury box were exhausted and additional names of jurors who were on panel but serving in another department at opening of trial were put in, such error in selection of jury for a trial under an indictment held waived by defendants' counsel in suggesting and requesting the procedure, in view of rule that a defendant will not be

permitted to lead a trial judge into unsubstantial error and then complain of it.

6. Criminal law ⇨183

Defendants on trial before court of competent jurisdiction on an indictment properly found and drawn before a jury legally impaneled and sworn held placed in jeopardy on jury being sworn, so that they could not be tried again for the same offense, following prosecutor's granted motion for a mistrial, which was opposed by defendants, who had waived the unsubstantial errors in selection of the jury on which the motion was based (Pen.Code, §§ 1070, 1088, 1098).

In Bank.

Petition for a writ of prohibition by Russell O. Jackson and Frank A. Scott against the Superior Court of the State of California in and for San Diego County, and Hon. Lloyd E. Griffin, as Judge thereof.

Writ granted.

Prior opinion, 67 P.2d 384.

Hervey & Holt, of San Diego, for petitioners.

Thomas Whelan, Dist. Atty., Frank T. Dunn, Asst. Dist. Atty., and V. C. Winnek, Deputy Dist. Atty., all of San Diego, for respondents.

CURTIS, Justice.

This cause was transferred to this court after decision by the District Court of Appeal of the Fourth District that we might give further consideration to the question raised by petitioners that they were placed in jeopardy at the first trial of said action when the jury impaneled and sworn to try the case against petitioners was dismissed without their consent and over their protests. The authorities are in unison that jeopardy attaches to a defendant when he is placed on trial before a court of competent jurisdiction upon a valid indictment or information before a jury duly impaneled and charged with his deliverance. At just what stage in the proceedings in a criminal action is the jury "charged with the deliverance" of the defendant on trial? Respondents contend that, until the information is read to the jury and the plea of the defendant is stated, the jury is not charged with his deliverance. At the first

trial of petitioners the jury was impaneled and sworn, but, before the indictment was read or the plea stated to the jury, the prosecution moved the court to declare a mistrial and discharge the jury. As we have seen, the court granted this motion against the protest of the defendants. This question as to when jeopardy attaches to a defendant placed on trial in a criminal action is settled in so far as the courts of this state have spoken by the authorities cited in the opinion of the District Court of Appeal hereinafter set forth. These authorities hold that a jury stands charged with the deliverance of a defendant when its members have been impaneled and sworn. Respondents cite cases from other jurisdictions to the contrary, but they are not controlling in the face of the decisions of our own courts.

We are also in agreement with the District Court of Appeal in its holding that prohibition is available to petitioners to restrain the further trial of said action. The present action cannot in our opinion be distinguished from the case of *Huntington v. Superior Court*, 5 Cal.App. 288, 90 P. 141. That case was followed and approved in *Oliver v. Superior Court*, 92 Cal.App. 94, 97, 267 P. 764. The rule announced therein must be deemed to be the settled law of this state. We find ourselves therefore in complete accord with the opinion and decision of the District Court of Appeal rendered in this action and written by Mr. Justice Marks, and we adopt said opinion as the opinion of this court. The opinion of the District Court of Appeal is as follows:

"In this original proceeding petitioners seek a writ of prohibition prohibiting the respondent court and judge from proceeding with their trial under an indictment of the grand jury of San Diego county. Petitioners maintain they have once been placed in jeopardy for the several offenses charged in the indictment.

"Respondents have both demurred to and answered the amended petition, and in the demurrer attack it on both special and general grounds,—uncertainty, failure to state facts sufficient to constitute a cause of action, and lack of jurisdiction. The question of jurisdiction is not pressed. There can be no doubt that this court possesses jurisdiction to entertain and decide a petition for a writ of prohibition.

"Various instances of uncertainty are alleged. The amended petition has attached to it, and made a part of it by reference, a copy of those portions of the reporter's transcript material to this proceeding. This cures uncertainties appearing in the body of the amended petition, and also cures certain legal conclusions therein contained.

"Respondents urge that the writ should not be issued because petitioners possess a plain, speedy, and adequate remedy at law whereby they may preserve the rights which they hope to protect in this proceeding. They maintain that the plea of former jeopardy is one which the petitioners may or may not enter, their action depending on themselves and their counsel; that, if the trial court was in error in refusing their request to enter these pleas, and was in error in concluding that jeopardy had not attached, those questions might be raised on appeal if they should be convicted at their second trial, and would serve as a sure ground for reversal of the judgments which might be pronounced against them, which reversals would result in their discharge after the appeal had been decided. That the right to raise this question on appeal is plain cannot be doubted. That it is either speedy or adequate is open to serious question.

[1] "It was admitted in argument that the trial will consume several weeks. With such a voluminous record to prepare, considerable time would necessarily elapse before the appeal could be perfected and decided. In view of the considerable discretion vested in us in issuing these writs, we are constrained to hold that, while the remedy at law is plain, it is neither speedy nor adequate under the facts before us and especially in view of the fact that in its final analysis the question before us is one of the jurisdiction of respondents to again place petitioners on trial for the offenses charged in the indictment found against them. *Menjou v. Superior Court*, 128 Cal. App. 117, 16 P.2d 1007; *Huntington v. Superior Court*, 5 Cal.App. 288, 90 P. 141; *Oliver v. Superior Court*, 92 Cal.App. 94, 267 P. 764.

"It follows that the demurrer should be overruled and the cause considered on its merits. This will require that we set forth a somewhat detailed statement of the facts which are not in dispute.

"Petitioners were indicted and charged with violations of the Corporate Securities Act. The legal sufficiency of the indictment and the jurisdiction of the trial court are not questioned.

"Petitioners were placed on trial and the court proceeded to impanel a jury. When ten peremptory challenges had been used by each side, the trial judge required one of the defendants to exercise a peremptory before the People had used one. See sections 1088, 1070, 1098, Pen.Code. No formal objection to this procedure was made and for a time thereafter peremptory challenges were exercised in that order. Then counsel for defendants (petitioners here) informed the trial judge that he believed this procedure erroneous and stated that he would ask for an added number of peremptory challenges over those allowed by law (section 1098, Pen.Code) equal to the number he had used after the erroneous order of exercising such challenges had been enforced. No other objection was made at any time. The trial judge had no occasion to pass on this request because a satisfactory jury was obtained and sworn before either party had exhausted their peremptory challenges.

"A second alleged error was committed while impaneling the jury. In San Diego county one jury panel is used for the several departments of the superior court. Part of this panel was in attendance in the department of the respondent judge and another part was serving in another department. Those jurors completed their services and returned to the department in which petitioners were on trial. Just at what stage of the proceedings this happened does not appear. When the names in the jury box had been exhausted, counsel for defendants (petitioners here) informed the trial judge that eleven jurors on the regular panel were sitting in the courtroom and requested that their names be placed in the jury box, which was done, and the trial jury was completed and sworn.

"At this stage in the proceedings the following occurred:

"Mr. Dunn (Assistant District Attorney): If your Honor please, in regard to the impanelment of the jury, we have investigated the law and we find that in our opinion, and I think Counsel will agree, that there probably was error committed which was prejudicial in the rulings made by the Court relative to the exercising of the peremptory challenges. On behalf of the Peo-

ple and also on behalf of the defendants, for that reason we think the error committed is such that it would necessitate the Court in declaring this a mistrial.

"Mr. Hervey: If the Court please, we would want the record to show—are you moving for a mistrial at this time?

"Mr. Dunn: Yes.

"Mr. Hervey: Let the record show that the defendants resist the motion.

"The Court: Well, it appears that the Court made or possibly may have made some error in the question of exercising the peremptory challenges—

"Mr. Hervey: Before your Honor completes his statement, may I say for the record, that our position may be made clear—on behalf of Russell O. Jackson and on behalf of the defendant Frank A. Scott, we wish the record to show that the defendants are present in court prepared to proceed and object to a mistrial being declared.'

"The trial court granted the motion, declared a mistrial, discharged the jury, and continued the case to the following morning for retrial. Counsel for defendants (petitioners here) moved the trial court for permission to enter pleas of former jeopardy and former acquittal on behalf of both defendants (petitioners here). This motion was denied and this proceeding followed.

"Former jeopardy is thus defined in 8 Ruling Case Law, p. 138:

[2] "'A person is in legal jeopardy when he is put on trial, before a court of competent jurisdiction, on an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, and a jury is said to be thus charged when it is impaneled and sworn. The opinion prevails to some extent that jeopardy does not attach until a verdict is rendered. This doctrine, however, limits the term jeopardy to mean the same as autrefois acquit or convict. But the word means exposure to danger, and where a person is put on his trial on a charge of a crime before a jury sworn to decide the issue between the state and himself, he is then exposed to danger in that he is in peril of life or liberty. * * *

"Until the entire jury is selected and sworn jeopardy does not attach, so that

a defendant is not entitled to discharge because of former jeopardy, if, on discovering the failure of one of the jurors to take the oath, the jury is resworn and the trial begun de novo. But as soon as a jury has been impaneled and sworn jeopardy attaches, and a dismissal of the case, when not authorized by law and without the consent of the defendant, after the jury has been sworn and the trial actually commenced is equivalent to an acquittal of the charge and will constitute former jeopardy on a subsequent trial on the same charge. The rule necessarily implies that the jury sworn shall be one properly constituted, and therefore a defendant is not in jeopardy where the jury selected and sworn is not a legal jury, as for instance where one of the jurors is an alien, and therefore the court may properly withdraw him and substitute a duly qualified person in his place.'

"The substance of this definition has been approved by the courts of California with the exception of the last sentence which has only been declared by way of dicta. See *People v. Webb*, 38 Cal. 467; *People v. Cage*, 48 Cal. 323, 17 Am.Rep. 436; *People v. Hunckeler*, 48 Cal. 331; *People v. Curtis*, 76 Cal. 57, 17 P. 941; *People v. Ammerman*, 118 Cal. 23, 50 P. 15; *People v. Hawkins*, 127 Cal. 372, 59 P. 697; *People v. Stoll*, 143 Cal. 689, 77 P. 818; *People v. Tong*, 155 Cal. 579, 102 P. 263, 24 L.R.A., N.S., 481, 132 Am.St.Rep. 110; *People v. Nash*, 15 Cal.App. 320, 114 P. 784; *People v. Young*, 100 Cal.App. 18, 279 P. 824.

"In *People v. Hawkins*, supra, it was said: 'It is well settled that the impaneling of the jury is part of a trial (*Silcox v. Lang*, 78 Cal. 118, 20 P. 297); the legal jeopardy of the defendant has attached when a jury has been "charged with his deliverance", and the jury stands thus charged when its members have been impaneled and sworn. *Cooley's Constitutional Limitations*, 6th Ed. 399.'

"The case of *People v. Young*, supra, is so factually similar to the instant case that it must be considered as controlling here. In that case a jury with two alternates were sworn. The district attorney made his opening statement to the jury. A juror reported that he was acquainted with a witness who was to be called for defendant. Over the objection of defendant the district attorney was permitted to exercise a peremptory challenge on this juror and one of the alternates was drawn and entered

the jury box. Defendant was refused leave to enter the plea of former jeopardy. He was convicted, and in reversing the judgment and ordering his discharge the court said:

"'Jeopardy signifies the danger of conviction and punishment which one charged with a criminal offense incurs when duly put upon trial before a court of competent jurisdiction, and a jury has been charged with his deliverance. *People v. Tong*, 155 Cal. 579, 102 P. 263, 24 L.R.A., N.S., 481, 132 Am.St.Rep. 110. A jury stands so charged when its members have been impaneled and sworn. *People v. Hawkins*, 127 Cal. 372, 59 P. 697. His jeopardy is real and he cannot be again subjected to jeopardy unless the jury be discharged without rendering a verdict, by his consent, or upon some legal necessity resulting from physical causes beyond the control of the court. *People v. Hunckeler*, 48 Cal. [331] 334; *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272. If deprived of a verdict because an error of law would result in a mistrial, except as provided by statute therefor, the discharge is equivalent to an acquittal and is a bar to a subsequent trial. *People v. Tong*, supra. A defendant having been placed in jeopardy, it is a bar to another indictment or information for the same offense or for an attempt to commit it, or for an offense necessarily included therein, of which he might have been convicted under the first indictment or information. *People v. Zeigler*, 135 Cal. 462, 67 P. 754, 56 L.R.A. 882.'

[3] "Respondents seek to avoid the results of these rules by pointing out the alleged errors in impaneling the jury, which we have mentioned, and by arguing that jeopardy cannot attach unless the proceedings leading up to the swearing of the jury be so free from error that a verdict of guilty, if one be returned, will not be upset on appeal. This seems to be the rule in some states, if not in California. There seems to be much common sense and much sound argument behind such a rule. It might well be asked, how can a defendant be in danger of being deprived of life or liberty if the jury which tries him cannot return a verdict under which he can be punished? However, from the view we take of the case that question is academic here. The errors in impaneling the jury, pointed out by respondents, are not sufficiently substantial to cause a reversal of a judgment if petitioners had been con-

victed. Further, those errors, if any, were waived by petitioners. That such errors may be waived, and thereby their prejudicial effect, if any, be destroyed, is well established. *People v. Baillie*, 133 Cal. App. 508, 24 P.2d 528; *People v. Kelly*, 132 Cal.App. 118, 22 P.2d 526.

[4] "It is true that the Code provides the order in which peremptory challenges should be exercised. It is also true that it has been held that a departure from such order must be shown to be prejudicial and that where the established order was departed from and a defendant accepted the jury before his peremptory challenges were exhausted he suffered no prejudice from the error. *People v. Troutman*, 187 Cal. 313, 201 P. 928. See *People v. Durrant*, 116 Cal. 179, at page 197, 48 P. 75. We conclude that the error in the order of peremptory challenges was not prejudicial and that it was waived.

[5] "Respondents urge that the names of all the jurors from which the jury is to be drawn must be in the jury box from which the names of the prospective jurors are drawn. This statement is only true if subjected to several important exceptions. The exact procedure followed in the instant case was approved in the case of *People v. Loomer*, 13 Cal.App. 654, 110 P. 466, as authorized by the provisions of section 248 of the Code of Civil Procedure. Furthermore, the procedure followed here was upon the suggestion and at the request of counsel for petitioners. Any possible error was thereby waived. A defendant will not be permitted to lead a trial judge into unsubstantial error and then be heard to complain of it.

[6] "It is our conclusion that petitioners were placed on trial in a court of competent jurisdiction on an indictment properly found and drawn, before a jury legally impaneled and sworn. It follows that under the rules prevailing in California jeopardy attached when the jury was sworn and that respondents have lost jurisdiction to try them again for the offenses of which they, in the eyes of the law, have been acquitted."

It is ordered that the demurrer to the amended petition be overruled and that the writ of prohibition be issued as prayed for.

We concur: WASTE, C. J.; LANGDON, J.; EDMONDS, J.; SHENK, J.; HOUSER, J.; SEAWELL, J.

10 Cal.2d 376

EMPIRE WEST SIDE IRR. DIST. et al. v.
STRATFORD IRR. DIST. et al.

L. A. 15982.

Supreme Court of California.

Dec. 16, 1937.

1. Waters and water courses $\S$ 247(1)

Where land company owning riparian lands on both sides of river, before subdividing and selling lands with their pro rata share of water, created water company and transferred to it stock in mutual water company for distribution of water represented thereby to "parts of lands," evidence, including agreement that subdivisions would be supplied only from canals from which water could be carried by gravitation and finding that canals through which water would flow by gravitation were all located on east side of river, supported finding that water of mutual company was distributable exclusively to lands on east side of river except when available to west side lands as surplus water.

2. Waters and water courses $\S$ 247(1)

Owners of lands on west side of river purchased from land company, which owned riparian lands on both sides and, before subdividing and selling lands with their pro rata share of water, created water company to which it transferred stock in mutual water company representing water right, were guilty of laches in asserting that water of mutual company was intended to be distributed ratably to purchasers on both sides of river, and not exclusively to those on east side, where there had been a continual controversy over water from 1906 until 1934 when action was begun.

3. Appeal and error $\S$ 1071(5)

Findings in favor of respondents on certain defenses advanced by them would be disregarded as surplusage by reviewing court where evidence supported construction of contract, upon which solution of controversy turned, in accordance with respondents' contentions.

4. Estoppel $\S$ 93(7)

Owners of land on east side of river purchased from land company owning riparian lands on both sides could assert their exclusive right to water of mutual water company represented by stock which land company had transferred to water company formed by it, and they were not estopped because of inactivity during construction

of siphon reputedly intended to carry water of mutual company to owners on west side, where siphon was constructed on right of way belonging to owners on west side, no rights of owners on east side were invaded, and no water of mutual company was ever transported through siphon.

In Bank.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by the Empire West Side Irrigation District and others against the Stratford Irrigation District and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Clark Clement, of Lemoore, for appellants.

Harris, Willey, Griffith & Harris, Ronald B. Harris, and Everett G. Harris, all of Fresno, for respondents.

WASTE, Chief Justice.

This is an action for declaratory relief by which it is sought to have interpreted and made certain the provisions of a contract relative to the water and water rights represented by shares of stock in a mutual water company. From a decree construing the same favorably to the defendants, the plaintiffs have appealed.

It appears that in 1905 a corporation known as the Empire Investment Company, hereinafter referred to as the land company, was the owner of a large tract of land in Kings county, containing in excess of 18,000 acres and lying on both sides of the Kings river and riparian to it. As a riparian owner, the land company possessed the right to its proportional share of the water of the river. In addition, the land company also owned 8½ shares of stock in the Lemoore Canal & Irrigation Company, a mutual water company, which ownership entitled it to receive from that company a specified quantity of water for use on its lands. In order to facilitate a proposed subdivision and sale of the lands, the land company organized the defendant Empire Water Company and transferred to the latter its irrigation works and, without transferring its riparian right, authorized and empowered the water company as its agent to divert the riparian water to which it was entitled and supply the same to its lands, in accord-

ance with the terms of a contemporaneously executed agreement, for an annual charge of \$1 an acre. The land company also transferred to the water company its 8½ shares of stock in the Lemoore mutual water company, as agent or trustee, for the purpose of distributing the water represented thereby in accordance, likewise, with the provisions of the contemporaneously executed agreement.

The arrangement so outlined was made by a deed and written contract, bearing date of January 8, 1906, between the land company and the water company. It is expressly provided in the deed that it is not the intention to convey to the water company any riparian right, but that such right shall remain a part of and appurtenant to the lands. The contract recites that it is the desire of the parties to make a binding and permanent arrangement whereby the system for supplying the lands with water may be maintained and water be delivered perpetually to all of the lands of the land company for use thereon by it and by persons succeeding to its title. Upon completion of this arrangement, the land company proceeded with its subdivision project and succeeded in selling substantially all of its lands. Reference was made in the sales contracts and deeds to the aforesaid contract between the land and water companies.

[1] No question here arises as to the distribution of the riparian water among the numerous purchasers. The sole issue concerns the distribution of the so-called Lemoore water represented by the 8½ shares of stock in the mutual water company. It is the contention of the plaintiffs and appellants, all of whom own portions of the original ranch lying on the west side of the Kings river, that said Lemoore water, like the riparian water, was intended to be, and is, distributable ratably to both west and east side owners. The defendants and respondents, all of whom are east side owners, contend, on the other hand, that the Lemoore water, unlike the riparian water, was intended to be, and is, distributable exclusively to those lands lying on the east side of the Kings river. The solution of this controversy, obviously, turns upon a construction of the provisions of the 1906 contract between the land and water companies. As already stated, the trial court construed the same in accordance with the contention of the respondents, or east side owners.

In passing, it should be stated that this action is representative in character, the appellants and respondents representing, respectively, all west and east side owners. It should also be stated that other actions have been prosecuted from time to time in which various provisions of the deed and contract between the land and water companies have been, either directly or indirectly, brought before the courts for consideration. *Stratton v. Railroad Commission*, 186 Cal. 119, 198 P. 1051; *Quist v. Empire Water Co.*, 204 Cal. 646, 269 P. 533; *Braley v. Empire Water Co.*, 130 Cal.App. 532, 20 P.2d 75. None of such actions involved the precise point here presented, and, therefore, any reference therein to the same was wholly unnecessary to the disposition of such actions and obiter.

Respondents, however, refer us to the so-called Ferrasci proceeding instituted in 1913 before the Railroad Commission of this state by certain west side owners to have it determined that they, as well as east side owners, were entitled to share in the ratable distribution of the Lemoore water, here in dispute. That proceeding, involving the identical issue here presented, was directed against the water company but many east side owners intervened.

The commission, after hearing, ruled, as did the trial court herein, in favor of the east side owners who, as respondents upon this appeal, now cite said ruling, which failed to come under the scrutiny of the courts by way of writ of review or otherwise, as *res judicata* of the present controversy. Appellants contend, on many grounds, that the order of the Railroad Commission is not determinative or *res judicata* of the present controversy.

We find it unnecessary to pass upon the point for, in our opinion, and contrary to appellants' contention, the evidence herein is sufficient to support the finding of the trial court that it was the intention of the parties to the 1906 contract that the Lemoore water was to be used on and distributed to the east side lands to the exclusion of the west side lands, other than when available to the latter as surplus or waste water. In so concluding, we are aware of appellants' evidence to the effect that when they purchased their west side lands they did so in reliance upon representations that the Lemoore water, like the riparian water, was to be ratably distributed to the lands on either side of the river. However, and over against this evidence,

there exists the very clause in the 1906 contract between the land and water companies, the indefiniteness in which gives rise to this action, to the effect that the Lemoore "water may be delivered and distributed through said system to a part of said lands for all or any of said purposes." While the agreement does not expressly declare to what part of the lands the Lemoore water is to be delivered, it does contain an additional clause to the effect that "it is understood that all of said lands cannot be supplied from any one canal, but that subdivisions thereof will be supplied only from the canal from which water can be carried by gravitation to such subdivisions, and that [the water company] is only required to deliver water by gravitation. * * *" The record before us indicates, and the trial court found, in substance, that within the conception of the contract, the canals through which the Lemoore water will flow by gravity are all located on the east side of the river. This is also indicated in the petition, already referred to, filed by certain of the west side owners before the Railroad Commission in 1913, wherein it was alleged "that the Lemoore Canal and Irrigation Company's canal and ditches and irrigation system, and all thereof, are situate on the East side of said Kings River." In addition, the record indicates, and the court found, that the Lemoore water for many years has been used in irrigating lands on the east side of the river. This latter fact is also attested to by the unsuccessful 1913 effort of certain of the west side owners to procure from the Railroad Commission an order directing ratable distribution of Lemoore water to them. These attendant and surrounding circumstances, and the inferences deducible therefrom, may properly be considered in arriving at a conclusion as to the intent of the contracting land and water companies when, in their 1906 agreement, they provided that the Lemoore "water may be delivered and distributed * * * to a part of said lands. * * *" They indicate that the east side lands are the "part of said lands" intended.

Moreover, there is before us the testimony of the engineer who laid out the canals for the land company wherein he stated that there are about 3,500 acres of east side lands that cannot be served with riparian water by gravity, thus leading to the construction in 1905-1906 of a series of laterals or canals to carry Lemoore water

by gravity to said east side lands. This fact undoubtedly influenced the contracting parties in 1906 to provide that the Lemoore water may be distributed "to a part" of the lands and warrants the construction given to said contract and phrase by the court below, viz., that the "part" of the lands intended were situate on the east side of the river.

The ditch tender for the Lemoore canal company testified, among other things, that there are two distinctive canal systems on the Empire ranch; that they were distinctive in the sense of distributing distinctive sources of water supply (riparian and Lemoore); and that the canal system on the west side of the river, where appellants' lands are located, indicates that it was not adapted for the distribution of Lemoore water. The court below made findings to this effect.

Other evidence might be referred to, but we are of the view that sufficient has been said to indicate the propriety and reasonableness of the trial court's construction of the 1906 contract in a manner to cause the Lemoore water to be distributable exclusively to east side lands, other than when available to west side lands as surplus or waste water. There is support in the evidence for the trial court's award of surplus Lemoore water to the west side lands, which award, in our opinion, explains what the appellants refer to as an inconsistency in the findings.

[2] In addition, we are satisfied that there is ample evidence to support the lower court's finding that the appellants are chargeable with laches in the prosecution of the claim or asserted right relied on herein. As already stated, the contract between the land and water companies was executed January 8, 1906. The testimony of some of the appellants' own witnesses indicates that since that time there has been a continual controversy between the west and east side landowners over the Lemoore water, the former making yearly demands therefor. One of the appellants' witnesses testified that the east side landowners de-

nied that the west side landowners had any right to the Lemoore water. This evidence, coupled with the inactivity of the west side landowners from the time of the order of the Railroad Commission in the Ferrasci case (1915) purporting to award said Lemoore water to the east side landowners, whether *res judicata* or not, discloses an inexcusable apathy and tardiness of the appellants in the prosecution of any claim or right they may have had under the 1906 contract in and to the Lemoore water and supports the finding of laches made against them. It must be concluded that by the commencement of this action on December 21, 1934, the appellants were seeking to prosecute, at best, a stale claim.

[3] The trial court found in favor of respondents on other defenses advanced by them. In view of the conclusions already announced, it is unnecessary to consider or pass upon such other defenses urged by the respondents and the findings thereon, including the defense and finding that the order of the Railroad Commission in the Ferrasci proceeding is *res judicata* of the present controversy. The findings on said defenses may be disregarded as surplusage. *Baird v. Ocequeda*, Cal.Sup., 67 P.2d 1055; *Epstein v. Gradowitz*, 76 Cal.App. 29, 31, 243 P. 877.

[4] We cannot agree that an estoppel exists against the respondents by reason of their inactivity during the construction by the appellants of a siphon intended, reputedly, to carry Lemoore water. The trial court properly found that said siphon was constructed on a right of way belonging to the appellants; that no invasion of any rights of respondents resulted therefrom; that no cause of action arose thereby to the respondents; and that none of the Lemoore water was at any time transported through said siphon.

Other points not herein mentioned present nothing of merit.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.; EDMONDS, J.; SEAWELL, J.

10 Cal.2d 160

**PENZINER v. WEST AMERICAN
FINANCE CO. et al.****S. F. 15831, 15832.****Supreme Court of California.****Nov. 24, 1937.****Rehearing Denied Dec. 23, 1937.****1. Appeal and error ⇨1097(1), 1195(1)**

When the precise question before court has been decided in a former appeal in the same action and under substantially the same state of facts, the parties are estopped from again litigating the question in any subsequent proceeding either before the trial or appellate courts.

2. Appeal and error ⇨1099(3)

Appellate court's determination, on appeal from judgment sustaining demurrer to complaint, that cause of action predicated debtor's right to recover treble interest on theory that sale under trust deed constituted payment of interest stated a good cause of action, constituted "law of case" which governed Supreme Court on subsequent appeal in determining whether any interest was really paid by debtor, regardless of whether decision on former appeal was correct.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

3. Statutes ⇨273

Where statute gives right not existing at common law and no rights are vested, the right falls and the statutory remedy ceases to exist upon repeal of statute without a saving clause unless the right has been converted into a final judgment prior to a repeal of the statute.

4. Constitutional law ⇨18

In so far as constitutional amendment regarding usury changed maximum permissible rate of interest from 12 per cent. permitted by statute to 10 per cent., the Constitution, in effect, constituted an amendment of the usury law, notwithstanding the usury law was an initiative measure (Usury Law, §§ 1, 2 [St.1919, p. lxxxiii et seq.]; Const. art. 4, § 1; art. 20, § 22, adopted in 1934).

5. Constitutional law ⇨24

Clause of constitutional amendment repealing all provisions of Constitution and laws in conflict therewith repeals only those portions of prior constitutional provisions or acts repugnant to the constitutional amendment.

6. Statutes ⇨161(1)

In order for a second law to repeal or supersede prior law, the second law must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the prior law.

7. Statutes ⇨158

The presumption is against repeals of statutes by implication, especially where prior act has been generally understood and acted upon.

8. Statutes ⇨159

To overcome presumption against implied repeal of statute, two acts must be irreconcilable, clearly repugnant and so inconsistent that the two cannot have concurrent operation, and courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.

9. Usury ⇨8

Provision of constitutional amendment regarding usury which placed in hands of Legislature control of charges to be made by exempted groups did not indicate an intent to repeal in toto prior initiative usury law notwithstanding such provision was inconsistent with usury law over which Legislature had no power (Usury Law, §§ 1-5 [St. 1919, p. lxxxiii et seq.]; Const. art. 20, § 22, adopted in 1934).

10. Usury ⇨8

Usury law, at least as to nonexempt classes of lenders, was not repealed by adoption of constitutional provision relating to usury (Usury Law, §§ 1-5 [St.1919, p. lxxxiii et seq.]; Const. art. 4, § 1; art. 20, § 22, adopted in 1934).

11. Usury ⇨137

Where note and trust deed provided for interest at 7 per cent. per annum payable monthly in advance and lender each month charged borrower's account with one month's interest at 7 per cent. on entire amount of loan, regardless of amount which lender had advanced to borrower during such period, mere bookkeeping entries could not create liability against lender for usury, since it is only when there has been actual payment of usurious interest that one receiving such interest is liable for penalties imposed by usury law (Usury Law, §§ 1-5 [St.1919, p. lxxxiii et seq.]).

12. Usury ⇨42

Where note and trust deed provided for interest at 7 per cent. per annum payable

monthly in advance and usurious interest was paid only through application of proceeds of foreclosure sale to payment of interest claimed to be due, lender was entitled to 7 per cent. interest on amount actually loaned from date of maturity of note to date of sale, which amount was required to be considered in determining whether amount of interest or profit which lender received through trustees' sale exceeded maximum amount permitted by usury law (Usury Law, §§ 1-5 [St.1919, p. lxxxiii et seq.]).

13. Usury ☞42

Whatever costs or attorneys' fees lender incurred or paid out for purpose of defending mechanics' lien actions after trustees' sale under trust deed were not chargeable to borrower and were not properly payable by trustees out of proceeds of sale, and could not be considered in determining whether amount of interest which lender received through application of proceeds of sale to payment of interest claimed to be due exceeded maximum amount permitted by usury law (Usury Law, §§ 1-5 [St.1919, p. lxxxiii et seq.]).

14. Execution ☞268

Mortgages ☞372(2)

The purchaser at execution sale, or under foreclosure sale under trust deed, takes property as it stands and subject to all liens against it.

15. Usury ☞42

Lender purchasing at trustees' foreclosure sale was not entitled to be reimbursed out of proceeds of sale for money paid, after the sale, to discharge taxes which constituted lien against property prior to sale, and such payment could not be considered in determining whether amount of interest which lender received through application of proceeds of sale to payment of interest claimed to be due exceeded maximum amount permitted by usury law (Usury Law, §§ 1-5 [St.1919, p. lxxxiii et seq.]).

16. Usury ☞42

Item for ornamental plastering not secured by lien against property, but voluntarily paid by lender, could not be considered in determining whether amount of interest which lender received through application of proceeds of trustees' sale under trust deed to payment of interest claimed to be due exceeded maximum amount permitted by usury law (Usury Law, §§ 1-5 [St. 1919, p. lxxxiii et seq.]).

17. Usury ☞42, 137

Amounts properly paid out for legal services in foreclosure of trust deed were properly payable by trustees out of proceeds of foreclosure sale and were required to be considered in determining whether amount of interest which lender received by application of proceeds of foreclosure sale to payment of interest claimed to be due exceeded maximum amount permitted by usury law and in determining amount of interest on which treble damages were allowable in case payment of interest was usurious (Usury Law, §§ 1-5 [St.1919, p. lxxxiii et seq.]).

18. Usury ☞137

Where borrower had been compelled to pay lender as profit on loan an amount which exceeded maximum amount of profit permitted to be paid on loan under usury law, lender was liable to borrower in treble the amount of profit so paid by borrower (Usury Law, §§ 1-5 [St.1919, p. lxxxiii et seq.]).

In Bank.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by William L. Penziner against the West American Finance Company and others. From the judgment, the plaintiff and the named defendant appeals.

Judgment modified and, as so modified, affirmed.

Knight, Boland & Riordan, F. Eldred Boland, and John A. Sinclair, all of San Francisco, for appellants.

Bronte M. Aikins and Oliver B. Wyman, both of San Francisco, for respondent.

CURTIS, Justice.

These two appeals are taken from the same judgment. The judgment rendered was in favor of the plaintiff and against the defendant West American Finance Company, and is for the sum of \$38,909.91, besides costs and interest. Said defendant has appealed from said judgment on the ground hereinafter more fully referred to and discussed, and claims that the same is erroneous in its entirety. The plaintiff has appealed from said judgment and claims that it is inadequate and should include the sum of \$6,693.98, in addition

to the sum of \$38,909.91, the amount found due plaintiff by the trial court.

Plaintiff was the owner of two adjoining lots in the city of San Francisco, situated on Jackson street, near Buchanan. He planned to erect thereon a class A apartment house and applied to the defendant for a loan to finance the erection of said building. His application for a loan of \$150,000 was approved, the proceeds to be used in the erection of said building. Accordingly a promissory note in that amount payable one year after date with interest at 7 per cent. per annum payable monthly in advance was executed and delivered by plaintiff to defendant. At the same time and as a part of the same transaction, the plaintiff executed and delivered a trust deed to secure the payment of said promissory note. C. A. Gibson and R. T. Harper were named as trustees in said trust deed and the defendant was named as the beneficiary. This trust deed covered the two Jackson street lots owned by the plaintiff.

Upon the execution and delivery of his note and trust deed, and the recordation of the latter instrument, the plaintiff began the construction of said apartment house upon said lots. The process of construction continued for a period of one year and at the end of the year the building was uncompleted. The defendant had advanced for the use of plaintiff on said promissory note from time to time during said year the sum of \$134,396.11, which had been used in payment of the cost of constructing said building. This item according to the findings of the court was made up as follows: \$122,804.03, advanced by defendant to plaintiff, or on his orders, during said year; \$11,471.99, advanced by defendant to R. L. Flint during said year for the purpose of paying construction costs, and which was actually used for that purpose, and the item of \$120.09, insurance on said building. According to the terms of this promissory note it matured at the end of one year. The plaintiff was then unable to pay said note or the amounts advanced thereon. Proceedings were instituted to foreclose said trust deed and these proceedings resulted in a sale of the real property covered by the trust deed to the Pacific States Savings & Loan Company acting for the defendant for the sum of \$150,000. Although this property was bid in by the Pacific States Savings & Loan Company, it is conceded that the property was bought for defendant. Immediately after

the sale, the Pacific States Savings & Loan Company conveyed the property to the defendant. Thereafter and within one year from the date of said sale the plaintiff commenced this action. His complaint was subsequently superseded by his third amended complaint. The third amended complaint consisted of four causes of action. The first cause of action was for damages alleged to have been sustained by the plaintiff by the wrongful act of this defendant and others in failing to deed to plaintiff said property under a refinancing plan after it had been bid in at said foreclosure sale as it was alleged the defendant had agreed to do. The second cause of action was for the recovery of treble the amount of usurious interest alleged to have been paid by plaintiff to defendant. The third and fourth causes of action, we are not concerned with in the decision of either of these appeals. We do not consider it necessary to set forth in detail the facts alleged in the first and second causes of action as it would aid but little in the decision of any question before us. A more detailed statement of the allegations of these four causes of action may be found in the decision of the District Court of Appeal in the case entitled *Penziner v. West American Finance Company*, 133 Cal. App. 578, 24 P.2d 501.

To this complaint both general and special demurrers were interposed by the West American Finance Company and other defendants. These demurrers were sustained, but on appeal the judgment of the trial court in favor of the defendant after sustaining said demurrers was reversed as to plaintiff's first two causes of action. *Penziner v. West American Finance Co.*, supra.

Upon the case being returned to the superior court for trial upon the first two causes of action of said third amended complaint, the defendant filed its answer thereto. The cause went to trial, and resulted in a judgment in favor of the defendant on the first cause of action and in favor of the plaintiff upon the second cause of action. No appeal has been taken from the judgment on the first cause of action in favor of defendant. The controversy therein involved is, therefore, not before us in any manner. As before stated, the plaintiff has appealed from that portion of said judgment deducting from the amount of treble interest said sum of \$6,693.98, and the defendant has appealed from said

judgment in its entirety. We will continue to refer to the parties as the plaintiff and the defendant, the latter term applying only to the West American Finance Company.

The evidence shows that the transaction between the parties hereto was carried on in the following manner. Plaintiff was given credit upon the books of the defendant for the amount of the loan, \$150,000. He was paid no part of this sum in cash, but as payments became due on the building, the defendant would pay the contractors or advance to plaintiff funds sufficient to meet the payments, and charge plaintiff's account with the amount so advanced or paid. Plaintiff was also charged in advance monthly interest on the entire loan. For instance, the note was dated August 16, 1927. On that date the plaintiff's account was charged with the sum of \$875, being one month's interest at 7 per cent per annum on the entire amount of \$150,000. During that month the account of plaintiff as kept by defendant showed that defendant paid out for the use of plaintiff approximately the sum of \$7,500. On the 16th of September, defendant charged the plaintiff's account with a full month's interest on the entire loan although the entries in its books showed that it had only paid out for plaintiff at that time the sum of approximately \$7,500. On the following months for the balance of the entire year, the same procedure was followed. The regular charge of \$875, being one month's interest on the entire loan, was made against plaintiff's account each month regardless of the amount which the defendant from time to time had advanced for plaintiff during said periods. Plaintiff was also charged with the sum of \$4,500, as brokerage paid for making the loan, which the trial court found was not in fact paid. In this manner the plaintiff's account was charged during the year with \$10,500 interest, which together with the \$4,500 brokerage payment amount to a profit of \$15,000, and greatly exceeded 12 per cent. per annum. This amount the court found "is a greater sum and value than the rate of 12 per cent upon \$100.00 for one year." The interest on the several amounts of money from the time they were advanced respectively to the end of the year at 12 per cent. per annum is the sum of \$7,434.48. Upon the sale of the property under the deed of trust, the proceeds were applied, after the

payment of the costs of sale and said sum of \$134,396.11, to the payment of said brokerage charge of \$4,500 and interest on the entire loan from the date to the maturity of said promissory note.

It is first contended by defendant that plaintiff never paid one cent of interest to it and that the sale under the trust deed did not constitute payment of interest. The facts are undisputed that the only interest paid by plaintiff was paid through the sale of the encumbered property under the deed of trust and the application of the proceeds of said sale by the trustees to the payment of the amounts advanced by the defendant with interest thereon as charged in the manner hereinbefore shown and said sum of \$4,500 brokerage charge. This contention presents a serious question of law which might be difficult of solution if the same were properly before us. We are of the opinion, however, that the question as to whether the sale under the trust deed constituted payment of interest was decided in the former appeal in this action against the contention of the defendant.

As noted above the order of the trial court sustaining defendant's demurrer to the second cause of action of the third amended complaint, being the cause of action in which the judgment appealed from was rendered, was reversed by the District Court of Appeal. *Penziner v. West American Finance Company*, supra. As we have seen in this second cause of action, plaintiff predicates his right to recover treble interest upon the theory that the sale under the trust deed constituted payment of interest. In holding that the second cause of action stated a good cause of action, the court not only implied but expressly held that the sale of plaintiff's property under the trust deed and the application of the proceeds of said sale to the payment of the interest claimed to be due and owing from plaintiff to defendant constituted payment of such interest within the terms of the usury law then in force. A reading of the opinion in that case compels such a conclusion. The only argument advanced by the defendant against the application of the doctrine of the law of the case to the situation existing in the present action is that in the former appeal the court had before it only the allegations of the complaint; that the deed of trust was not before the court on the former appeal but is part of the record

on appeal now before us, and that this deed of trust contains a covenant that the plaintiff is entitled to any surplus over and above his obligation. Defendant does not indicate the materiality of its new evidence, but appears to contend that the facts now before the court are different from those before the court on the former appeal, and therefore the rule of the law of the case does not apply. It cites in support of its present contention the case of *Otten v. Spreckels*, 183 Cal. 252, 191 P. 11. That case simply holds that the rule has no application where the facts in the second appeal are different from those shown to have been present on the first appeal. There is no question but that the decision correctly states the law, but it will appear from a most casual reading of the opinion in that case that there was a radical difference between the facts before the court on the two appeals. That is not the case in the present appeal. We fail to see just what bearing the provision of the trust deed containing a covenant that the trustor shall be entitled to any surplus over and above his obligation, had in determining the question as to whether the sale under the trust deed constituted payment of interest. Such a provision is usually contained in instruments of that character, and even in the absence of such a covenant, the rule would be the same, and upon a sale of the trust property, after the payment of all claims of the beneficiary and the trustees, the surplus remaining would belong to the trustor. 25 Cal.Jur. p. 108; *Atkinson v. Foote*, 44 Cal. App. 149, 156, 186 P. 831.

[1,2] It is clearly established by the decisions in this state that when the precise question before the court has been decided in a former appeal in the same action and under substantially the same state of facts, the parties are estopped from again litigating this question in any subsequent proceeding either before the trial or appellate courts. *United Dredging Co. v. Industrial Accident Commission*, 208 Cal. 705, 712, 284 P. 922, and scores of cases decided by this court and listed in 2 Cal.Jur. pp. 946, 947 and 948. On the former appeal in this action the question as to whether the sale under the trust deed and application of the proceeds thereof constituted payment of interest, was squarely before the court, and it was unequivocally held that such sale constituted a payment of interest on the original obligation of the

plaintiff. That the court so held plainly appears from the following excerpts from the opinion: On page 588 of 133 Cal.App., page 505 of 24 P.2d, we find this statement: "Through the sale and conveyance to the loan company [the Pacific States Savings & Loan Company] for the finance company [the defendant herein], plaintiff paid the latter, and the latter [the defendant] extorted from him, for the loan, the sum of \$19,362.50, which exceeds 12 per cent. per annum on \$100,000, the amount actually advanced." Again on the same page of the opinion, the court says: "The interest was paid to and received by the finance company [defendant] alone, by the application of the amount of the bid made by the loan company at the sale to the claimed debt due to the finance company by the trustees." The law of the case applies regardless of whether the former decision is correct or erroneous. *Westerfeld v. New York Life Ins. Co.*, 157 Cal. 339, 342, 107 P. 699; *Tally v. Ganahl*, 151 Cal. 418, 421, 90 P. 1049; *Newport v. Hatton*, 207 Cal. 515, 519, 279 P. 134; and *McEwen v. New York Life Ins. Co.*, 187 Cal. 144, 147, 201 P. 577. In these decisions the doctrine of the law of the case is stated as follows: "Where upon an appeal the Supreme Court, in deciding the appeal, states in its opinion a principle or rule necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal * * * and this, although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular." *Westerfeld v. New York Life Ins. Co.*, supra, 157 Cal. 339, at page 342, 107 P. 699, 700. However, in holding that the law of the case applies in the present appeal before us, we are not to be understood as passing upon the accuracy of the former decision. For our present purpose, the former decision in this action establishes the law which must govern this court in determining the question as to whether any interest was really paid by the plaintiff. The former opinion held that interest was paid by the sale under the trust deed and the application of the proceeds of the sale in the manner shown above. That decision established the law which must govern this court in the decision of the question there decided.

[3] It is next contended that the Usury Law of 1918 (St. of 1919, p. lxxxiii), an

initiative measure, was repealed by the adoption in November, 1934, of section 22 of article 20 of the Constitution. The judgment in this case was rendered June 17, 1935. There can be no doubt that if the constitutional provision did in fact repeal the Usury Law of 1918 without a saving clause, plaintiff's cause of action fell with such repeal. The right to recover treble damages given by section 3 of the Usury Law is a purely statutory remedy, not existing at common law, and is likewise a penalty imposed upon the lender. The rule in such cases is clear that where no rights are vested the right falls and the statutory remedy ceases to exist upon the repeal of the statute without a saving clause unless the right has been converted into a final judgment prior to a repeal of the statute. Although the cause of action upon which the judgment herein is based, accrued prior to the date of the alleged repeal, the judgment was entered subsequent to that date. The repeal of the statute without a saving clause would therefore wipe out the cause of action and render the judgment of no legal validity. *Anderson v. Byrnes*, 122 Cal. 272, 54 P. 821; *Napa State Hospital v. Flaherty*, 134 Cal. 315, 66 P. 322; *People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 P. 866, 37 L.R.A.(N.S.) 934, Ann.Cas.1912B, 1148; *Moss v. Smith*, 171 Cal. 777, 155 P. 90; *Callet v. Alioto*, 210 Cal. 65, 290 P. 438; *Krause v. Rarity*, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; *Ewell v. Daggs*, 108 U.S. 143, 2 S.Ct. 408, 27 L.Ed. 682.

We are thus directly presented with the question as to the legal effect upon the Usury Law of the adoption by the people of section 22 of article 20 of the Constitution. It should be here mentioned that the Usury Law was adopted as an initiative measure and inasmuch as it contains no provision permitting its amendment by the Legislature, the act can be amended or repealed only "by a vote of the electors." California Constitution, art. 4, § 1.

On the question as to the legal effect of the constitutional provision, not only have exhaustive briefs been filed by the parties, but numerous amici curiæ have filed briefs covering a wide range of discussion.

The Usury Law consists of five sections. Section 1 provides that the rate of interest upon the loan or forbearance of money, or upon California judgments shall be 7 per cent. per annum, but it shall be com-

petent for the parties to contract for a rate of interest not to exceed 12 per cent per annum, if such contract is in writing.

Section 2 provides that no person, company, association, or corporation shall directly or indirectly take or receive, in money, goods, or things in action, or in any manner whatsoever any greater sum for the loan or forbearance than at the rate of 12 per cent. per annum; that in the computation of interest, interest shall not be compounded, nor shall interest bear interest unless so agreed in writing. It is further provided that any agreement or contract of any nature "in conflict with the provisions of this section shall be null and void," as to its interest provisions and no action to recover interest on such agreement shall be maintained, and the maturity date of the debt cannot be accelerated.

Section 3 provides that every person, company, association or corporation that has paid interest in excess of that allowed under sections 1 and 2 may recover against the person, company, association, or corporation who shall have taken or received the same, treble the amount of the money so paid in violation of said sections, providing that such action must be brought within one year after such payment. The section further provides for certain penalties to be imposed on certain classes of lenders which provisions have been held to be unconstitutional (*Wallace v. Zinman*, 200 Cal. 585, 254 P. 946, 62 A.L.R. 1341), and then provides any violation of sections 1 and 2 shall be a misdemeanor.

Section 4 repeals sections 1917, 1918, 1919 and 1920 of the Civil Code and all acts and parts of acts inconsistent with the usury law.

Section 5 provides that the act may be designated as the "usury law."

Article 20, § 22, of the Constitution is not divided into numbered sections. Paragraph 1 provides that the rate of interest upon the loan or forbearance of money, or upon California judgments shall be 7 per cent. per annum, but it shall be competent for the parties to any loan agreement to contract in writing for a rate of interest not exceeding ten per cent per annum. It is to be noted that except for the permissible contract rate being reduced from 12 per cent. to 10 per cent. this paragraph is substantially similar to section 1 of the Usury Law.

Paragraph 2 of the amendment provides that no person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than 10 per cent. per annum upon any loan or forbearance of any money. Except as to the reduction of interest from 12 per cent. to 10 per cent. per annum this paragraph is substantially similar to the first part of section 2 of the Usury Law. The many other provisions of section 2 of the Usury Law find no counterpart in the constitutional amendment.

Paragraph 3 of the constitutional amendment finds no counterpart in the Usury Law. It provides, "However, none of the above restrictions shall apply" to building and loan associations, industrial loan companies, credit unions, licensed pawnbrokers or personal property brokers, or to banks incorporated under the state "Bank Act" of 1909, p. 87, as amended or under federal law, or to any nonprofit cooperative association organized under the Agricultural Code (St. 1933, p. 255) and certain other designated classes of lenders of which appellant is not a member, "nor shall any such charge of any said exempted classes of persons be considered in any action or for any purpose as increasing or affecting or as connected with the rate of interest hereinbefore fixed." It is further provided that "the Legislature may from time to time prescribe the maximum rate per annum of, or provide for the supervision, or the filing of a schedule of, or in any manner fix, regulate or limit, the fees, bonus, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge or receive from a borrower in connection with any loan or forbearance of any money, goods or things in action."

Paragraph 4 of the constitutional amendment provides that, "The provisions of this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith."

In reading the amendment it is at once apparent that the first two paragraphs, except as to reducing the maximum rate of interest, are wholly consistent with the Usury Law. Further, the amendment is wholly silent as to remedies or penalties and does not contain many of the other provisions of the Usury Law. The amendment does, however, place in the hands of the Legislature the power to control certain

of the charges of certain designated classes of lenders. Aside from reducing the maximum permissible rate from 12 per cent. to 10 per cent. there is nothing in the constitutional provision to indicate that it was intended thereby to affect the applicability of the Usury Law provisions at least in so far as they apply to the nonexempt classes of lenders of which defendant is one.

In so far as the provisions of the Usury Law and the constitutional provision are similar, or substantially so, it is obvious that they are not in conflict, and it is further clear that the repealing clause of the amendment did not expressly repeal the similar provisions of the Usury Law, inasmuch as that clause only supersedes laws "in conflict therewith." It is not at all unusual to find both a statutory provision and a constitutional provision identical in their operation, and in such event both are considered as the source of the right conferred or penalty imposed. In *Kaysser v. McNaughton*, 6 Cal.2d 248, 57 P.2d 927, an almost identical problem to the one here under discussion was presented. That case involved the question as to the effective repeal date of the stockholders' liability. This liability was first imposed by statute. Later, a substantially similar provision was inserted in the Constitution. While both were in existence, the court held the liability was imposed by both the statute and the Constitution. At a still later date the constitutional provision was repealed. It was held that the statutory provision still remained and served to impose the liability until the statute was itself repealed. See, also, *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 P. 667. It therefore follows that in so far as the provisions of the usury law and the constitutional amendment are identical, or substantially so, such provisions were not repealed by the constitutional provision.

[4] In so far as the constitutional amendment changes the maximum permissible rate of interest from 12 per cent. to 10 per cent. for all practical purposes, it constitutes an amendment of sections 1 and 2 of the Usury Law. It is true the usury law is an initiative measure, but it is quite clear that an initiative measure may be changed or amended by a constitutional provision adopted by the people. Article 4, § 1, provides that no act adopted by the people "shall be amended or repealed except by a vote of the electors." Article 20, § 22, was adopted by such a vote.

Defendant urges that the usury law was repealed under any one or all of three theories: (1) That it was expressly repealed by the repealing cause of paragraph 4; (2) that it was impliedly repealed because inconsistent with the constitutional provisions; and (3) that a repeal by revision was accomplished. In connection with the last two theories, appellant relies strongly on the reasoning of *Fenton v. Markwell & Co.*, 11 Cal.App.2d (Supp.) 755, 52 P.2d 297, in which it was held the usury act was repealed by the adoption of the constitutional provision. After a careful consideration of the applicable rules of construction, we are convinced that none of the theories advanced by appellant is sound.

[5] As far as the alleged express repeal is concerned, little need be said. Article 20, section 22 only repeals or supersedes "all provisions of this Constitution and laws enacted thereunder in conflict therewith." Such clauses have uniformly been held to repeal or supersede only those portions of prior acts repugnant to the later act. It must be presumed that the Legislature in proposing and the electorate in adopting the constitutional amendment acted with full knowledge of the existence of the prior statute relating to the same general subject. Such a limited repealing clause expresses indirectly the intent that nonconflicting prior statutes shall remain in force. It is well settled that such a repealing clause operates as an express limitation upon the extent to which the former acts shall cease to be operative, namely, only in so far as they are actually inconsistent with the new act. These rules of construction are well settled. The appropriate rule, supported by many authorities, is stated as follows in 59 Corpus Juris, p. 903: "Such a clause is effective to repeal all prior general laws or parts thereof, which are repugnant to, inconsistent and irreconcilable with, the repealing statute. * * * On the other hand, the clause operates as an express limitation upon the extent to which it is intended that former acts shall cease to be operative, namely, only so far as they are actually inconsistent with the new act. Also, it may be considered as a recognition, or indication of a purpose, that prior acts or parts of acts which are not repugnant to and inconsistent with the new act are to remain in force * * *." See, also, 25 R.C.L., p. 912; *Holdden v. Minnesota*, 137 U.S. 483, 11 S.Ct. 143, 34 L.Ed. 734.

The arguments based on implied repeal and repeal by revision are equally without merit. One of the cases strongly relied upon by appellant expressing these rules is *Mack v. Jastro*, 126 Cal. 130, 58 P. 372, holding that the County Government Act of 1897 in reference to the issuance, sale and disposition of county bonds was intended to substitute a new and complete scheme in relation to the subject-matter, and to have superseded certain earlier acts dealing with the same subject. At page 132 of 126 Cal., page 373 of 58 P., the court stated: "We think, however, that a reading of the two sections at once discloses that the legislature in the county government act of 1897 designed and devised a new and complete scheme for the issuance of county bonds, and, while it is true that repeals by implication are not favored, whenever it becomes apparent that a later statute is revisory of the entire matter of an earlier statute, and is declared as a substitute for it, the later statute will prevail, and the earlier statute will be held to have been superseded, even though there be found no inconsistencies or repugnancies between the two." And again, 126 Cal. 130, at page 133, 58 P. 372, 373 it is stated: "It would unduly and unnecessarily prolong this consideration to set forth the two statutes for purposes of comparison and contrast, but, as has been said, a mere reading of the two will at once disclose that the legislature by the latter formulated a plan for the issuance of bonds full and complete in itself, and therefore a plan which superseded its earlier declaration on the matter. It is not so much a repeal by implication as it is that, the legislature having made a new and complete expression of its will upon the subject, this last expression must prevail, and whatever is excluded therefrom must be ignored." In *Sponogle v. Curnow*, 136 Cal. 580, 584, 69 P. 255, 256, the rule is briefly stated as follows: "Although an act, or part of an act, may not be repealed expressly or by necessary implication, still a revision of the whole subject-matter covering said act would supersede all such portions as were omitted from the revisory act." Other similar statements of the rule are to be found in *State v. Conkling*, 19 Cal. 501; *Treadwell v. Yolo County*, 62 Cal. 563; *Harris v. Cooley*, 171 Cal. 144, 152 P. 300; *Carter v. Stevens*, 208 Cal. 649, 284 P. 217.

[6] The above statements of the rule likewise serve to fix the extent of its opera-

tion. In order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.

[7,8] The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon. To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together. Where a modification will suffice, a repeal will not be presumed. *Santa Cruz Rock Pavement Co. v. Lyons*, 133 Cal. 114, 65 P. 329; *Smith v. Mathews*, 155 Cal. 752, 758, 103 P. 199; *In re Johnson*, 167 Cal. 142, 138 P. 740; *Crooks v. People's Finance, etc., Co.*, 111 Cal.App. (Supp.) 769, 292 P. 1065; *Beneficial Loan Society v. Haight*, 215 Cal. 506, 11 P.2d 857; 23 Cal.Jur., p. 694.

Applying these well-settled principles of construction to the two provisions under consideration, we have no hesitancy in holding that there is nothing in the constitutional amendment indicating an intent that the provision was intended as a revision of the entire subject covered in the usury act, nor are the provisions of the two acts so inconsistent or repugnant that the later repealed the earlier by implication. There have already been noted the many provisions of the Usury Law—material and important provisions—which are entirely consistent with, and in fact supplement, the constitutional provision. As already noted, the constitutional amendment fails to expressly provide any remedies or penalties—matters fully covered in the Usury Law. These remedial and penalty provisions have been the subject of judicial interpretation for over seventeen years. All that the constitutional amendment does is to reduce the maximum permissible rate from 12 per cent. to 10 per cent. per annum; to exempt certain enumerated classes of lenders from certain of its provisions; and to place in the legislature a certain degree of control over the fixing of charges made by the exempted groups. In its own sphere of operation, and in so far as it establishes different rules from those found in the usury law, the constitutional provision is supreme—but that is the extent of its operation.

[9] Of course, the placing in the hands of the Legislature the control of the charges to be made by the exempted groups is inconsistent with the Usury Law over which the Legislature has no power. This change, however, was brought about by a constitutional provision voted upon and approved by a vote of the people. To that extent the electorate has waived its freedom from interference granted it by article 4, section 1 of the Constitution. This does not indicate an intent to repeal in toto the prior measure.

Moreover, the power granted to the Legislature by the constitutional amendment is expressly limited in its scope to the regulation and control of the charges of the exempted classes of lenders. As to the non-exempt classes of lenders, the Legislature possesses no such power. The usury law applied to all lenders. That has been changed to permit the Legislature to regulate the charges made by certain lenders, but except as to reduction of the maximum interest rate, there is nothing to indicate that the constitutional amendment was intended to affect the non-exempt lenders at all.

This interpretation finds some support in the background of the constitutional provision. This court decided the case of *Beneficial Loan Society v. Haight*, supra, in 1932. In that case it was held that because the terms of the Usury Law applied to all lenders, the Legislature had no power to provide by statute that personal property brokers could charge a higher rate than permitted by the usury law. See, also, *Crooks v. People's Finance Co.*, supra. In the *Haight Case*, the court recognized the force of the argument that from an economic standpoint there was need for the classification of certain types of lenders differently from other lenders as to permissible rates of interest and other charges. The legislature in order to remedy this situation submitted article 20, § 22, to the electorate. It is quite significant that in the argument in support of the amendment sent to all voters (there was no argument contra), there is not one word indicating an intent to repeal the usury law. The argument speaks of "inadequacies" of the usury law, and of the individual problems of the exempted groups, and of the necessity for legislative regulation of these groups. Among other things it states: "This measure seeks to rectify the errors of the usury law and cure its deficiencies." It is quite

unlikely that if the legislature in drafting, and the people in adopting, the constitutional provision had intended it to repeal the usury law, such intent would not have been clearly expressed.

[10] From what has been said, it follows that in our opinion, at least as to the non-exempt classes of lenders (of which group defendant is a member) the Usury Law was not repealed by the adoption of the constitutional provision, and plaintiff's cause of action was not affected thereby.

The further and final contention of defendant is that assuming that the sale of the property under the trust deed, as detailed above, constituted a payment of interest, and assuming that the usury law has not been repealed, no usurious interest was in fact paid by the plaintiff. This contention is based upon the claim that there were two other charges against the fund in the hands of the trustees, after said sale under the trust deed, which the trustees were required to satisfy and pay, and that after the payment of these two items, the balance remaining in their hands, if the whole thereof was applied to the payment of interest on the aggregate of the amount advanced during the year, would not exceed the rate of 12 per cent. per annum. These two items were: (1) Interest on the sum of \$134,396.11 at the rate of 7 per cent. per annum from the date of the maturity of said promissory note, August 15, 1928, to the date of the sale, December 31, 1928, amounting to the sum of \$3,527.86; (2) the sum of \$6,193.98, costs and attorneys' fees in defending certain mechanics' lien cases and for conducting the trustees' sale.

[11, 12] We think the claim of defendant respecting the item of \$3,527.86 should be sustained. The note and trust deed provide for interest at the rate of 7 per cent. per annum payable in advance. There was nothing usurious in the original transaction between the parties as shown by the written instruments evidencing the loan. There was nothing in the dealings of the parties which ran counter to the provisions of the Usury Law prior to the date of the trustees' sale. It was only in the application of these proceeds of the sale that usurious interest or excessive profit is claimed to have been extorted. We are not overlooking the entries made by defendant in its books of account wherein the defendant was charged with the items of brokerage and interest, but mere bookkeeping entries could not create any liability against the defendant,

or in favor of the plaintiff. It is only when there has been an actual payment of usurious interest that the one receiving such interest is held to have violated the terms of the Usury Law and accordingly held liable for the penalties thereby imposed. *Liebelt v. Carney*, 213 Cal. 250, 2 P.2d 144, 78 A.L.R. 405; *Grall v. San Diego Bldg. & Loan Ass'n*, 127 Cal.App. 250, 257, 15 P.2d 797; *Coulter v. Collins*, 71 Cal.App. 381, 385, 235 P. 465. It was not, therefore, until the interest and brokerage were actually paid through the trustees' sale that it is claimed the Usury Law was violated. The defendant was, therefore, entitled to interest at the rate of 7 per cent. on this amount of \$134,396.11 from the date of maturity of the note to the date of the sale amounting as we have seen to the sum of \$3,527.86. This amount should be taken into consideration in determining whether the amount of interest or profit which the defendant received through the trustees' sale exceeded the maximum amount permitted by the usury law.

The item of \$6,193.98 referred to above involves some further facts. At the time of the trustees' sale, December 31, 1928, there were on file and of record a number of mechanics' liens against said property for work done and materials furnished in the construction of said buildings. A suit to foreclose four of these liens had been instituted on December 28, 1928, and was pending at the date of said sale, and suits to foreclose the two remaining liens were commenced in the following March after the sale under the trust deed. The defendant expended various sums of money in the defense of these suits. In one of these suits there was an appeal from the judgment which was reversed and a petition for a hearing denied by this court on June 20, 1932. *Keeling Collection Agency v. Penziner*, 123 Cal.App. 296, 11 P.2d 24.

[13-17] The defendant at the trial presented an itemized statement purporting to show that it had paid out after the date of said trustees' sale the sum of \$13,021.72 as costs and attorneys' fees in the defense of said mechanics' lien actions; for legal services rendered by its attorney in the foreclosure proceedings; for taxes on said property which were a lien thereon at the date of the trustees' sale; and a charge of \$451.02 for ornamental plastering on said building. The court found: "That the sum of \$6,193.38 is a reasonable allowance for legal services and costs involved in

said suits and in the proceedings leading up to and including the trustees' sale." However, it refused to hold that these charges were properly payable by the trustees out of the proceeds of the sale under the trust deed. As we have seen there was only one of said lien suits pending at the date of said sale, and it had been commenced only three days before said sale. There is no evidence that the trustees or the defendant as beneficiary paid out any costs whatever or any attorneys' fees, or became liable for any costs or attorneys' fees prior to said sale on account of this pending action. Whatever costs or attorneys' fees the defendant incurred or paid out for that purpose after said sale it expended as purchaser, and not as a beneficiary under said deed of trust, and such payments were not chargeable to the plaintiff and were not properly payable by the trustees out of the proceeds of the sale. The rule is well settled that the purchaser at execution sale, or under a foreclosure sale under a deed of trust, takes the property as it stands and subject to all liens against it. *Jordan v. Myres*, 126 Cal. 565, 58 P. 1061; *Boggs v. Fowler*, 16 Cal. 559, 76 Am.Dec. 561; *Breeze v. Brooks*, 71 Cal. 169, 181, 9 P. 670, 11 P. 885. As to the taxes paid by the defendant after the sale, although a lien against the property prior to the sale, they were paid by it as purchaser and not as the beneficiary under the trust deed. Defendant was not, therefore, entitled to be reimbursed out of the proceeds of the trustees' sale for money paid to discharge said taxes. *T. L. Reed Co. v. Kruse*, 220 Cal. 181, 29 P.2d 856. The item of \$451.02 for ornamental plastering was simply a voluntary payment by the defendant. It does not appear even to have been secured by a lien against the property. This disposes of all the items of said statement except the item of \$2,027 paid out as legal services in the foreclosure of said deed of trust. This charge was a proper charge, and one which the trustees were entitled to pay from the proceeds of the trustees' sale. It should have been allowed by the trial court in its computation for the purpose of determining whether there was any usury in the payment of interest, and also in determining the amount of interest upon which treble damages should be allowed in case the payment of interest was usurious. With these two items just discussed allowed, the account between the parties upon the trustees' sale stood as follows:

Cash advanced up to maturity of note	\$134,396.11
Interest thereon at 7% per annum from August 16, 1928, to December 31, 1928	3,527.86
Attorneys' fees in foreclosure proceedings	2,027.00
Total	\$139,950.97

[18] This amount taken from \$150,000, for which the property was sold at the trustees' sale leaves the sum of \$10,049.03, as the amount of interest or profit that was paid to the defendant through the trustees' sale. Interest on the several amounts of money advanced from the respective dates of their advancement to the date of the maturity of said promissory note, computed at the rate of 12 per cent. per annum, as testified to by an expert accountant, was the sum of \$7,434.48. We find no serious contention on the part of the defendant that this amount is incorrect. The interest, or profit, therefore which was paid the defendant exceeded the maximum amount permitted to be charged by the usury law by the difference between \$10,049.03 and the sum of \$7,434.48, or the sum of \$2,614.55. The plaintiff, therefore, having been compelled to pay defendant the sum of \$10,049.03 as a profit on said loan which amount exceeded the maximum amount of profit permitted to be paid on said loan under the provisions of the Usury Law of this state, defendant is liable to plaintiff in treble the amount of profit so paid by the plaintiff, or the sum of \$30,147.09, in which amount plaintiff is entitled to judgment against the defendant.

Our determination of the questions involved in the appeal of the defendant from the judgment herein leaves but little to be said respecting the appeal of the plaintiff. This appeal involves the sum of \$6,693.98 which the trial court charged against the plaintiff and deducted from the certain amounts found to be due plaintiff. This sum of \$6,693.98 is made up of the two items of \$6,193.98 and \$451.02, already given consideration in this opinion, and a third item amounting to \$48.98, being money paid out by R. L. Flint after the trustees' sale from funds which were paid to him by the defendant prior to said sale. We have already held that the item of \$451.02 was improperly charged against plaintiff, and for the same reason, the item of \$48.98 is not a legal charge against plaintiff. We have further held that of the

sum of \$6,193.98 only the sum of \$2,027, attorneys' fees paid for services rendered in proceedings to foreclose said trust deed, was a legal charge against the plaintiff, and we have made allowance for it accordingly. It should not, therefore, be again deducted from any amount found to be due the plaintiff. The remaining items making up said sum of \$6,193.98 represent payments made by the defendant as purchaser at said trustees' sale and subsequent to said sale and were, therefore, not chargeable to the plaintiff. We conclude in view of this situation that the defendant is not entitled to any deduction from the amount found to be due plaintiff on account of any of the amounts making up said item of \$6,693.98.

The judgment is accordingly modified by striking therefrom the following words, "thirty-eight thousand and nine hundred and nine and 91/100 dollars (\$38,909.91)," and inserting therein in the place of said words stricken out the words, "thirty thousand and one hundred and forty-seven and 9/100 dollars (\$30,147.09)," and as so modified the judgment is affirmed. Costs on appeal to be paid by the respective party incurring the same.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.



10 Cal.2d 183

WOLF v. PACIFIC SOUTHWEST DISCOUNT CORPORATION.
L. A. 16238.

Supreme Court of California.
Nov. 24, 1937.

1. Usury ⇐8

Constitutional amendment regarding usury did not repeal entire usury law, but did repeal provisions of usury law as to organizations and individuals exempted by constitution from general provisions of usury law (Usury Law of 1918 [St.1919, p. lxxxiii]; Const. art. 20, § 22, adopted in 1934).

2. Pawnbrokers and money lenders ⇐6

Where constitutional amendment regarding usury exempted personal property broker from general provisions of usury law and authorized Legislature to prescribe maximum

rate of interest to be charged by such broker, but Legislature had not enacted such legislation, amount of interest or profit which personal property broker could exact for loan made by him was not limited by statute or constitution (Usury Law of 1918 [St. 1919, p. lxxxiii]; Const. art. 20, § 22, adopted in 1934).

3. Statutes ⇐273

A repeal of statute or amendment thereof resulting in a repeal of the statutory provision under which cause of action arose wipes out the cause of action unless the same has been merged into a final judgment.

4. Pawnbrokers and money lenders ⇐6

Where constitutional amendment dealing with usury and repealing provision of usury law as to personal property broker did not contain saving clause as to cause of action accruing prior to adoption of amendment, any cause of action which borrower from personal property broker might have had prior to constitutional amendment was destroyed thereby (Usury Law of 1918 [St. 1919, p. lxxxiii]; Personal Property Brokerage Act [St.1933, p. 1496]; Const. art. 20, § 22, adopted in 1934).

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by J. B. Wolf against the Pacific Southwest Discount Corporation. Judgment for defendant, and plaintiff appeals.

Affirmed.

For prior opinion, see 63 P.2d 844.

Harry K. Sargent, of Los Angeles, for appellant.

Don S. Irwin, and Edward J. Cotter, both of Los Angeles, for respondent.

CURTIS, Justice.

Plaintiff instituted this action to recover treble the amount paid by him as interest or profit on two loans made to the plaintiff by the defendant. Each of said two loans plaintiff alleges was usurious. Upon the trial of the action, and after the plaintiff had closed his case, the court, upon motion of the defendant, granted a nonsuit, after which judgment was rendered in favor of the defendant, from which the plaintiff has appealed.

Each of said loans was secured by a chattel mortgage upon household furniture and

was negotiated by the Scherer Brokerage Company, a regularly licensed personal property broker. The defendant was also a personal property broker doing business as such under the Personal Property Brokerage Act. St.1933, p. 1496. The charge of usury was based upon the alleged illegal payment of a commission by plaintiff to the Scherer Brokerage Company. In negotiating said loans, the plaintiff contends that the defendant shared in the fruits of said commission payments to such an extent that it received a profit on each of said loans which exceeded the maximum amount of interest or profit permissible under the usury law.

[1, 2] Each of said loans was entered into and all payments of interest or commission were made while the usury law adopted by the people in 1918 was in full force and effect. However, in 1934, the people of the state adopted article 20, section 22, of the Constitution. While the adoption of this section of the Constitution did not repeal the usury law of the state, St.1919, p. lxxxiii [Penziner v. West American Finance Company (Cal.Sup.) 74 P.2d 252, this day filed], it did cause some radical changes to be made in that statute, and particularly respecting those organizations or individuals doing business as personal property brokers. The third paragraph of said section of the Constitution designated certain organizations and individuals which are exempt from the general provisions of the usury law, and the legislature was given power to prescribe the maximum rate of interest to be charged in connection with loans made by them. Personal property brokers were included in the exempted classes. While the legislature has acted under this constitutional grant of power as to certain of these exempted classes, it has taken no action respecting the interest charges which may be made by a personal property broker. Therefore, since the adoption of said section of the Constitution in 1934, there has been no provision of law, either statutory or constitutional, limiting the amount of interest or profit which a personal property broker may exact for a loan made by him. *Matulich v. Marlo Investment Co.*, 7 Cal.2d 374, 60 P.2d 842.

[3, 4] It will be further noted that the constitutional amendment repealing the provisions of the usury law as to those exempted classes contains no savings clause as to causes of action accruing prior to the adoption of said amendment. A repeal of the statute, or the amendment thereof, resulting

in a repeal of the statutory provision under which the cause of action arose wipes out the cause of action unless the same has been merged into a final judgment. *Penziner v. West American Finance Co.*, supra, and authorities cited therein. As the judgment in this case was adverse to the plaintiff, any cause of action which the plaintiff might have had prior to said amendment of the statute has been destroyed by the amendment. The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.



10 Cal.2d 266

**NUCKOLLS v. BANK OF CALIFORNIA,
NATIONAL ASS'N, et al.**

NUCKOLLS et al. v. SYMONDS et al.
S. F. 15668.

Supreme Court of California.

Nov. 27, 1937.

Hearing Denied by Supreme Court
Dec. 23, 1937.

1. Appeal and error ⇨113(2)

Appeal will not lie from an order refusing to vacate a judgment or order which is itself appealable.

2. Appeal and error ⇨82(3)

Order granting motion to vacate judgment, being an order made after judgment, was appealable (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

3. Appeal and error ⇨439

Trial court had jurisdiction to vacate judgment notwithstanding case had been appealed to Supreme Court, where motion to vacate and order granting the same were not made until after Supreme Court had dismissed appeal and remittitur had been filed in trial court.

4. Appeal and error ⇨1197

Where remittitur, issued under direction of an appellate court, is filed with clerk with whom judgment roll is filed, the jurisdiction of trial court reattaches.

5. Judgment ⇨338

Trial court had jurisdiction to entertain motion to set aside judgment notwithstand-

ing dismissal of appeal from judgment, as against contention that dismissal of appeal rendered judgment immune from attack as to appellant (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

6. Judgment ⇨388

Trial court properly entertained motion of bankruptcy trustee of one of litigants to vacate judgment, where notice specified not only inadvertence and mistake, but that trustee was necessary party, that judgment was fraudulent, and that trustee had meritorious defense (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

7. Judgment ⇨394

Order granting motion of bankruptcy trustee of one of the litigants to vacate judgment and to permit trustee to appear in cause was the equivalent of an order making the trustee a party to the action.

8. Parties ⇨50, 95(1)

Statute permitting court to order additional party to be brought in and statute permitting party to amend pleading by adding name of party are remedial provisions and should receive a liberal construction in order to dispose of causes upon their substantial merits (Code Civ.Proc. § 389, and § 473, as amended by St.1933, p. 1851).

9. Usury ⇨129

The defense of usury is available to debtor's trustee in bankruptcy (Usury Law of 1918 [St.1919, p. lxxxiii]).

10. Bankruptcy ⇨213

Debtor's trustee in bankruptcy was "proper party" to action to foreclose an assignment lien on debtor's property, where bankruptcy petition was filed while foreclosure action was pending and before judgment was rendered, although bankruptcy adjudication was not made until after rendition of judgment in foreclosure action.

[Ed. Note.—For other definitions of "Proper Party," see Words & Phrases.]

11. Judgment ⇨387

Where debtor's bankruptcy trustee was proper party to an assignment lien foreclosure action, it was within trial court's discretion to set aside judgment and permit trustee to defend action on behalf of estate of bankrupt.

12. Bankruptcy ⇨152

The title to bankrupt's property vests in trustee and reverts back to date of fil-

ing of bankruptcy petition and not on date debtor is adjudicated a bankrupt.

13. Appeal and error ⇨854(2)

Where trial court granted motion of debtor's bankruptcy trustee to be made party to foreclosure action on all grounds upon which motion was based, if any of grounds furnished legal reason supporting order, order was required to be sustained.

14. Bankruptcy ⇨213

Even if motion of debtor's bankruptcy trustee to be made party to action to foreclose an assignment lien was based on ground that trustee was a necessary party, trial court had power under such motion to grant it on the lesser ground that the trustee was a proper party.

15. Usury ⇨8

The adoption of constitutional amendment regarding usury did not repeal usury law of 1918 in toto, but all provisions of usury law not in conflict with provisions of constitutional amendment remain in full force and effect (Usury Law of 1918 [St. 1919, p. lxxxiii]; Const. art. 20, § 22, as adopted in 1934).

16. Appeal and error ⇨982(1)

Order granting motion of debtor's bankruptcy trustee to vacate judgment would not be reversed on ground that there had been full trial of issue regarding usury as to which trustee sought relief, where trial was practically an ex parte hearing with no one representing bankrupt or his estate.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Anna B. Nuckolls against the Bank of California, National Association, as trustee, and others, wherein M. C. Symonds, as trustee of the estate and effects of defendant Alexander McMillan, also known under and by the names of Alexander C. McMillan and A. C. McMillan, respectively, a bankrupt, filed a cross-complaint. From adverse orders, Anna B. Nuckolls, Maurice R. Carey, as trustee, and Marshall Nuckolls appeal.

Appeal dismissed in part, and affirmed in part.

Maurice R. Carey, Lloyd Hummel, and John A. Gorfinkel, Marshall Nuckolls, all of San Francisco, for appellants.

Pillsbury, Madison & Sutro, of San Francisco, for respondent Bank of California.

Fred A. Watkins, of San Francisco, for respondent Alexander C. McMillan.

Charles A. Christin and George D. Collins, Jr., both of San Francisco, for respondent George L. Crabtree.

George N. Crocker, of San Francisco, in pro. per.

Glikbarg & Wolf, of San Francisco, for respondent Atlas Olympia Co. of California.

Torregano & Stark, of San Francisco (T. J. Keegan, of San Francisco, of counsel), for respondent M. C. Symonds.

Bronte M. Aikins and Oliver B. Wyman, both of San Francisco, amici curiæ.

CURTIS, Justice.

Alexander C. McMillan, the then owner of two-fifteenths of a certain trust estate, on June 8, 1929, executed and delivered to the defendant Marshall Nuckolls, his promissory note for \$63,000 and interest at 10 per cent. per annum, payable semi-annually, and to secure the payment of the same executed a written assignment to said Marshall Nuckolls of said two-fifteenths of said trust estate. On November 21st of the same year, said Alexander C. McMillan executed and delivered to said Marshall Nuckolls, a second promissory note in an amount of \$5,000 and interest, and secured the payment of the same by a further assignment of said two-fifteenths of said trust estate. Thereafter the said Marshall Nuckolls executed and delivered to plaintiff, Anna B. Nuckolls, his promissory note for \$30,000 and interest, and assigned to said Anna B. Nuckolls said promissory note for \$63,000 for the purpose of securing the payment of said promissory note for \$30,000 and interest. Thereafter said Marshall Nuckolls made a second assignment of said \$63,000 note to the defendant, Maurice R. Carey, as trustee to secure the payment of the claims of certain creditors of the said Marshall Nuckolls. Thereafter the said Alexander C. McMillan made a second assignment of said two-fifteenths of said trust estate to secure a promissory note of \$1,000 which at the date of the commencement of this action was held and owned by defendant George L. Crabtree. The said Marshall Nuckolls also assigned said promissory note of \$5,000 of date, November 21, 1929, executed by Alexander C. McMillan, to the First National Bank of

Pleasanton to secure his promissory note of \$3,110 given to said bank. Default was made in the payments due on said \$63,000 note and by reason of said default this action was commenced by the said Anna B. Nuckolls to enforce payment of said promissory note and to foreclose the lien given to secure the same. The Bank of California, National Association, was made a party defendant in said action for the reason only that it was the trustee of the estate, two-fifteenths of which was given as security for the \$63,000 note. Marshall Nuckolls, Maurice R. Carey, as trustee, the First National Bank of Pleasanton, and George L. Crabtree, as well as others not necessary to mention were also named as defendants in said action. The four last-named defendants appeared in said action and by proper pleadings set forth their respective claims of lien against said two-fifteenths of said trust estate. The defendant, Maurice R. Carey, as trustee, also filed a cross-complaint in which he sought to establish and foreclose his lien, as trustee, against the two-fifteenths of said trust estate. Judgment was rendered in favor of plaintiff and the answering defendants in which their respective rights as lien claimants against said two-fifteenths of said trust estate were determined, based upon the priority of their respective claims against said trust estate as hereinbefore set forth. In said judgment it was decreed that the lien of defendant George L. Crabtree against said trust estate was subsequent and subordinate to the claim of defendant Marshall Nuckolls and all persons claiming under him. Crabtree appealed from said judgment, but his appeal was subsequently dismissed. This action was commenced on October 10, 1933, and the judgment therein was rendered on January 17, 1935. Alexander C. McMillan was a defendant in said action and appeared therein and filed an answer to plaintiff's complaint and alleged therein that the promissory note executed by him to the defendant Marshall Nuckolls was usurious, and claimed that a substantial deduction should be made from the face of said note by reason of the fact that said note was tainted with usury. Before the trial of said action, the defendant Alexander C. McMillan changed the attorneys acting for him in said action, and at the trial through his attorneys thus substituted, waived all defenses to said action including the defense of usury, and made no further appearance in said action. After the trial of

said action and before the entry of judgment therein, certain creditors of Alexander C. McMillan filed a petition to have said McMillan declared a bankrupt. This petition was filed on December 14, 1934. Upon this petition the said McMillan was on April 5, 1935, adjudged a bankrupt and on May 21, 1935, the respondent herein M. C. Symonds was elected trustee of the estate of said bankrupt and subsequently qualified as such trustee, and was by order of the United States District Court in which said bankruptcy proceedings were pending directed to appear in the present action on behalf of the creditors of said bankrupt. Thereafter and on July 15, 1935, said trustee moved the trial court to vacate said judgment and permit the trustee to file an answer and cross-complaint in said action. The motion to vacate the judgment was granted on November 8, 1935, and on November 20, 1935, an order was made approving the filing of the answer and cross-complaint of the trustee in bankruptcy. An appeal was taken from each of these orders by plaintiff Anna B. Nuckolls, and defendants Marshall Nuckolls, and Maurice R. Carey, trustee. These same parties appealed from an order made on December 12th denying the motion of plaintiff Anna B. Nuckolls, and defendants Marshall Nuckolls, and Maurice R. Carey, as trustee, to vacate the two orders dated respectively, November 8 and November 20, 1935. A further appeal was taken by the same parties from an order dated December 27, 1935, modifying or amending the order dated November 8, 1935.

[1,2] The appeal from the order of December 12th denying motion to vacate the two orders of date respectively November 8 and November 20, 1935, is dismissed as no appeal will lie from an order refusing to vacate a judgment or order which is itself appealable. In re Estate of Baker, 170 Cal. 578, 150 P. 989. The order of November 8, 1935, being an order made after judgment is appealable. Section 963, Code Civ.Proc. (as amended by St.1933, p. 2472); Butler v. Soule, 124 Cal. 69, 56 P. 601; Storke v. Storke, 111 Cal. 514, 44 P. 173. The orders of November 20, 1935, and December 27, 1935, respectively, are merely supplementary to the order of November 8, 1935, and if the latter order may be sustained, it will follow as a matter of course that the two other orders were properly made. This is particularly so in the present instance as the appellants make no specific objections to the two later

orders, that are not made to the earlier order. Therefore we shall confine our discussion of the issues on this appeal to the order of November 8, 1935, vacating the judgment in this action and permitting the respondent, M. C. Symonds, as trustee in bankruptcy, to file an answer and cross-complaint in this action. The two subsequent orders will stand or fall depending entirely upon the fate meted out to the prior order of November 8, 1935.

[3,4] It is contended by appellants in the first place that, as an appeal had been taken from said judgment by defendant Crabtree, the trial court had no jurisdiction over said action; that the appeal from said judgment transferred the entire cause to the Supreme Court and that the order of the trial court vacating said judgment was void for that reason. However, it appears from the record that the appeal from said judgment was dismissed on the 12th day of July, 1935, with directions that the remittitur issue forthwith, and that the remittitur was actually filed in the office of the clerk of the trial court on the following day. As the motion to vacate judgment was not made until July 15, 1935, and was not granted until November 8, 1935, it thus appears that the motion to vacate judgment and the order granting the same were made after the filing of the remittitur in the trial court at which time the jurisdiction of the Supreme Court over the action had ceased and the same was revested in the trial court. Fischer v. Lukens, 41 Cal.App. 358, 182 P. 967; Herrlich v. McDonald, 83 Cal. 505, 23 P. 710; Adams v. Dohrmann, 63 Cal. 417; Granger v. Sheriff, 140 Cal. 190, 195, 73 P. 816. Upon this subject we find the following explicit statement in the case last cited, "When the remittitur is filed with the clerk 'with whom the judgment roll is filed' the jurisdiction of the superior court re-attaches."

[5] The further contention is made by appellants that the court had no jurisdiction to entertain the motion of the trustee to set aside the judgment theretofore rendered in said action and to permit said trustee to file an answer in said action under section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851), or under any other provision of law, for the reason that the judgment as against Crabtree, had, upon the dismissal of the appeal of Crabtree, become final, and immune from attack by any person or for any reason whatsoever. Upon the dismissal of Crab-

tree's appeal, the judgment as between him and the other parties to the action became final, and, as to the parties to said appeal, the judgment was immune from further attack, but the status or effect of that portion of the judgment determining the rights of Crabtree was after such dismissal no different from that of the balance of said judgment determining the rights of the other parties in said action. The time for an appeal or motion for a new trial had then expired and the judgment as a whole had become final. The court had the same jurisdiction to entertain a motion to set aside the judgment determining Crabtree's rights as it had to entertain said motion respecting the other parties to said judgment. The authorities cited by appellants in support of this contention are beside the mark as they are predicated on a false premise. In citing them appellants assume that the Crabtree portion of the judgment is immune from attack under section 473 of the Code of Civil Procedure, or under any other provision of law, which assumption, as we have shown, is not the case.

[6-8] Equally untenable is the contention of the appellants that the trustee, not being a party to said action, could not apply for relief under section 473 of the Code of Civil Procedure, and, therefore, was without any right to move the court to set aside the judgment and permit him to appear therein and contest the claims of the appellants. The motion made by the trustee was on much broader grounds than those stated in section 473 of the Code of Civil Procedure. As grounds for the granting thereof, the notice specified not only inadvertence and mistake but that the trustee was a necessary party to said action; that the judgment was fraudulent; and that the trustee had a meritorious defense to the action. While strictly speaking, according to the terms of section 473 of the Code of Civil Procedure, only a party to an action may avail himself of the privileges accorded under this section, there is no such limitation placed upon motions made upon other grounds stated in said notice of motion. Under the authority of *Hammond Lumber Company v. Gilkey*, 120 Cal.App. 252, 7 P. 2d 724, we think the trial court properly entertained said motion, and the granting thereof was the equivalent of an order making the trustee a party to said action. *Syvertson v. Butler*, 3 Cal.App. 345, 85 P. 164. Sections 473 and 389 of the Code of Civil Procedure are remedial provisions and

should receive a liberal construction in order to dispose of causes upon their substantial merits. *Nicoll v. Weldon*, 130 Cal. 666, 667, 63 P. 63; *Melde v. Reynolds*, 129 Cal. 308, 311, 61 P. 932.

[9] A further point raised by appellants is that the defense of usury is not available to a trustee in bankruptcy. This contention has been the subject of a number of decisions both in the federal and state courts, and in every instance to which our attention has been called it has been decided adversely to the position of the appellants in the instant case. In *Remington on Bankruptcy* it is stated that the trustee in bankruptcy may plead usury although this defense is usually said to be one purely personal to the debtor. 4 *Remington on Bankruptcy* (4th Ed.) p. 258. In *Corpus Juris* (66 C.J. p. 320), we find the following statement of the rule: "It has been held and recognized that an assignee or trustee in bankruptcy acquires the bankrupt's right to protect the estate against usurious claims, and, in the absence of a statute providing otherwise, he may plead usury to claims against the bankrupt's estate, or bring suit to recover back usurious interest paid, or to recover securities pledged by the bankrupt to secure a usurious loan." The text of the two publications just cited is supported by the following cases: *In re Stern* (C.C.A.) 144 F. 956; *Teshner v. Roome*, 106 Or. 382, 210 P. 160, 212 P. 473; *Loganville Banking Co. v. Forrester*, 17 Ga.App. 246, 87 S.E. 694; *In re Kellogg* (D.C.) 113 F. 120; *In re Kellogg* (C.C.A.) 121 F. 333; *In re Miller* (D.C.) 118 F. 360; *In re Samuel Wilde's Sons* (D.C.) 133 F. 562.

[10-12] We deem it unnecessary to pass upon the contention of the appellant that the application of the trustee did not show any fraud upon the court or upon any of the parties to the action, for the reason that we are convinced that the trustee was a proper party to the action, and that being so, it was within the discretion of the court to set aside the judgment and permit him to defend the action on behalf of the estate of the bankrupt. In support of this conclusion, the record shows that the petition in bankruptcy was filed while the action was pending and before judgment was rendered, although the order adjudicating *McMillan* a bankrupt was made after judgment was rendered. The title to the bankrupt's property vested in the trustee and reverted back to the date of the filing of the petition in bankruptcy, and not on the date the debtor

is adjudicated a bankrupt. *Everett v. Judson*, 228 U.S. 474, 33 S.Ct. 568, 57 L.Ed. 927, 46 L.R.A.(N.S.) 154; *Bailey v. Baker Ice Machine Co.*, 239 U.S. 268, 36 S.Ct. 50, 60 L.Ed. 275; *Martin v. Commercial National Bank*, 245 U.S. 513, 38 S.Ct. 176, 62 L.Ed. 441; *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 51 S.Ct. 270, 75 L.Ed. 645; *Noyes v. Bank of Italy*, 206 Cal. 266, 270, 274 P. 68. The facts in the present case are in principle very similar to those in the case of *Hammond Lumber Company v. Gilkey*, 120 Cal.App. 252, 7 P.2d 724, 725, except that the trustee there was not relying on usury as a defense. As we have held that the defense of usury is available to the trustee, that element of dissimilarity is not material. The two cases are alike in that they involve the right of the trustee under the facts stated to have the judgment set aside and permission given him to file an answer in the action. The *Hammond Case* was an action to foreclose mechanic's liens against property belonging to two defendants who were served with process and their defaults for failure to answer the complaint were regularly entered. Prior to the entry of said defaults, petitions in bankruptcy had been filed against each defaulting defendant. Thereafter they were adjudicated bankrupts and a trustee of their estate was elected. He failed to make any appearance in the action, and some three months thereafter judgment of foreclosure was entered in the action. After the entry of the judgment the trustee moved to set aside the same and permit him to file an answer in the action. His motion was granted, and on appeal the order granting the motion was affirmed. We find the following pertinent statements in the opinion in that case which we think are applicable to the facts in the present case: "The plaintiff was asserting a lien on real property, title to which, subject to whatever lien plaintiff might establish, had vested in the defendant trustee, and it seems to us that the trustee in bankruptcy should have the right to be heard in this matter as long as the property on which the lien was impressed by the judgment had not actually been sold under execution and was still under the jurisdiction of the trial court." "It has also been held that a trustee in bankruptcy may assert or contest claims and rights to property, maintain or defend proceedings under circumstances where the bankrupt himself would not be at liberty to act. In *re Kessler*, [supra] 186 F. 127, 108 C.C.A.

239. In *Dambmann v. White*, 48 Cal. 439, which is a case relative to the power and capacity of an assignee in bankruptcy to recover the assets of the bankrupt under the old law, it is said: 'Whatever right the bankrupt had is assigned to and vests in the assignee, who thereby becomes, for the purpose of maintaining or defending suits, "possessed as of his own property" of the estate assigned to him. It is true he holds the title and the property when recovered in trust for certain purposes specified in the statute. But as between him and a stranger he holds the title, and may assert it in the same form of action as though he owned the fee.'" In that case the court quoted with approval the following statement of the law from the case of *First National Bank of Sioux City v. Flynn*, 117 Iowa 493, 91 N.W. 784, 785: "'Plaintiff contends that as Flynn, trustee, did not file his motion and answer until the next term after the default was granted, he was not entitled to relief. Code § 3790. * * * The trustee's application was not an ordinary motion to set aside a default, which could be made only by the defendant against whom the default was rendered but was in reality an intervention in behalf of the creditors of the bankrupt's estate to contest plaintiff's claim and its right to a lien. That the state court had the inherent power to entertain such application, so long as the case was pending before it, cannot be doubted. *Heath v. Shaffer* (D.C.) 93 F. 647.'"

The fact that in the present case the property involved may be personal property, while in the cited case the property was real estate, does not affect the right of the trustee to contest the liens of appellants. In either case the trustee holds the legal title to the encumbered property subject to valid liens against it.

The excerpts from the decision of the Iowa supreme court also afford a further answer to appellants' contention that the trustee's motion to vacate the judgment was improperly granted for the reason that he was not a party to the action and did not therefore bring himself within the terms of section 473 of the Code of Civil Procedure. As already stated by us, the motion of the trustee was broader than the ordinary motion under said section, as it was based upon other grounds than those specified in said section. It was, in some respects, as stated by the Supreme Court of Iowa, in the nature of an application or petition in intervention on behalf of the

bankrupt's estate to contest the claims of the appellants and their right to liens against property belonging to the bankrupt estate.

[13,14] The motion in the Hammond Lumber Company Case, *supra*, was not granted on any ground of fraud, but upon the sole ground that the trustee was the owner of the property subject to valid liens against it, and therefore he was a proper party to an action brought to foreclose said lien. In the present action the situation of the parties was in practically all material respects the same as that in the case just cited. While the trustee in the instant action based his motion to set aside the judgment in part on the ground of fraud, he also included in his motion as a ground for granting the same that he was a necessary party to the action. The trial court granted the motion apparently upon all grounds upon which it was based. If any of such grounds furnished a legal reason supporting the order of court, the action of the court in granting the order must be sustained. If there is any doubt as to the trustee being a necessary party to said action, we have no hesitancy in holding that he was a proper party thereto. As before stated, he was vested with the title to the property subject to whatever liens the other parties to said action had against said property. It was his duty to defend against said liens if he had good cause to believe any of them was invalid in whole or in part. At least under this situation it was within the discretion of the trial court to grant the motion of the trustee under the facts stated herein. Even if the motion was made upon the ground that the trustee was a necessary party, it was within the power of the court under such a motion to grant the same upon a lesser ground—that is, upon the ground that he was a proper party.

[15] A considerable portion of the briefs of the parties hereto and those of certain amici curiae filed herein was devoted to the question as to whether the usury law enacted by vote of the people, November, 1918 (St.1919, p. lxxxiii), under the initiative provision of the Constitution of this state had been repealed by the adoption of article 20, section 22 of said Constitution. This question has been given consideration by this court in the case of *Penziner v. West American Finance Co.*, 74 P.2d 252. In our decision of the appeal in that case, we held that by the adoption of said section of the Constitu-

tion the usury law of 1918 had not been repealed, but that all the provisions of said usury law not in conflict with the provisions of said constitutional amendment were in full force and effect. It is not necessary to repeat here the discussion and our conclusion contained in our opinion in the case of *Penziner v. West American Finance Company*, *supra*.

[16] Finally the appellants contend that a full and complete trial of the action was had at which all matters and issues were fully presented and determined by the trial court. It is true that upon the hearing before the trial court after the entry of the default of the defendant Alexander C. McMillan evidence was given in minute detail as to the several sums of money advanced by the said Marshall Nuckolls to the said Alexander C. McMillan and for the use and benefit of the latter and as to certain sums of money due from Alexander C. McMillan to the said Marshall Nuckolls for legal services. The aggregate amount of these several sums of money was shown to be the sum of \$63,000 and upon such evidence the court found that the said Alexander C. McMillan "borrowed and received from defendant, Marshall Nuckolls, the sum of sixty-three thousand dollars (\$63,000), which said sum the defendant, Alexander C. McMillan, did then and there promise to pay to said defendant, Marshall Nuckolls, according to the terms and provisions of a certain promissory note" (here follows a description of the promissory note which is the subject of this action). But this trial, if it can be called such, was practically an *ex parte* hearing with no one to represent the bankrupt or his estate. While the evidence as appears in the record is most convincing in support of the finding of the trial court, yet the same judge who presided at the hearing after default and signed the findings also heard and granted the motion of the trustee to set aside the judgment rendered by him upon said findings. The judge having heard the evidence introduced at the "full and complete trial," was in a much more advantageous position than this court to pass upon the subsequent motion to set aside the judgment rendered as a result of such "trial."

While other points are made and reasons advanced for a reversal of the judgment, they are not of sufficient substance to justify a detailed answer, and for that reason will not be further discussed. They are without merit, and present no legal reason

for a reversal of any of the orders appealed from.

The appeal from the order of date, December 12, 1935, is dismissed; and the other three orders appealed from, are, and each of them is, affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; EDMONDS, J.



10 Cal.2d 278

**NUCKOLLS v. BANK OF CALIFORNIA,
NATIONAL ASS'N, et al.**

SYMONDS v. NUCKOLLS.

SYMONDS et al. v. NUCKOLLS et al.

S. F. 15709.

Supreme Court of California.

Nov. 27, 1937.

**Hearing Denied by Supreme Court
Dec. 24, 1937.**

1. Usury ☞8

Usury law is in full force and effect except as to those provisions thereof which are in conflict with constitutional amendment regarding usury (Usury Law of 1918 [St.1919, p. lxxxiii]; Const. art. 20, § 22, as adopted in 1934).

2. Bills and notes ☞376

The defense of usury is not available against a holder in due course (Usury Law of 1918 [St.1919, p. lxxxiii]).

3. Bills and notes ☞338

Wife, who accepted alleged usurious note as part of her share of community property in property settlement on obtaining divorce, was "holder for value and in due course," as against contention that because note was part of community property notice to husband was imputable to wife, where wife had no actual notice and acted in good faith in accepting note and received only a fair share of community property (Civ.Code, § 3137).

[Ed. Note.—For other definitions of "Holder for Value" and "Holder in Due Course," see Words & Phrases.]

4. Usury ☞56

Transaction was not rendered usurious by acts of noteholder's agent in making an excessive and unlawful interest charge without holder's knowledge or consent, where holder did not receive any of the usurious interest (Usury Law of 1918 [St.1919, p. lxxxiii]).

5. Assignments ☞85

Lien of holder of intermediate assignment, given as security, of debtor's interest in trust estate was prior to lien of assignment subsequently executed to holder of assignment constituting first lien, where holder of the intermediate assignment had notified trustee but not holder of first assignment.

6. Assignments ☞85

Where holder of intermediate assignment, given as security, of debtor's interest in trust estate notified trustee of the assignment but did not notify holder of first assignment and first assignee took an additional assignment as security for further loan and at debtor's request applied dividends received from trustee to payment of the additional loan, the intermediate assignee was not entitled to have dividends re-applied to reduction of interest due on indebtedness secured by first assignment.

Appeal from Superior Court; Marin County; Edward I. Butler, Judge.

Action by Anna B. Nuckolls against the Bank of California, National Association, as trustee, Horatio G. McMillan, also known under and by the names of H. G. McMillan and Horatio McMillan, respectively, and others, wherein M. C. Symonds, as trustee of the estate and effects of Horatio G. McMillan, also known under and by the names of H. G. McMillan and Horatio McMillan, a bankrupt, filed a cross-complaint against the plaintiff. From the judgment, M. C. Symonds, as trustee, and others appeal.

Affirmed.

Hearing denied by Supreme Court; SHENK and EDMONDS, JJ., dissenting.

Charles A. Christin, of San Francisco, Cal., for appellants Pacific Nat. Bank of San Francisco, and T. J. Keegan.

Torregano & Stark, Charles A. Christin, and T. J. Keegan, all of San Francisco, for appellant M. C. Symonds, trustee.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant General Motors Corporation.

George D. Collins, Jr., of San Francisco, for appellant George L. Crabtree.

Maurice R. Carey, Lloyd Hummel, and John A. Gorfinkel, all of San Francisco, for respondent Anna B. Nuckolls.

Pillsbury, Madison & Sutro, of San Francisco, for respondent Bank of California, National Ass'n, Trustee.

Fred A. Watkins, of San Francisco, for respondent Horatio G. McMillan.

Beverly B. Crawford, of Oakland, for respondent George B. Fink.

C. A. Christin, of San Francisco, for respondent E. S. Leslie.

Bush & Cleary, of Modesto, for respondent David F. Bush.

Marshall Nuckolls, of San Francisco, in pro. per.

George N. Crocker, of San Francisco, in pro. per.

CURTIS, Justice.

The defendant Horatio G. McMillan was the owner of two-fifteenths of a certain trust estate created under the last will and testament of his father, Anthony McMillan, deceased, and established by the decree of distribution in the estate of said decedent. The Bank of California, National Association, was the trustee of said trust estate. On June 28, 1926, the said Horatio G. McMillan, executed his promissory note for \$30,000 in favor of defendant, Marshall Nuckolls, and assigned his two-fifteenths of said trust estate to the said Marshall Nuckolls as security for the payment of said promissory note. The note bore interest at 12 per cent. per annum, compounded semiannually, and is referred to in the record as note No. 1. After the execution and delivery of this note, the parties to this transaction evidently became aware that the note as drawn was usurious under the Usury Law (St.1919, p. lxxxiii) then in force in that it bore interest at the maximum rate provided by the Usury Law and in addition thereto this interest was compounded. Accordingly and for the purpose of remedying this defect, on March 30, 1928, Horatio G. McMillan executed a new note for the same amount with the same rate of interest, except that there was no compound interest provided in the new note, which is referred to in this record as note No. 2. This note, although executed on March 30, 1928, was dated June 28, 1926 (the same date which note No. 1 bore), and

interest was payable from that date. The assignment of the two-fifteenths of the trust estate given as security for the payment of note No. 1 was by the agreement of the parties made to continue as security for the payment of note No. 2.

At the time note No. 1 was executed, Marshall Nuckolls and plaintiff, Anna B. Nuckolls, were husband and wife, and the said note was their community property. Thereafter a divorce was granted to these parties, and on January 7, 1927, Marshall Nuckolls in a contemplated division of the community property of himself and wife assigned to Anna B. Nuckolls note No. 1, although he retained physical possession of said note. This note was in his possession when, on March 30, 1928, he surrendered it up to Horatio G. McMillan and received in exchange therefor note No. 2, as stated above. Thereafter on the 26th day of November, 1928, the said Marshall Nuckolls and Anna B. Nuckolls consummated their property settlement, and on that date said Marshall Nuckolls transferred and assigned to Anna B. Nuckolls note No. 2 and by written assignment transferred to her the assignment of said two-fifteenths of said trust estate held by him as security for the payment of said note No. 2 and at that date said Marshall delivered to the said Anna B. Nuckolls said note No. 2 and said assignment of McMillan given to secure the payment of said note. After the delivery of said note No. 2 to Anna B. Nuckolls, Marshall Nuckolls continued to collect the interest thereon at the rates specified therein for and on behalf of Anna B. Nuckolls.

Other loans were made to McMillan, all of which were secured by assignments of the two-fifteenths of said trust estate. It is not necessary to specify any of these subsequent loans except the loan of \$6,000 on June 5, 1930, evidenced by a promissory note to Marshall Nuckolls. This note and security were transferred and assigned to Anna B. Nuckolls on June 6, 1930.

There were the following further transfers or liens against Horatio G. McMillan's interest in said trust estate:

1. On May 3, 1930, McMillan assigned his interest in said trust estate to General Motors Corporation to secure the payment of \$2,980.37 with interest at 7 per cent. per annum.

2. On January 9, 1932, McMillan made a further assignment of his interest in said

trust fund to secure the payment of a promissory note for \$1,000.

3. On June 30, 1933, McMillan borrowed \$2,500 from the Pacific National Bank and assigned his interest in said trust to secure the payment of said sum.

4. On September 24, 1934, in an action brought by T. J. Keegan against McMillan, a writ of attachment was served upon the defendant, the Bank of California, National Association, as trustee, in an action to recover \$15,933.

This action was instituted on October 10, 1933, by plaintiff Anna B. Nuckolls to recover the several amounts due her from McMillan on the several loans held by her against McMillan, and to foreclose the interest of McMillan in said trust estate. All of the above-named persons and corporations claiming liens against McMillan's interest in said trust estate were made parties defendant. McMillan was also made a defendant, but after the institution of the action he was declared bankrupt and M. C. Symonds, his trustee in bankruptcy, was made a party to the action, and filed an answer and cross-complaint. All the defendants, including Symonds as trustee, set up usury as a defense to various of the claims of plaintiff. The General Motors Corporation set up an additional defense which will be stated more definitely and considered later in this opinion.

The court found that note No. 2 and certain of the other obligations of Horatio G. McMillan, held by plaintiff and mentioned above, were, at the respective dates upon which they were incurred, usurious and in violation of the Usury Law of 1918, but that said Usury Law had been repealed on November 6, 1934, by the adoption of article 20, section 22, of the State Constitution; accordingly neither note No. 2 nor any of the other obligations were usurious or contrary to any usury statute of the State of California, and that they are "and each of them is founded and based upon a valuable, good, and sufficient consideration". Judgment was rendered in favor of plaintiff Anna B. Nuckolls for the full amount of her several claims with interest. The following-named defendants have appealed from said judgment: M. C. Symonds, the trustee in bankruptcy; Pacific National Bank; George L. Crabtree; General Motors Corporation; and T. J. Keegan.

Only two points are raised in appellants' opening brief. One of these affects the in-

terest and is made in behalf of all of the appellants and the other concerns the judgment only in so far as it determines the rights of the appellant General Motors Corporation. These points, as stated in the brief, are as follows: (A) Was the Usury Law of the state of California repealed by the constitutional amendment of 1934? (B) The court erred in holding that the six-thousand-dollar note of Horatio G. McMillan executed in favor of Marshall Nuckolls and by him assigned to the plaintiff Anna B. Nuckolls had priority over the claim of General Motors Corporation.

[1] As to the first of these two points which involves the present status of the Usury Law in this state, the question therein involved was considered and determined by this court in its opinion in the case of *Penziner v. West American Finance Company*, 74 P.2d 252. It was there held that the Usury Law of 1918 was still in full force and effect except as to those provisions thereof which are in conflict with article 20, section 22, of the Constitution, adopted in the year 1934. It is not necessary to repeat here our decision of that subject as contained in the opinion in that case upon the present status of the Usury Law in this state.

However, appellants were apparently not willing to rest their case upon the sole ground that the Usury Law has not been repealed, as they have devoted a considerable portion of their opening brief under the "first point" to an attempt to show that Anna B. Nuckolls was not a holder in due course of the notes and securities held by her, which were executed by the said Horatio G. McMillan and secured by assignments of his interest in said trust estate, and not being such a holder of these securities the defense of usury was available to appellants to defeat, or at least to reduce the amount of, her claims as fixed by the judgment in this action.

In connection with this question, the record shows that the court found that Anna B. Nuckolls acquired said obligations before maturity in good faith and for value without actual notice of any infirmity in any of the instruments or defect in the title of the defendant Marshall Nuckolls, and without any actual notice of any defense to any of said instruments.

[2] There was nothing usurious on the face of any of the obligations and there was

nothing in the body of any of them to indicate to an innocent purchaser that it was usurious. The law in this state is well established that the defense of usury is not available against a holder in due course. *Brown v. Guaranty Mortgage Company*, 220 Cal. 532, 31 P.2d 788; *Cannon v. Goebel*, 217 Cal. 399, 18 P.2d 931; *Community Lumber Company v. Chute*, 215 Cal. 268, 10 P.2d 57, and *Baker v. Butcher*, 106 Cal.App. 358, 289 P. 236.

Appellants contend, however, that other specific findings of the court show that plaintiff was not the holder of said note in due course, and that after she became the owner of said note she knowingly collected usurious interest thereon. The court found that plaintiff acquired said note in a property settlement with her husband Marshall Nuckolls, from whom she had been divorced. Appellants make no claim that plaintiff did not acquire said obligation for value, but base their contention that the defense of usury is available to them against the plaintiff as to note No. 2, upon the claim that it was community property, and, therefore, Anna B. Nuckolls was not a holder thereof in due course, and, furthermore, that after the note was assigned to Anna B. Nuckolls, Marshall Nuckolls acted as her agent in charging, allocating, and demanding usurious interest.

[3] We shall first consider the contention that Anna B. Nuckolls was not a holder in due course. As we have seen, the court expressly found that plaintiff became the holder of said note without any actual notice of any infirmity therein. The only showing under which she could be held to have received constructive notice would be that, as the note was the community property of herself and husband, notice to him would be imputed to her. In other words, appellants contend that Anna B. Nuckolls had constructive notice that the note was usurious, and therefore she was not a holder in due course. Section 3137 of the Civil Code provides that: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." In the case of *Merced Security Savings Bank v. Bent Bros.*, 207 Cal. 652, 656, 279 P. 765, 767, we find this section cited and followed in the

following language: "To constitute notice of any infirmity in the check of the appellant, or defect in the title thereto of the Farmers' & Merchants' National Bank, the respondent must have had actual knowledge of the infirmity or defect, or knowledge of such facts that its action in taking the instrument amounted to bad faith. Civ.Code, § 3137. The check was complete and regular upon its face, and it had not been previously dishonored. It was taken by the respondent in good faith and for valuable consideration, passing by reason of the settlement for the balance due on the clearances on September 18, and respondent had no notice of any defect in the title of the negotiating bank." The following cases contain similar statements of the law: *Goodale v. Thorn*, 199 Cal. 307, 314, 249 P. 11; *James Mills Orchard Co. v. Bank of America*, 137 Cal.App. 299, 305, 30 P.2d 626, 32 P.2d 342; *Ross v. Title Guarantee Co.*, 136 Cal.App. 393, 399, 29 P.2d 236; *Druker v. Howe & Haun Investment Co.*, 136 Cal.App. 437, 442, 29 P.2d 289.

There is nothing in the findings which would indicate that Anna B. Nuckolls had actual knowledge of any facts that would put her upon inquiry as to whether the note was usurious or indicated that in taking the note she was acting in bad faith. On the other hand, the whole tenor of the findings of fact is that she acted innocently and in perfect good faith in accepting the note as a part of her share of the community property. The record shows that at the time of the divorce the parties were the owners of community property of the reasonable value of over \$270,000, and that in the settlement she received only a fair and equitable division thereof. It does not stand to reason that if she had knowledge of any fact that would cause her to question the validity of said note she would have accepted it as part of her share of the community property instead of other property of the community of unquestioned validity. We are, therefore, of the conclusion that Anna B. Nuckolls is a holder for value and in due course of said promissory note No. 2. The same conclusion applies to all the other obligations of Horatio G. McMillan which she held and which are involved herein. None of them showed on its face that it was usurious.

We now come to the further contention of appellants that after note No. 2 and also the other obligations upon which it is

claimed usurious interest was collected, were assigned to Anna B. Nuckolls, Marshall Nuckolls acted as her agent in collecting usurious interest upon these obligations and that the acts of her agent rendered the transactions usurious.

[4] Finding No. 9 reads as follows: "That it is true that after the 26th day of November, 1928, said defendant, Marshall Nuckolls, for himself and as agent for plaintiff, Anna B. Nuckolls, the subsequent assignee of said note 'No. 2', charged, allocated and continued to demand from defendant, Horatio G. McMillan, and Lilian E. McMillan interest at semi-yearly intervals upon the principal sum of said note 'No. 2' and upon the interest accruing thereupon after the taking of said note."

Similar findings were made as to the other obligations on which usurious interest was charged and demanded. It will be noted that the language used in the finding is that Marshall Nuckolls "charged, allocated and continued to demand from defendant * * * interest at semi-yearly intervals upon the principal sum * * * and upon the interest accruing thereupon after the taking of said note." It will be further noted that while the court found that Marshall Nuckolls, as the agent of his wife "charged, allocated, and continued to demand" interest upon the interest, there is no finding that he paid said illegal interest, or any part thereof, to his wife. We have carefully gone over the voluminous findings of the court, and we are unable to discover any finding therein that Marshall Nuckolls paid any part of the usurious interest to Anna B. Nuckolls, his wife. Furthermore, the findings compel the inference that Anna B. Nuckolls did not assent to or know that any usurious interest was being charged or collected by Marshall Nuckolls. The transaction was not therefore rendered usurious by the acts of her agent in making an excessive and unlawful interest charge. *Vaughan v. Peoples' Mortgage Company*, 130 Cal.App. 632, 641, 20 P.2d 335, 339; *Niles v. Kavanagh*, 179 Cal. 98, 100, 175 P. 462, 463, 1 A.L.R. 831; *St. John v. Fowler*, 229 N.Y. 270, 273, 128 N.E. 199; *Chicago Fire Proofing Co. v. Park Nat. Bank*, 145 Ill. 481, 32 N.E. 534, 535; *Franzen v. Hammond*, 136 Wis. 239, 116 N.W. 169, 170, 19 L.R.A.(N.S.) 399, 128 Am.St.Rep. 1079, 1082; *Freedman v. Katz*, 246 Mich. 296, 224 N.W. 325, 326, cited in 63 A.L.R. 831, 834; *New York Mortgage Co. v. Garfinkle*, 231 App.Div. 327, 247 N.Y.S. 313, 315, 316.

A few excerpts from these authorities will serve to clarify this rule. In the *Niles v. Kavanagh*, supra, case, this court held that "a payment to an agent of the lender is, in effect, a payment to the lender himself. But where the lender is in no way interested in a charge, or connected with it, the transaction is not to be denounced as usurious." In *Franzen v. Hammond*, supra, the supreme court of Wisconsin stated the rule in the following language: "It is not within the apparent scope of a legitimate business agency to violate the law. So where an agent loans money, exacting a bonus for himself, the presumption is rather that it is without the knowledge of the principal than with such knowledge." The Supreme Court of Michigan in *Freedman v. Katz*, supra, after reviewing the authorities upon this question, stated the conclusion as follows: "The great weight of authority is that a loan is not rendered usurious by the lender's agent charging the borrower, for his own benefit, a commission or bonus for procuring the loan, in excess of the maximum legal rate of interest, where such charge is made without the lender's knowledge or consent, either expressed or implied, and is not ratified or shared by him." In *Vaughan v. Peoples' Mortgage Co.*, supra, the rule is concisely stated in the following language: "Where an individual wishes to invest money through an agent, the integrity of the loan is not affected by the act of the agent in charging usury, unless the lender has knowledge of the transaction or assents to it or receives some benefit from it." Our conclusion from the foregoing discussion and citation of authorities is that the act of her agent in collecting usurious interest without her knowledge or consent did not render the transaction usurious as to Anna B. Nuckolls where no part of such usurious interest was received by her.

[5, 6] The second point raised by appellants concerns only the appellant General Motors Corporation. This appellant holds an assignment by Horatio G. McMillan of his interest in said trust estate to secure the payment of \$2,980.37 and interest. The date of this assignment is May 3, 1930. After this assignment was executed and delivered and notice thereof served upon the Bank of California, the trustee of the trust estate, McMillan, on June 5, 1930, made the assignment of his interest in said trust estate to secure the payment of said promissory note of \$6,000 as stated above. No notice of the assignment to the General Motors Corpora-

tion was given to the plaintiff or to Marshall Nuckolls, and when dividends were paid by the bank to Marshall Nuckolls he applied a sufficient amount of these dividends at the special instance and request of Horatio G. McMillan to the payment of said promissory note of \$6,000. Appellant contends that this money should have been paid on the interest due on said \$30,000 promissory note thereby reducing the amount of interest due thereon. The trial court found that said \$6,000 note had been paid in full. No claim is made that either plaintiff or Marshall Nuckolls did not act in the matter in perfect good faith. It cannot be questioned that the lien of General Motors Corporation was prior to that securing the \$6,000 note, and had General Motors Corporation notified plaintiff of its lien and directed the payment of said dividend to the amount due on the \$30,000 note, its lien on said funds would have been preserved, but no such notice was given to the plaintiff. As a result of this lack of notice and at the instance and request of the debtor these dividends were applied to the payment of the \$6,000 note. The situation here is much like that shown to have existed in the case of *Anderson v. Northwestern Trust Company*, 184 Minn. 200, 238 N.W. 164, 166. In its decision of that case, the court ruled as follows: "So payments and application thereof were facts accomplished and made in accord with the directions of the debtor. Under the law, applications made were rightful and legal when made. The then undisclosed equities, if any, of the plaintiff would not overturn what had rightfully been done. In *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 73 N.W. 159, 160, 248, this court said: 'It is the rule that an application once rightfully made by either party is conclusive and final; also that the law will not disturb an application made by the parties.'" A reasonable application of this rule to the facts in the present case renders it necessary to hold that as the funds in question were applied according to the agreement between the debtor and the creditor without any knowledge on the part of the creditor of the equities of a third party, "the law will not disturb an application once made by the parties."

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; EDMONDS, J.; SHENK, J.

MacLEOD v. FOX WEST COAST THEATRES CORPORATION et al.
L. A. 16239.

Supreme Court of California.

Dec. 16, 1937.

1. Torts ⇨3

An action for tort does not lie unless there is a legal duty imposed by statute or otherwise owing by the defendant to the one injured.

2. Theaters and shows ⇨4

Theater owner had exclusive right to determine who should be permitted to attend any showing of a motion picture to which the public was not invited, in the absence of any release or qualification of its rights in such regard.

3. Theaters and shows ⇨4

A film corporation, with which theater owner had agreed that attendance at a "pre-showing" would be limited to representatives of the press and to 100 employees of the film corporation, had no power to encroach upon the absolute remaining right possessed by theater owner to determine who should be invited.

4. Theaters and shows ⇨4

Where film corporation agreed with theater owner that attendance at "pre-showing" would be limited to representatives of the press and to 100 employees of the film corporation, an invitee of the film corporation who did not fall in either of such classes was not entitled to admission to the theater, but was in legal effect a "trespasser" on the premises.

[Ed. Note.—For other definitions of "Trespasser," see Words & Phrases.]

5. Trespass ⇨10

One who is on the land of others without their consent and against their will is a "trespasser."

6. Trespass ⇨10

Every wrongful entry upon land in the occupation or possession of the owner constitutes a "trespass."

[Ed. Note.—For other definitions of "Trespass," see Words & Phrases.]

7. Partnership ⇨128

Ordinarily, a partner may bind the partnership with respect to transactions that

are within the scope of the partnership business (Civ.Code, § 2403, subd. 1).

8. Partnership ⇨139

A partner may modify or rescind an executory contract if it is reasonably necessary or proper in the conduct of the firm's business and might be legally revoked or canceled by the partnership (Civ.Code, § 2403, subd. 1).

9. Theaters and shows ⇨4

Theater owner had authority to revoke invitation extended by film corporation which had agreed that attendance at "preshowing" of a film would be limited to representatives of the press and to 100 employees of film corporation, although it might be deemed within film corporation's power as a partner in a joint venture to extend an invitation to an individual not within the classes agreed upon (Civ.Code, § 2403, subd. 1).

10. Theaters and shows ⇨4

Where film corporation agreed with theater owner that attendance at the "preshowing" of a film should be limited to representatives of the press and to 100 employees of the film corporation, theater owner which used no more force than was reasonably necessary was not liable for ejecting an invitee of the film corporation who did not fall in either of such classes.

11. Torts ⇨16

A person may use all such force as is reasonably necessary to protect his person or property.

In Bank.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Thomas MacLeod against the Fox West Coast Theatres Corporation and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Prior opinion, 63 P.2d 337.

Loeb, Walker & Loeb, Charles A. Buckley, Albert W. Leeds, and John B. Bertero, all of Los Angeles (Herman F. Selvin, of Los Angeles, of counsel), for appellants.

Sparling & Teel and Maurice C. Sparling, all of Los Angeles, for respondent.

PER CURIAM.

The facts that are decisive of the instant case in substance appear to be that the de-

fendant Fox West Coast Theatres had agreed with Charles Chaplin Film Corporation to the effect that for the purpose of testing the "sound track" and of correcting any slight imperfections which might be detected in a "film" which theretofore had been produced by the latter, it would be "run through" at a theater that was owned and operated by the former. By Fox West Coast Theatres it was deemed advisable, and was so stated by it to Charles Chaplin Film Corporation, that the persons who would be permitted to witness such "preshowing" would be limited to representatives of the press, and to 100 employees of Charles Chaplin Film Corporation. Notwithstanding such direction on the part of the owner of the theater, but in conscious disregard thereof, the publicity representative of Charles Chaplin Film Corporation, who had been told by her superior officer of that corporation "to use her own judgment" with respect to the persons who should be invited to witness the "preshowing," at the request of one who was a radio announcer for a rival motion picture producer, extended an invitation to witness said "preshowing" not only to him, to his wife, and to the plaintiff, but also to a young woman who had been invited by plaintiff to accompany him; none of whom was within either of the classes of persons which theretofore had been designated as proposed invitees by the defendant corporation. In addition to the direct understanding of the parties regarding the limitation which thus had been placed upon the personnel of those who were to be invited on the occasion, for the purpose of checking the several invitees and of preventing uninvited persons from entering the theater, it was also agreed that on the evening when the "film" was to be "run through," defendant Sargent, who was the district manager of the defendant corporation, and the publicity representative of the Charles Chaplin Film Corporation would be at the entrance to the theater where the "preshowing" was to take place. That part of the agreement was substantially executed. However, when at the appointed time plaintiff arrived at and within the "forecourt" of the theater he was recognized by defendant Sargent and within a short time thereafter, on each of three separate occasions, emphatically was told by Sargent in effect that he would not be permitted to enter the theater. After some conversation had occurred between the radio announcer and the publicity representative of Charles Chaplin Film Corpora-

tion, and the consequent admission of the former into the lobby of the theater, on plaintiff's representation to Sargent that he wished to see the radio announcer in order that he might inform him of plaintiff's inability to witness the "preshowing" of the "film," plaintiff was accorded leave to enter the lobby of the theater for that purpose. According to plaintiff's testimony, after he had thus entered the lobby of the theater and had been therein "a second or a few minutes" (or, as testified by others, from five to ten minutes), acting under the direct order of defendant Sargent, two police officers approached plaintiff and "by the arm * * * escorted" him from the lobby of the theater to a position in the "forecourt" thereof; a distance of approximately thirty feet. Although in being thus ejected plaintiff suffered therefrom no asserted physical violence, yet without giving any details in connection therewith, plaintiff complained that the police officers had been "too rough." In the course of two weeks next ensuing, plaintiff commenced the instant action, and shortly thereafter he was discharged from his employment for the reason, as given by his employer, that it had been "embarrassed * * * because of this suit and the occurrence at the Chinese Theatre."

From the record herein, it appears that on the trial of the action, in answer to certain special interrogatories that had been submitted to it, the jury found not only that the removal of plaintiff from the lobby of the theater was not "justified," but also that by reason of such ejection plaintiff had sustained damage in the sum of \$1,000; furthermore, that the discharge of plaintiff from his employment was a "proximate result of his ejection," for and on account of which his damages were fixed at \$4,000. From the ensuing judgment the defendants have prosecuted the instant appeal.

[1] The foundational question in the cause, and the one that is determinative of the appeal herein is whether in the premises any actionable tort was committed by the defendant. In California Jurisprudence, volume 24, page 590, it is said: "In order to constitute an actionable tort there must be a legal duty imposed by statute or otherwise owing by the defendant to the one injured."

[2] At the outset, it should be remembered that Fox West Coast Theatres was the owner of the theater and that at any showing of a motion picture therein to

which the public was not invited, in the absence of any release or qualification of its rights in that regard, the said defendant alone had the exclusive right to determine who should be permitted to attend.

[3-6] It is manifest that to the defendant Fox West Coast Theatres, as the owner and operator of a theater at which the "film" was subsequently to be shown to the public, it was a matter of some financial importance that the audience at the "preshowing" be limited; but in the instant matter it conclusively appears that said defendant in part had surrendered its exclusive right so to decide, in that it had been agreed by it and Charles Chaplin Film Corporation that the audience would be limited to two designated classes of persons, to wit, members of the press and employees of the Charles Chaplin Film Corporation. Unquestionably, plaintiff could not qualify as a member of either of such classes; so that, in line with the understanding of the parties to the agreement, in no wise was plaintiff entitled to admission to the theater. Clearly, if admitted at all, his admission into the theater would have had to depend upon some understanding between the parties to the agreement other than that which originally was contemplated and agreed upon by them. In other words, in the first place Fox West Coast Theatres was in complete control. It surrendered a limited, restricted right to another which in its exercise was to be supervised jointly by an agent of the respective parties to the agreement. It would seem incontrovertible that the person to whom the restricted right was given had no power to enlarge it, or in anywise to encroach upon the absolute remaining right that was possessed by the owner of the property. For example, if, in addition to the agreement that actually was made with respect to the individuals who were to be invited, the parties thereto had stipulated that members of the white race only were to be admitted to the "preshowing" it would seem unlikely that any one would contend that Charles Chaplin Film Corporation properly might disregard that element of the contract and as a result legally fill the theater with persons who were members of a race other than the white race. From such a standpoint it would follow that even though plaintiff might have shown that, as far as Charles Chaplin Film Corporation was concerned he had been an invited guest, nevertheless, since plaintiff's invitation was in excess of the authority of the Charles Chaplin Film

Corporation, plaintiff's position with reference to being entitled to admission into the theater was that of one who had not been properly invited thereto, but that in legal effect he was a trespasser on the premises. One who is "on the land of others * * * without such consent and against their will, * * * is a trespasser." *Brown v. Boston & M. R. R.*, 73 N.H. 568, 64 A. 194, 199. Also, "Every wrongful entry upon lands in the occupation or possession of the owner constitutes a trespass." *Triscony v. Brandenstein*, 66 Cal. 514, 6 P. 384.

[7,8] However, plaintiff contends that the "preshowing" was a "joint venture" of Fox West Coast Theatres and Charles Chaplin Film Corporation, and that as a consequence the parties thereto had equal rights with respect to the matter of issuing invitations. But even assuming (without so deciding) that such was the situation of the parties, it does not follow that plaintiff had any legal right to complain of the treatment that he received. Ordinarily it may be a correct statement of the law that with respect to transactions that are within the scope of a partnership business, one of the partners therein is fully authorized to bind the partnership. Civ.Code, § 2403, subd. (1). But assuming that that principle of law is applicable herein, it also is indisputable that either partner possesses authority to revoke or to cancel any executory contract, or transaction that legally might be revoked or canceled by the partnership. "When reasonably necessary or proper in the conduct of the firm business, as it is ordinarily conducted, a partner may modify or rescind a firm contract already made. * * *" 47 C.J. p. 847; see, also, *Bradbury v. McLendon*, 119 Miss. 210, 80 So. 633; *Macaulay v. Palmer*, 125 N.Y. 742, 26 N.E. 912; *Harper et al. v. McKinnis*, 53 Ohio St. 434, 42 N.E. 251; *Shellito v. Sampson*, 61 Iowa 40, 15 N.W. 572. In *Story on Partnership* (Gray's Ed.) page 205, it is said: "* * * One partner alone may release, or even compound, or compromise a partnership debt. * * * A release by one partner certainly binds all the partners * * *" And also, in *Bates, Law of Partnership*, volume I, § 409, the following statement is found: "A

partner can give notice of abandonment for the firm, and can consent to the cancellation of a policy of insurance and bind his co-partner thereby. * * *" *Hillock v. Traders' Ins. Co.*, 54 Mich. 531, 20 N.W. 571.

[9-11] It follows that even though it be conceded that on the invitation of one of the parties to the "joint venture" plaintiff lawfully was within the lobby of the theater, it equally was within the power of the other partner to the "joint venture" at any time to revoke the right or license of plaintiff to be within the said lobby and to order him to be removed therefrom. And since from the record herein, it affirmatively appears that in ejecting plaintiff from the theater neither excessive force, nor more force than reasonably was necessary was exerted, it follows that plaintiff had no cause of action against the defendants herein or either of them. In the case of *Nakashima v. Takase*, 8 Cal.App.2d 35, 39, 46 P.2d 1020, 1022, it is said: "The time-worn rule of torts is that a person has a right to use all such force as is reasonably necessary to protect his person or property. * * * *Bigelow on Torts* (8th Ed.), p. 153." Also in the case of *Phelps v. Arnold*, 112 Cal.App. 518, 522, 297 P. 31, 33, wherein this rule is discussed, it is said: "'In the case of *Walker v. Chanslor*, 153 Cal. 118, 94 P. 606, 17 L.R.A., N.S., 455, 126 Am.St.Rep. 61, * * * many of the authorities, ancient and modern, are therein collated. The rule therein announced is the common-law rule that an owner has the right to forcibly eject trespassers and if the force used is not excessive, the trespasser has no personal action against the owner. The correctness of the ruling has never been questioned and now stands as the accepted law of this jurisdiction." *Townsend v. Briggs*, 99 Cal. 481, 34 P. 116; *Burnham v. Stone*, 101 Cal. 164, 35 P. 627.

It becomes unnecessary to discuss either of the several other points that have been presented by the respective parties to the appeal.

The judgment is reversed.

24 Cal.App.2d 67

Ex parte PYLE.

Application of MANSELL.

Cr. 2004.

District Court of Appeal, First District,
Division 1, California.

Dec. 15, 1937.

Habeas corpus ☞30(1)

The lack of service of citation on mother of minor, in custody of probation officer pending hearing on petition under statute giving juvenile court jurisdiction of a minor without proper parental control and in danger of leading an idle, dissolute, lewd, or immoral life, did not warrant granting of application for writ of habeas corpus, where hearing had been postponed, and statute provided citation could be served 24 hours before time set for hearing (St.1937, pp. 1030, 1035, §§ 700(b, k), 726).

Proceeding in the matter of the application of Margaret Hope Mansell for a writ of habeas corpus in behalf of Shirley Jean Pyle, a minor.

Application denied.

Theodore Tamba, of San Francisco, and J. Elwood Andresen, of Oakland, for petitioner.

PER CURIAM.

It appears from the application filed herein for a writ of habeas corpus and from the documents submitted in connection therewith that the above-named minor is being detained in the custody of the chief probation officer of the city and county of San Francisco under the authority of a warrant issued by the juvenile court pending the hearing of a petition filed therein alleging that said minor is a person coming within the provisions of subdivisions (b) and (k) of section 700, article 6, of the Welfare and Institutions Code, chapter 369, p. 1030, St. 1937. The main ground urged for the issuance of the writ is that no citation has been issued by said juvenile court, nor has any ever been served on the minor's mother, the lawful custodian of said minor. The application filed herein alleges, however, that the hearing in the juvenile court has been continued to December 17, 1937; and section 726 of said Code provides that service of the citation shall be made at least twenty-four hours before the time set for the hearing. It will be seen, therefore, that

up to the present time there has been no violation of said statutory requirement, and it must be presumed there will be none.

For the reasons stated, the application is denied.



24 Cal.App.2d 130

HARLIS v. BECKER.

Civ. 10657.

District Court of Appeal, First District,
Division 2, California.

Dec. 21, 1937.

1. Statutes ☞212

In enacting statute fixing venue in county where obligation is to be performed under contract of defendant, or in county of defendant's residence, if "demand" does not exceed \$300, but otherwise in county of defendant's residence, the Legislature presumably used the word "demand" in the sense of aggregate demand in accordance with universally followed and long-established rule that jurisdiction of superior court is determined by whether aggregate demand exceeds \$300 (Code Civ.Proc. § 395, as amended by St.1933, p. 1840, § 6).

[Ed. Note.—For other definitions of "Demand," see Words & Phrases.]

2. Venue ☞7

Under statute fixing venue in county where obligation is to be performed under contract of defendant, or in county of defendant's residence, if "demand" does not exceed \$300, but otherwise in county of defendant's residence, action on open book account was required to be tried in county of defendant's residence, where aggregate amount sued for exceeded \$300, but separate causes of action were each for less than \$300 (Code Civ.Proc. § 395, as amended by St.1933, p. 1840, § 6).

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by H. D. Harlis against George J. Becker. From an adverse order, defendant appeals.

Reversed, with directions.

George H. Hauerken, of San Francisco, for appellant.

Frank V. Kington, of Redwood City, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued in the superior court in San Mateo county upon an open book account. Defendant moved for a change of the place of trial to the city and county of San Francisco, which is conceded to be the place of his residence. This motion was denied, and it is the subject of this appeal.

The complaint was framed in five separate causes of action, each for a sum less than \$300. The whole demand was for \$507.49. Each cause of action related to labor and materials furnished the defendant at Redwood City in San Mateo county.

The question on appeal is whether a plaintiff creditor can split a demand on an open book account into a series of causes of action each under \$300, but the whole aggregating more than that sum, so that jurisdiction of the action is conferred on the superior court, but at the same time, the defendant debtor is deprived of his right to trial in the county of his residence. The inquiry is confined to those causes arising or current in judicial townships where jurisdiction is limited to \$300.

Section 395 of the Code of Civil Procedure, as amended by St.1933, p. 1840, § 6, provides that "in all other cases" than those specially provided for in preceding sections of the Code of the county in which the defendant resides at the commencement of the action is the proper county for the trial of the action. An exception follows reading: "When a defendant has contracted to perform an obligation in a particular county, and the demand, exclusive of interest, does not exceed three hundred dollars, either the county where such obligation is to be performed, or the county in which the defendant" resides shall be the proper county for the trial.

[1] Assuming that the various items of an open book account between the same parties may thus be made the subject of separate causes of action, the jurisdiction of the superior court rests on the fact that the aggregate demand is for a sum in excess of \$300. This has long been the rule in this state and one universally followed. *Hammell v. Superior Court*, 217 Cal. 5, 7, 17 P.2d 101. Hence, when the Legislature put the venue statute on the same basis of

demand, it is reasonable to assume that the word was used in the same sense and with the same limitations.

[2] We conclude that, whatever may be the amount of the separate causes of action, the demand is found in the aggregate amount sued for; that, when a defendant is sued in a superior court in assumpsit for a sum in excess of \$300, the proper county for the trial of the action is the county in which he resided at the commencement of the action; that the motion of the defendant herein should have been granted, and the cause should be transferred to the municipal court in the city and county of San Francisco.

The order is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



24 Cal.App.2d 36

BELKNAP et al. v. SCHILLING.

Civ. 11600.

District Court of Appeal, Second District,
Division 2, California.

Dec. 13, 1937.

Hearing Denied by Supreme Court
Feb. 10, 1938.

1. New trial ⚡75(1)

An inadequate recovery may be set aside and a new trial granted on ground that evidence does not justify verdict.

2. New trial ⚡70

Insufficiency of evidence to justify verdict is ground for new trial peculiarly within trial court's discretion.

3. Appeal and error ⚡979(2)

Order granting a new trial on ground of insufficiency of evidence to justify verdict will not be disturbed on appeal except for manifest abuse of discretion.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Samuel L. Belknap and wife against Fred Fredrick Schilling, wherein defendant filed a cross-complaint against plaintiffs and brought in Samuel L. Belknap, Jr., who filed a cross-complaint

against defendant. From orders granting motions for new trial, the respective parties appeal, and, from an order denying defendant's motion for nonsuit at the close of plaintiffs' testimony, defendant appeals.

Affirmed.

Alfred E. Dennis, of Los Angeles, for appellants and respondents Belknap.

Haight, Trippet & Syvertson, by Raymond L. Haight and Lyle C. Newcomer, Jr., all of Los Angeles, for appellant and respondent Schilling.

CRAIL, Presiding Justice.

These are two appeals by the respective parties from the orders of the court granting motions for new trial as to their respective causes of action against the other.

Samuel L. Belknap and wife brought an action against Fred Schilling. Defendant Schilling filed a cross-complaint against the plaintiffs and also brought into the case Samuel L. Belknap, Jr., who in turn filed a cross-complaint against Mr. Schilling. All three actions are for damages arising out of an automobile collision which occurred at the intersection of Atlantic and Whittier boulevards in Los Angeles county. The Belknaps were going north on Atlantic. Mr. Schilling was going west on Whittier. The intersection was a business corner on which the traffic was regulated by green, yellow, and red lights. There is considerable conflict in the evidence as to the rate of speed of the cars, and each party claimed that he was in line with the green lights. Each party admitted that he did not see the other after starting into the intersection until just before the collision.

The issues were tried before a jury. The jury returned a verdict in favor of Samuel L. Belknap and his wife for medical bills and the car bill and found against the plaintiffs and against the cross-complainants on all other matters. Thereafter the court granted the motions of the respective parties for new trial on the ground of the insufficiency of the evidence to justify the verdicts. The respective parties appeal from these orders granting new trials, con-

tending that the evidence shows that the opposite party was guilty of negligence as a matter of law. Defendant Schilling also appeals from the order denying his motion for a nonsuit at the close of the plaintiff's testimony made upon the same ground. This court has read the evidence and is satisfied that it cannot say on appeal that either of the parties was guilty of negligence or contributory negligence as a matter of law. Under the evidence the question of negligence of the respective parties is for the jury to determine under all the facts and circumstances in evidence bearing upon the question.

[1-3] Defendant next contends that the damages awarded plaintiffs on each verdict were more than adequate, and that therefore the court abused its discretion in setting aside the judgments. "* * * it is well settled that an inadequate recovery may be set aside and a new trial granted on the ground that the evidence does not justify the verdict." *Lambert v. Kamp*, 101 Cal.App. 388, 281 P. 690; *Bencich v. Market Street Railway Co.* (Cal.App.) 67 P.2d 398. It is also well settled that insufficiency of the evidence to justify a verdict is a ground for a new trial which is peculiarly within the discretion of the trial court, and its order granting a new trial will not be disturbed on appeal unless it appears that there was a manifest abuse of discretion. *Prout v. Perkins* (Cal.App.) 69 P.2d 194. There is no showing that the trial court abused its discretion.

Finally, the defendant contends that Samuel L. Belknap, Jr., could have avoided striking the car of appellant and that the jury was fully warranted in believing Mr. Belknap, Jr., was contributorily negligent in the manner in which he proceeded across the intersection in question, and that under the circumstances it was an abuse of discretion for the court to grant him a new trial. We see no abuse of discretion by the court in granting this order.

The orders are affirmed.

We concur: WOOD, J.; McCOMB, J.

WARE v. CULP.**Civ. 5897.****District Court of Appeal, Third District,
California.****Dec. 10, 1937.****Rehearing Denied Jan. 8, 1938.****Hearing Denied by Supreme Court****Feb. 7, 1938.****1. Hospitals ⇐7**

Ordinarily, in absence of contrary agreement, a general hospital is not liable for negligence of either an attending physician or nurse on account of unprofessional conduct.

2. Hospitals ⇐7

Where hospital patient was burned by electric pads furnished by hospital but used by patient's special nurse improperly by applying them to patient's leg for too long a period of time, hospital was not liable for injury, since nurse was not acting as "employee" of hospital.

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

3. Hospitals ⇐8

The doctrine of *res ipsa loquitur* could not be applied to impose liability on hospital to patient burned when patient's special nurse improperly applied electric pads furnished by hospital to patient's leg for too long a period of time, since, notwithstanding fact hospital furnished electric pads, they were under exclusive control of patient's private doctor and special nurse.

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Action by Bessie Ware against Dewey Culp, doing business as the Yuba City General Hospital. From an adverse judgment and from an order denying a new trial, defendant appeals.

Judgment reversed, with directions.

Rich, Weis & Carlin, of Marysville, for appellant.

McDaniel & Mahon, of Marysville, for respondent.

PER CURIAM.

The defendant, Dewey Culp, doing business as Yuba City General Hospital, has appealed from a judgment which was rendered against her for injuries sustained by the plaintiff while she was a patient in

that hospital under the charge of a private physician in the hospital. The plaintiff was seriously burned by an electric pad which was applied to the calf of her left leg by a special nurse who had charge of the case at the time of the accident. It is contended the defendant is not responsible for the negligence of the special nurse for the reason that she was employed by the plaintiff and had sole charge of the patient under the supervision of a private physician.

Dewey Culp owns and operates a public hospital in Yuba City, under the name of Yuba City General Hospital. This hospital was patronized by local patients, many of whom were taken there for treatment under the supervision of their private physicians. At the time of the accident in question, there were nine patients in the hospital. At least one of these patients, besides the plaintiff, was in charge of a special nurse. The defendant provided two general nurses at that time, who were regularly employed in the hospital. Miss Lucille Walton, a registered nurse, in the regular employ of the defendant, had general supervision of the hospital at the time the accident occurred. The hospital kept a list of special nurses which it recommended to patients for employment in serious emergency cases. Dr. Benjamin F. Miller, a duly qualified and experienced physician, located at Yuba City, was engaged in practicing his profession in that locality only a short time before the accident. He did not know any local special nurses. November 10, 1935, the plaintiff was suffering severely, and she sent for Dr. Miller. He visited her and found that she was afflicted with a "bad heart and kidney infection." Upon the doctor's advice the plaintiff was taken to the Yuba City General Hospital. For several days she remained in the hospital receiving only the care of the general nurses under the supervision of her physician, who frequently visited her. At 9 o'clock on the night of November 18th, the doctor found his patient suffering very severe pain in her legs. Her limbs were massaged, and she was otherwise treated to relieve the pain. The doctor then left the hospital. About 2 o'clock the following morning, Miss Edna Silvey, a general night nurse in the hospital, found the plaintiff suffering excruciating pain in her legs. After consulting Miss Lucille Walton, her superior nurse, Doctor Miller was called. He arrived in about twenty minutes, and found the plain-

tiff writhing in pain caused by arterial spasms as a result of thrombosis. She was hysterical. Her legs were numb and cold; the circulation of blood was obstructed; and the limbs lacked normal sensation. The doctor promptly administered morphine and nitroglycerine tablets to relieve her pain. She subsequently lost consciousness. After massaging her legs and otherwise treating her for her ailment, the doctor directed Miss Silvey, the general nurse, to apply heat to the patient's limbs. This was first done by the use of hot-water bottles and heated blankets. The doctor then directed the nurse to substitute electric pads for the hot-water bottles. This was done. Two of them were procured. They were in perfect condition. One was placed under the calf of the left leg. The other was placed at her thigh. The limbs were then covered with flannel. The pads were connected with electric plugs in the wall, and they were switched on low temperature and left in that condition. The doctor remained in actual charge of the patient until after a special nurse was called and arrived at 5 o'clock in the morning. During that time he frequently examined the limbs and testified that no burn occurred until after the special nurse took charge of the case. The court so found at the trial of the case. There is no evidence to the contrary. The doctor said in that regard:

"Mr. Rich: In your opinion there was no burn on that leg until the time you left? A. No, I didn't see any burn there.

"Q. If a burn took place it was after the special nurse came on the job, is that right? A. Apparently."

After the doctor and the general nurses had done what they could to relieve the patient's suffering, a consultation was held between the two regular nurses and Mrs. Littlejohn, who was a special nurse in charge of a patient under the supervision of Dr. Hoffman. They thought the serious condition of Mrs. Ware made it advisable to have a special nurse. Miss Walton, the head nurse, asked Dr. Miller if he did not think he should have a special nurse for Mrs. Ware. The doctor said: "Yes, it would be perfectly all right." He then asked, "Is there anyone close by?" to which inquiry Mrs. Littlejohn said there was a nurse by the name of Mrs. May Hull who had just completed her work on another case and that she lived down the alley about a block away, and was probably

available. The doctor replied, "That is fine, can you go and get her?"

In regard to the employment of a special nurse, the doctor testified: "I was right there giving her [the plaintiff] medication and watching her and one of the nurses said 'don't you think she needs a special' and I said 'it would be advisable.'"

Mrs. Hull, the special nurse, was called and arrived within a few moments. The doctor explained to her the condition of the patient, giving the nurse general instructions regarding her care, and warned against permitting the electric pad to get too hot. He then left the hospital. After that time Mrs. Hull had sole charge of the plaintiff. She was not thereafter assisted by any of the regular hospital nurses. She was not in the regular employ of the hospital. She was neither employed nor paid by the hospital on this occasion. Apparently she was not subject to directions from the nurses or authorities of the hospital with respect to her care of the plaintiff. When her services were dispensed with, she was paid by the plaintiff, and not by the hospital. Regarding the employment of special nurses, the defendant, Dewey Culp, testified:

"We have a list of nurses who register with us for special duty. When they are on duty they phone in and tell us so that we will know not to bother calling them for a case. When a special is required by a patient the case is referred to the doctor for his judgment as to whether a nurse shall be called or not. If he says a nurse should be called he is given a list of the nurses available at that time.

"Q. And makes a selection from them? A. Yes.

"Q. Have you ever, on your own initiative, procured the services of any special nurse without the direction of the doctor? A. No. * * *

"Q. Do I understand that a special nurse isn't procured until directed by the doctor in charge? A. A special is not procured until the doctor orders it. * * *

"Q. You say positively, of your own knowledge, that Mrs. Hull was not in your employ? A. She was not.

"Q. And Mrs. Littlejohn was not? A. She was not. * * *

"Q. Did you have authority to hire or fire any special nurse? A. No."

The record contains no testimony in conflict with the foregoing evidence. At

9 o'clock on the morning when Mrs. Hull took charge of the case it was discovered the plaintiff had been very badly burned on the calf of her left leg over the area which came in contact with one of the electric pads. The doctor was promptly called and found that she had suffered a very severe third degree burn. He testified in that regard: "The electric pad was not overheated, but I believe the electric pad was left too long after 5 a. m. The skin tissue was so void of circulation that even a warm pad would have caused the burn." The flesh sloughed away, exposing the bone. The wound became ulcerous and aggravated. She was confined to the hospital on that account for several weeks. The plaintiff was then compelled to go about on crutches. The doctor testified that she was likely to suffer from that injury throughout her life; that the injury was permanent.

Suit for damages was brought against Dewey Culp, as sole owner of the hospital. Neither the physician nor the special nurse in charge of the case was made defendant in the action. The cause was tried before the court sitting without a jury. The special nurse, Mrs. Hull, was not called as a witness by either party, although she was present in the courtroom during the trial. The court found that Mrs. Hull, the special nurse, attended the plaintiff professionally at the special instance and request and in behalf of the defendant, and that, "After her arrival and after the departure of Dr. Miller through and because of the carelessness and negligence of said nurse, Mrs. Hull, in applying said electric pad to plaintiff's left leg [she] was burned by the electric pad." Judgment for \$7,600 was rendered in favor of the plaintiff. A motion for new trial was denied. From the judgment and order denying a new trial, the defendant has appealed.

It is contended the evidence fails to support the court's finding that the special nurse, Mrs. Hull, was acting as the servant or employee of the defendant, at the time the plaintiff was burned as a result of the nurse's negligence. On the contrary, it is asserted the evidence is undisputed that the special nurse, through whose negligence the plaintiff was burned, was exclusively the employee of the plaintiff, subject only to the control and directions of her private physician, and that the defendant, therefore, is not liable for the negligence of plaintiff's private nurse.

Assuming, without so deciding, that a special nurse might be employed by a general hospital for the care of a patient under circumstances which would render the hospital liable for her negligence, that relationship between the hospital and the nurse depends upon the contract which exists. The burden of proving that relationship rested on the plaintiff in this case. She utterly failed to establish any such relationship. The evidence in this case appears to be just the contrary. According to the usual custom, the special nurse was employed by the plaintiff in this case through her representative, Dr. Miller. Through Miss Walton, a general nurse in the hospital, the name of a special nurse was suggested to the doctor. He approved the suggestion and requested that her service be procured. He personally waited at the hospital until she arrived. He then turned his patient over to her exclusive charge. There is no evidence that any general nurse or employee of the hospital ever saw the plaintiff or attempted to direct or advise the special nurse with respect to the care of the patient after she took charge of the plaintiff until after the accident occurred. Apparently the special nurse took absolute charge of the patient, independently of any interference or control on the part of the nurses or employees of the hospital. The defendant testified she had no authority to hire, dismiss, or control the conduct of the special nurse in her treatment of the patient. The defendant testified that she did not employ the special nurse. When the services of the special nurse were dispensed with, she was paid directly by the plaintiff and not by the defendant. No item for her services was included in the hospital bill. There is no substantial evidence that the special nurse was an employee of the hospital with respect to the services which she performed for the plaintiff. We are driven to the conclusion that the special nurse was in the employ of the plaintiff subject to the exclusive control and directions of her private physician, Benjamin F. Miller.

[1] Ordinarily, in the absence of an agreement to the contrary, a general hospital is not liable for the negligence of either an attending physician or nurse on account of unprofessional conduct.

It has been frequently held that a general hospital is not ordinarily liable for injuries to a patient resulting from mis-

takes which occur in the manner of the professional treatment of a patient by a nurse or a physician for the reason that their professional treatment is not subject to control or directions by the administrative officers or employees of the hospital. Of course there may be a liability on the part of a hospital if its administrative officers are negligent in employing an incapable nurse through whose carelessness or lack of ability in the course of her duties the patient is injured. It is not claimed the hospital in this case was guilty of negligence in employing an incapable nurse. In the case of *Brown v. St. Vincent's Hospital*, 222 App.Div. 402, 226 N.Y.S. 317, 321, cited in note 60 A.L.R. 303, it is said:

"The general rule is well settled that * * * the hospital does not accept responsibility by contract, or become liable in tort, for the acts of physicians, surgeons or nurses who treat patients in the institution."

And in the case of *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92, 94, 52 L.R.A.(N.S.) 505, Ann.Cas.1915C, 581, in holding that a nurse does not ordinarily sustain the relationship of a servant or employee of a hospital in administering professional treatment, it is said: "It is true, I think, of nurses, as of physicians, that, in treating a patient, they are not acting as the servants of the hospital. The superintendent is a servant of the hospital; the assistant superintendents, the orderlies, and the other members of the administrative staff are servants of the hospital. But nurses are employed to carry out the orders of the physicians, to whose authority they are subject. The hospital undertakes to procure for the patient the services of a nurse. It does not undertake, through the agency of nurses, to render those services itself. The reported cases make no distinction in that respect between the position of a nurse and that of a physician; * * * and none is justified in principle. If there are duties performed by nurses foreign to their duties in carrying out the physician's orders, and having relation to the administrative conduct of the hospital, the fact is not established by this record, nor was it in the discharge of such duties that the defendant's nurses were then serving."

The last paragraph of the preceding quotation applies directly to the facts of

the present case. The plaintiff in this case was injured by the negligence of her special nurse in the careless performance of her professional duties, and not in carrying out administrative duties of the hospital. The court so found. There is no evidence to support any other theory regarding the manner in which the injury was sustained.

In accordance with the preceding declaration of law regarding the liability of a hospital for the negligence of a professional nurse who is assigned to care for a patient therein, in the case of *Moody v. Industrial Acc. Comm.*, 204 Cal. 668, 269 P. 542, 543, 60 A.L.R. 299, the hospital was held to be exonerated from liability, and an award of the Industrial Accident Commission was therefore annulled. It was there determined the nurse was performing an independent professional service for the patient, and that such services distinguished her from a mere "employee." The court said:

"The following definition may be regarded as a correct statement of what constitutes an independent contractor: One who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, and not the means whereby it is to be accomplished. * * * 'It is well settled that, where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilities, or acquiring the immunities, of a master, with respect to the person controlled.' * * * The decisive test of the relationship is: Who has the right to direct what shall be done, and when and how it shall be done? Who has the right to general control? * * * In other words, the test of what constitutes independent service lies in the control exercised. The test of control means complete control, and we must carefully distinguish between authoritative control and mere suggestion as to detail. * * *

"'Ordinarily a trained nurse, performing her usual duties with the skill which is the result of training in that profession, does not come within the definition of a servant, but rather is one who renders personal services to an employer in pursuit of an independent calling.' * * * The professions of doctor and nurse are so closely allied that decisions applicable to

one would appear to apply equally well to the other. In the great majority of instances the inference, that it is the implied intention of the parties to contracts for the services of a medical practitioner that he is not to be under the employer's control with respect to the details of his work, is corroborated by the consideration that the employer is a person who does not possess the technical skill which would qualify him to exercise such control, and that it would for that reason, be highly inexpedient for him to attempt to exercise it. 19 A.L.R. 1186. 'There is no more distinct calling than that of the doctor, and none in which the employee is more distinctly free from the control or discretion of his employer.'

It is unreasonable to assume that a physician or a professional nurse is subject to the direction and control of the administrative officers of a hospital with respect to their professional care and treatment of a patient.

To the same effect is the case of *Payne v. Santa Barbara Cottage Hospital*, 2 Cal. App.2d 270, 37 P.2d 1061, 1062, where a judgment against the hospital for the negligent failure on the part of a trained nurse to remove from the abdomen of a patient upon whom an operation was performed, a "toothpick applicator" before the incision was closed. That judgment was reversed on the ground that the hospital was not liable for damages. It is there said: "The hospital, if it furnished the toothpicks as plaintiff contends, sent them to a professional [nurse] employed by plaintiff to care for him. * * * It cannot rightly be said that defendant or its employees should have anticipated that the nurse or physician would voluntarily use an unfit appliance in caring for the patient's wound."

[2] In the last-mentioned case, a hearing was denied by the Supreme Court. The facts of that case appear to conform to the present case in principle. In this case the hospital did supply the electric pad which caused the injury. It is not contended the pads were defective. The only evidence in that regard is to the effect that they were not defective. They were merely used by the special nurse improperly by applying them to the leg of the plaintiff for too long a period of time. That was clearly the professional dereliction of the nurse regarding which the administrative officers of the hospital had neither the control, nor the right to direct

the conduct, of the trained nurse. Clearly the hospital is not liable for such conduct over which it possessed no authority. In that regard the nurse was not acting as the employee of the hospital.

In the case of *Timbrell v. Suburban Hospital, Inc.*, 4 Cal.2d 68, 47 P.2d 737, 739, the plaintiff sued both the hospital and a special nurse for injuries received while she was a patient in the hospital, by being burned from the application of a hot-water bottle. A jury returned a verdict in favor of the nurse, but against the hospital. On appeal the judgment was affirmed on the theory that the plaintiff was burned through the negligence of "an employee of the hospital" and not by the act of the nurse. The court said: "It must then be assumed that the jury concluded that the injury occurred at the instance of the regular employees of the hospital who had charge of the patient when Miss Lane was not present."

The question as to whether that finding was supported by the evidence was not raised on appeal. It is not discussed. We must assume there was ample evidence in that case to support that finding. It is there assumed the special nurse was employed by the plaintiff's physician, and not by the hospital. The circumstances of her employment were similar to those of the present case. There is nothing in that case in conflict with what we have previously said regarding the responsibility of a general hospital for the negligence of a special nurse who is employed by a patient therein.

[3] The doctrine of *res ipsa loquitur* cannot aid the plaintiff under the circumstances of this case. Notwithstanding the fact that the hospital furnished the electric pads, they were under the exclusive control of the doctor and the special nurse, after she took charge of the patient. There is no evidence that any general nurse or employee of the hospital undertook to direct or control their use after the special nurse took charge of the case. There is no evidence that such employees even entered the room of the patient thereafter or knew anything about the manner in which the electric pads were being used. The undisputed evidence is that the injury occurred after 5 o'clock in the morning while the special nurse, Mrs. Hull, was in absolute charge and control of the patient and of the use of the electric pads. The court so found. There is no room for the

application of the doctrine of *res ipsa loquitur* under such circumstances.

For the reasons assigned, we are impelled to hold the court's finding that the plaintiff was injured through the negligence of an "employee of the hospital" and that it is therefore liable for damages is not supported by the evidence.

In view of the foregoing determination of the question of liability of the hospital for the negligence of the special nurse, it becomes unnecessary to pass upon the asserted excessive amount of the judgment.

The judgment is reversed, and the court is directed to render judgment in favor of the defendant.



24 Cal.App.2d 15

Ex parte MACKALL.
Cr. 1597.

District Court of Appeal, Third District,
California.

Dec. 10, 1937.

1. Habeas corpus ⇌79

Alleged illegality of accused's commitment to prison could not be considered by reviewing court on original habeas corpus proceeding where irregularity did not appear in record of trial but only in proceeding in superior court for purpose of giving information to board of prison terms and paroles.

2. Habeas corpus ⇌79

Where record of trial before reviewing court on habeas corpus proceeding is regular on its face and shows jurisdiction, no further inquiry can be made.

3. Habeas corpus ⇌79

Where record of trial in criminal case was regularly certified as being correct, reviewing court could not presume, on original habeas corpus proceeding, that something took place at time of arraignment and entering of defendant's plea thereto, which did not appear on record.

4. Habeas corpus ⇌4

Any irregularity in trial of criminal case in failure to enter plea of not guilty by reason of insanity and in judgment being pronounced before trial court had jurisdic-

tion to do so should have been presented on appeal, not in original habeas corpus proceeding challenging legality of commitment.

Original habeas corpus proceeding by Francis C. Mackall, for and in behalf of E. V. Nicholson, against Clyde I. Plummer, Warden of the State Prison at Folsom, Cal.

Writ discharged, and defendant Nicholson remanded to the custody of the warden.

Francis C. Mackall, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The petition in this cause alleges that one E. V. Nicholson is illegally confined and restrained of his liberty in the state's prison at Folsom, Sacramento county, Cal., and alleges in that behalf the illegality of a certain commitment issued out of the superior court of the county of Riverside, state of California. The ground upon which the alleged illegality is based is that the petitioner, at the time he was arraigned upon an information charging him with the crime of burglary, entered a plea of not guilty to the charge, and also not guilty by reason of insanity, and that the judgment of the court sentencing him to the state's prison at Folsom was pronounced after the verdict of the jury was rendered finding him guilty of the offense of burglary and fixing the degree therein and before his trial on the plea of not guilty by reason of insanity.

In behalf of the petition the attention of the court is called specially to the case of *People v. Marshall*, 99 Cal.App. 224, 278 P. 258, and the same case before the court on a subsequent appeal reported in 209 Cal. 540, 289 P. 629. In those cases it was held that the irregularity in the pronouncing of sentence preceding the trial of the defendant on the question of insanity necessitated the remanding of the cause to the trial court for the repronouncing of sentence. Those cases, of course, were where the defendant had presented the question of irregularity upon an appeal from a judgment rendered against him where the record at the trial showed the irregularity of the proceedings.

[1] The record of the trial in this cause, however, shows no such irregularity. The effort to establish the irregularity appears from a proceeding had in the superior court for the purpose of giving information to the board of prison terms and paroles, and not upon the trial of the defendant in whose behalf this petition was filed.

While in the case of *In re Lake*, 65 Cal. App. 420, 224 P. 126, it is held that, for the purposes of ascertaining whether the trial court acted within or without jurisdiction, the court may look into the evidence taken at the time of the trial, this does not authorize an appellate court to look into a statement which was taken before the trial court simply for the purpose of giving information to the board of prison terms and paroles.

[2-4] We do not need to cite authorities to the effect that, where the record of the trial before us is regular upon its face and shows jurisdiction, no further inquiry can be made. The petition relies upon the statement taken as aforesaid, in which appears the following: "It will be ordered at this time that the sheriff hold in custody the defendant, until after his trial, on his plea of not guilty by reason of insanity, next Thursday, the 23rd, and I will order that he be not delivered to the Warden of the State's Prison until after that date." As we have stated, this is no part of the record at the time of the trial. It is a proceeding had for a special purpose. The certified copy of the judgment before us shows only that E. V. Nicholson, at the time of his arraignment, entered only a plea of not guilty to the charge of burglary, and not that he also entered a plea of not guilty by reason of insanity. This record is regularly certified as being correct, and we cannot presume that something took place at the time of the arraignment and the entering of defendant's plea thereto, which does not appear on the record. If there was an irregularity in the trial of the defendant, and a failure to enter his plea of not guilty by reason of insanity, and the judgment was pronounced before the court had jurisdiction so to do, such facts should have been presented upon appeal, where the record would have established just what took place, and the holding of the court in the *Marshall Case* would have been controlling upon such an appeal.

Bearing upon the same question, where it is held that such effect should be presented upon appeal, is the case of *In re Ryley*, 108 Cal.App. 544, 291 P. 847.

The certified record of the trial, which we may consider upon this application, being perfectly regular, and not showing that any plea was entered by the defendant Nicholson, other than the simple plea of not guilty, and that the judgment upon such plea, after verdict finding him guilty of burglary in the first degree, being in regular form, it must be held that the petitioner is not entitled either to a discharge or to be remanded to the superior court of Riverside county for resentencing.

The writ is discharged, and the defendant E. V. Nicholson, in whose behalf the petition herein has been filed, is remanded to the custody of the warden of the state's prison at Folsom.

We concur: PULLEN, P. J.; THOMPSON, J.



24 Cal.App.2d 58

MacCRACKEN v. BOARD OF MEDICAL EXAMINERS.

Civ. 10419.

District Court of Appeal, First District,
Division 2, California.

Dec. 14, 1937.

Hearing Denied by Supreme Court
Feb. 10, 1938.

1. Constitutional law ☞56

In absence of constitutional provision, the Legislature is without authority to confer any judicial functions upon an administrative board.

2. Physicians and surgeons ☞11(3)

The writ of review is not a proper remedy to review an order of the Board of Medical Examiners entered in a proceeding to revoke a license to practice medicine, since board's function in such a proceeding is administrative and not judicial, and writ of review will lie only to review the exercise of judicial functions.

3. Physicians and surgeons ☞11(3)

An appeal from judgment affirming order of Board of Medical Examiners revok-

ing petitioner's license to practice medicine was required to be dismissed where order was sought to be annulled by writ of review, since such writ was not available to review order, and trial court was without jurisdiction to make any order other than one denying writ.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Petition by William B. MacCracken to annul, by a writ of review, an order of the Board of Medical Examiners revoking petitioner's license to practice medicine. From a judgment affirming the order, petitioner appeals, and the Board of Medical Examiners moves to dismiss the appeal.

Motion granted.

Vincent Surr and Morgan V. Spicer, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen. and Lionel Browne, Deputy Atty. Gen., for respondent.

PER CURIAM.

Petitioner sought, by writ of review, to annul an order of respondent, Board of Medical Examiners, revoking petitioner's license to practice medicine. The alternative writ was issued and a hearing had. The trial court gave judgment affirming the order of respondent, Board of Medical Examiners. Petitioner has appealed from this judgment. Respondent now moves to dismiss the appeal.

[1,2] We are constrained to hold, in the light of recent decisions, that the writ of review is not a proper remedy to review an order of respondent made in a proceeding to revoke a license to practice medicine. The writ of review will lie only to review the exercise of judicial functions, and in the absence of constitutional provision, the Legislature is without authority to confer upon an administrative board any judicial functions. *Standard Oil Company of California v. State Board of Equalization*, 6 Cal.2d 557, 59 P.2d 119; *Whitten v. State Board of Optometry*, Cal.Sup., 65 P.2d 1296. The function of the board in a proceeding to revoke a license has been held to be administrative, not judicial. *Hartman v. Board of Chiropractic Examiners*, Cal. App., 66 P.2d 705.

[3] Since the writ of review was not available to petitioner, the trial court was without jurisdiction to make any order

other than one denying the writ. It follows that the motion to dismiss this appeal must be granted. *O'Donnell v. Board of Medical Examiners of Cal.*, Cal.App., 70 P.2d 246.



GABRIELLI v. KNICKERBOCKER et al.*

Civ. 5818.

District Court of Appeal, Third District,
California.

Nov. 30, 1937.

Hearing Granted by Supreme Court
Jan. 27, 1938.

1. Constitutional law ☞84

The "profession of religion" protected by Constitution is giving voice to one's beliefs; the form of worship to that which is outlined or specified in rules or tenets governing organization to which one belongs; whereas "liberty of conscience" goes much further (Const. art. 1, § 4).

2. Schools and school districts ☞177

The suspension and expulsion of pupil from school, for failure to salute American flag, without following statute requiring "other means of correction," is arbitrary and unwarranted, especially where order of suspension or expulsion was unlimited in time (School Code, § 1.30, and § 1.35, as added by St.1931, p. 2584).

3. Schools and school districts ☞148

The right to attend a public school is a fundamental vested right.

4. Constitutional law ☞92

One who deprives another of a vested right must show that prescribed procedure has been substantially followed.

5. Schools and school districts ☞172½

A school district's rules and regulations are to be liberally construed, but legal procedure must be shown to have been substantially followed in deprivation of a constitutional right.

6. Schools and school districts ☞171, 172

School trustees may promulgate all reasonable rules and regulations for government of schools under their charge, but such rules, regulations, and acts must be reasonable and not arbitrary.

*For subsequent opinion see 82 P.2d 391.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Petition for writ of mandate by Charlotte Gabrielli, a minor, by Joseph J. Gabrielli, her guardian ad litem, against Dorothy C. Knickerbocker and others. From a judgment awarding the writ, respondents appeal.

Affirmed.

Otis D. Babcock, Dist. Atty., and William A. Green, Deputy Dist. Atty., both of Sacramento, for appellants.

Wayne M. Collins, of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In consideration of this cause, the respondent will be referred to as "Petitioner," and the respondents in the trial court will be referred to as "Appellants."

The cause is before us upon an appeal from a judgment of the superior court of the state of California, in and for the county of Sacramento, in favor of the petitioner, and against the appellants, awarding the petitioner a writ of mandate, as theretofore prayed for. The facts of the case are substantially as follows:

The petitioner and her father were and are American citizens, resident of the Sacramento City School District. Prior to the action complained of the petitioner was a student at Fremont School in said district. Because of religious objections thereto the petitioner refused to conform to a custom imposed by certain of the appellants on all of the students in said school, requiring the students thereof to salute the flag and to pledge allegiance thereto. By reason of such refusal petitioner was suspended and expelled by the appellants. The salute to the flag and the pledge of allegiance we understand to be in the following language: "I hereby pledge allegiance to the flag of the United States, and to the Republic for which it stands, one Nation, indivisible, with liberty and justice to all."

After the suspension and expulsion of the petitioner an application was filed in the superior court above named, asking for a writ of mandate ordering the petitioner's readmission to said school. As stated, the writ was granted directing the admission of said petitioner, according to the terms contained in said writ of mandate.

It appears from the record that the petitioner and her father are both members of a certain religious denomination known as and called "Jehovah's Witnesses"; that the tenets and teachings of said denomination forbid the pledging to, or the taking of the oath of allegiance in any form, to any other power or banner than that of God, and cite for our consideration, among other passages of the Bible, the third, fourth, and fifth paragraphs of the twentieth chapter of Exodus, and especially, the third verse thereof, which reads: "Thou shalt have no other gods before me." Reference is then made to the fifth verse where prescribed penalties are to be inflicted. Our attention is also called to the tenth verse of the sixty-second chapter of Isaiah, enjoining the setting up of the banners of God's salvation.

We need not follow further the allegations of the petition as to the religious convictions of the petitioner, and of the members of the church known as "Jehovah's Witnesses," further than to state that the conscientious convictions of the petitioner appear to have been upheld by the trial court.

In addition, however, to arguing the correctness of the trial court's conclusion as set forth in the writ of mandate, the petitioner also contends that the action of the appellants was arbitrary, and that no rule or regulation governing the school in question was ever adopted requiring the salutation to the flag and the pledging of allegiance to the republic; that it was only a custom followed in said school, and which custom is not universally followed in the schools of the county of Sacramento.

The contention of the appellants is in substance that the salutation to the flag and the pledge of allegiance to the republic is in no sense a religious rite or ceremony; and cite a number of cases which we will mention hereafter in support of such contention. Section 4, of article 1, Declaration of Rights, relating to religious freedom, reads as follows: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state; and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify

practices inconsistent with the peace or safety of this state."

The stipulation of facts set forth in the transcript show that the petitioner was in all respects an exemplary pupil; that, while the salute was being given to the flag and the pledge of allegiance repeated, she simply stood silently. The only offense attributable to the petitioner, if such it may be called, is and was her failure to join in the salute and the repetition of the pledge of allegiance.

A similar question has been before the courts of Massachusetts, New Jersey, and Georgia. The decisions in the above-named courts were that the salute to the flag is in no sense a religious rite, and expulsion of pupils who are members of the church of Jehovah's Witnesses was upheld. In all of these states, however, there appears to have been legislative acts enjoining the salute of the flag and the pledge of allegiance by pupils of public schools.

The cases relied upon by the appellants are as follows, to wit: *Carleton B. Nicholls v. Mayor and School Committee of Lynn* (Mass.) 7 N.E.2d 577, 110 A.L.R. 377. This appears to be the leading case on the subject, and the question of the religious or nonreligious character of the salute to the flag and the pledge of allegiance considered very fully, and it is there held that the salute to the flag and the pledge of allegiance is in no sense a religious rite. This case, however, does not reach the crucial point mentioned in section 4 of article 1 of the Declaration of Rights, governing religious matters in the state of California, in that it is not a question whether the salute to the flag and the pledge of allegiance is or is not a religious rite, but whether it constitutes an infringement upon the liberty of conscience of the person affected. This statement is likewise true as shown by a consideration of the case of *Hering v. State Board of Education*, 117 N.J.L. 455, 189 A. 629, where the Supreme Court of New Jersey likewise held the salute to the flag and the pledge of allegiance not to be a religious rite, but made no mention of whether such a ceremony would infringe the liberty of conscience which is granted by section 4 of article 1 of our State Constitution.

[1] In the case of *Leoles v. Landers*, 192 S.E. 218, the Supreme Court of Georgia followed the line of reasoning adopted by

the Supreme Court of Massachusetts, holding simply that the salute to the flag and the pledge of allegiance was not a religious rite, but went no further and did not consider the question as to whether such a ceremony would or would not constitute an infringement of one's liberty of conscience. Those cases relate practically only to professions and form of worship. The profession of one's religion is, as we understand, to be giving voice to one's beliefs, the form of worship to that which is outlined or specified in the rules or tenets governing the organization to which one belongs. Liberty of conscience goes much further, and under our Constitution, so long as it does not interfere with the morals, peace, and the health of the public, it would appear to be controlling. However, whether the ceremony of saluting the flag and pledging allegiance to the republic for which it stands does tend, or reasonably tend, to infringe upon one's liberty of conscience, is not necessary for us to decide.

[2] Section 1.30 of article 4 of the School Code of California reads as follows: "Boards of school trustees and city boards of education shall have the power, and it shall be their duty to suspend or expel pupils for misconduct when other means of correction have failed to bring about proper conduct." The record before us fails to show any compliance with the provisions of this section. It does, however, clearly appear that the only action taken by the appellants in this case was that of suspension or expulsion, which clearly indicates that the appellants acted without legal right, and in the suspension or expulsion of the petitioner exceeded their jurisdictional powers.

[3] In *Piper v. Big Pine School District*, 193 Cal. 664, 226 P. 926, 929, the Supreme Court, in speaking of the right of a pupil to attend a public school of this state as being fundamental, used the following language: "The advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is, therefore, a right—a legal right—as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected by all the guaranties by which other legal rights are protected and secured to the possessor." Preceding the above quotation the court

had referred to the statutes and Constitution of this state.

[4] It is almost needless to say that, where one has been deprived of a property right, or, as stated in the above quotation, a vested right, it is necessary for the one who makes the deprivation to follow the procedure substantially, and to show that such procedure has been substantially followed.

[5] While the rules and regulations of the district are to be liberally construed, when it comes to the deprivation of a constitutional right it must be shown that the legal procedure in making the deprivation has been substantially followed. In the case at bar there is no showing whatever that the section of the School Code which we have quoted has been either strictly, or even substantially, followed, or that any attempt was, or has been made to substantially follow the same.

That the right to attend a public school is fundamental we may further cite, 23 Cal.Jur. p. 141, § 104, where it is said: "But the right to be admitted to a public school is a valuable right which may be enforced in an appropriate proceeding. It is a privilege granted by the State Constitution, and is a legal right as much as a vested right in property."

[6] Not having followed the procedure set forth in section 1.30 of article 4 of the School Code, it follows that the suspension and expulsion of the petitioner was arbitrary and unwarranted. While, as we have stated, it is within the province of school trustees to promulgate all reasonable rules and regulations for the government of schools under their charge, those rules, regulations, and acts must be reasonable and not arbitrary.

In 24 Ruling Case Law, page 575, paragraph 24, it is stated that the courts will not interfere with the exercise of discretion by school trustees, and that the presumption is always in favor of the reason-

ableness and propriety of a rule and regulation duly made. The reasonableness of regulations is a question of law for the courts. This rule is affirmed in 56 C.J. p. 853, § 1091. See, also, the case of *C. C. McLeod v. State of Mississippi*, etc., 154 Miss. 468, 122 So. 737, 63 A.L.R. 1161. Note to *Jones v. Day*, 18 A.L.R. 649.

In addition to section 1.30 of article 4 of the School Code we may cite section 1.35, as added by St.1931, p. 2584, which reads: "No pupil shall be suspended from school for more than two consecutive weeks." There appears to be no limit to the order of suspension or expulsion in the case at bar.

By reason of the mandatory provisions of section 1.30, supra, it is unnecessary for us to review the sections of the School Code relative to the powers of boards of directors in punishing pupils for infractions of the rules adopted, nor is it necessary for us to consider what constitutes compliance with section 5.544 of the same Code relative to instruction being given calculated to inculcate a spirit of loyalty to the government of the United States, and a willingness to uphold all that the Constitution of the United States and the Constitution of the state of California represent.

The record before us presents no question of morality; no question of peace; no question of health; no question of disobedience or improper conduct on the part of the petitioner; just a simple question of standing mute while other pupils saluted the flag and repeated the pledge of allegiance. This obviates any necessity for a further consideration of the questions involved or a reference to the rather exhaustive and learned briefs submitted by counsel.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

24 Cal.App.2d 11

DU QUESNAY v. HENDERSON.

Civ. 11365.

District Court of Appeal, Second District,
Division 1, California.

Dec. 10, 1937.

1. Divorce ⇨62(1)

Domicile is necessary to give a court jurisdiction over subject-matter of divorce.

2. Divorce ⇨327

A purported decree of divorce secured by parties in Mexico was nullity because of lack of jurisdiction, where the parties were both residents of Los Angeles county and neither of parties appeared in person in the Mexican court.

3. Judgment ⇨831

Existence of jurisdiction is always a proper subject of inquiry in connection with any judgment of a foreign court offered in court of state.

4. Husband and wife ⇨279(1)

Where first and second settlement agreements made between parties to divorce suit were inconsistent, the later agreement should prevail where it ratified the previous property settlement and provided that in case of inconsistencies between the two documents the later document should prevail.

5. Husband and wife ⇨279(1)

Where property settlement agreement between parties to divorce action provided for payment of specified sum in monthly payments and that, upon the sale, transfer, or refinancing of the real property, the balance then remaining unpaid should immediately become due, the execution of a renewal mortgage for \$40,000 on two of parcels constituted a "refinancing" within agreement; "financing" meaning the borrowing of money at interest, and "refinancing" meaning to finance again or anew.

[Ed. Note.—For other definitions of "Finance; Finances," see Words & Phrases.]

6. Husband and wife ⇨279(1)

Where property settlement agreement between parties to divorce action provided for acceleration of monthly payments in case of refinancing of real property by husband, wife's acceptance of monthly payments after refinancing without knowledge thereof did not constitute ratification of

continuance of such monthly payments or waiver of acceleration clause.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Sybil J. Du Quesnay, formerly Sybil J. Henderson, against Nathaniel Winston Henderson, also known as N. Winston Henderson, and also known as N. W. Henderson. From a judgment for plaintiff, defendant appeals.

Affirmed.

LeRoy Reames and James R. Jaffray, both of Los Angeles, for appellant.

Wilbert C. Hamilton and John F. Hoor-naert, both of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff, the divorced wife of defendant, seeks to recover a balance alleged to be due her under a property settlement executed on May 22, 1935, subsequent to the filing in Los Angeles county by plaintiff of an action for divorce against defendant. Under the terms of said agreement, defendant among other things promised to pay to plaintiff \$250 cash forthwith and the further sum of \$10,525, payable \$100 or more on the first of every month commencing July 1, 1935, for a period of five years, the balance of said \$10,525 remaining unpaid on May 21, 1940, to be paid by defendant at that time in full, or a note secured by a trust deed to be executed by him in favor of plaintiff, payable \$100 or more per month with interest at 5 per cent. per annum, "provided, however, that upon the sale, transfer or refinancing of the real property, above described, the balance then remaining unpaid of said \$10,525.00 shall immediately become due and payable."

No evidence was presented at the trial, but the cause was submitted upon a stipulation of facts from which it appears that plaintiff and defendant intermarried on September 17, 1921, and that since then until the filing of the complaint herein (September 24, 1936) "both have been and now are bona fide residents" of Los Angeles county; that on November 15, 1934, plaintiff filed in Mexico an action for divorce against defendant, which was granted, neither party appearing in person in the Mexican court; that on said November 15, 1934, the parties made a property settlement, which was duly recorded; that on the following April 29, 1935, plaintiff filed

in Los Angeles county an action for divorce against defendant, and on May 22, 1935, said parties executed and recorded another property settlement agreement which is the subject of the instant action; that thereafter an interlocutory decree of divorce was granted, which approved both property settlements, and on July 7, 1936, final judgment of divorce was entered in Los Angeles county. Meanwhile, on September 26, 1935, plaintiff agreed to permit defendant to mortgage one of the lots covered by the property settlement of May 22, 1935, and on June 11, 1936, defendant executed a note for \$40,000 secured by a mortgage on the remaining two lots described in said property settlement agreement. It was further stipulated that \$1,900 had been paid under the terms of the said agreement, leaving a balance, if any, of \$8,875 due to plaintiff.

From a judgment in the sum of \$8,875 in favor of plaintiff, defendant appeals to this court, urging: (1) That the rights of the parties are determined by the Mexican divorce and the property settlement of November 15, 1934; (2) that the execution by defendant of a mortgage for \$40,000 does not constitute a "refinancing of the real property," as contemplated by the terms of the property settlement agreement of May 22, 1935; (3) that the plaintiff by her acceptance of payments after the execution of the mortgage ratified continuance of the monthly payment provisions of said property settlement.

Plaintiff in her Los Angeles county divorce complaint alleged that by reason of duress on the part of defendant, she was compelled to file for the Mexican divorce "by mail," and to enter into the property settlement of November 15, 1934. Furthermore, the property settlement of May 22, 1935, makes no mention of the Mexican divorce, but it ratifies the property settlement of November 15, 1934, and provides that in case of inconsistencies between the two documents that the 1935 document shall prevail.

[1-3] We believe that appellant's first point is untenable. It appears from the record that the Mexican divorce was a "mail order" divorce; that the matrimonial domicile of the parties at all times herein mentioned was in the State of California; and that at the time the complaint was filed in Mexico and the decree granted, both parties were residents of Los Angeles county and physically present within its

boundaries, neither appearing in the Mexican court. Domicile is necessary to give a court jurisdiction over the subject-matter of divorce; consequently, the purported decree of divorce secured in Mexico is a nullity because of lack of jurisdiction, the existence of jurisdiction being always a proper subject of inquiry in connection with any judgment of a foreign court offered in the courts of our own state. *Delanoy v. Delanoy*, 216 Cal. 27, 34, 13 P.2d 719, 86 A.L.R. 1321; *Kegley v. Kegley*, 16 Cal.App.2d 216, 220, 60 P.2d 482; *People v. Harlow*, 9 Cal.App.2d 643, 646, 50 P.2d 1052; *Ryder v. Ryder*, 2 Cal.App.2d 426, 431, 37 P.2d 1069.

[4] Under the first property settlement, plaintiff was to receive a monthly annuity until she remarried or one of the parties died. Under the second settlement, she was to receive a specified sum of money, payable in installments during a period of five years, said payments to be accelerated upon the happening of certain contingencies, as hereinbefore referred to. As can readily be seen, these particular provisions of the two agreements are inconsistent, hence the agreement of May 22, 1935, should prevail, as was agreed by the parties thereto at the time of its execution.

[5] The next question is whether or not the appellant by executing a mortgage for \$40,000 refinanced the former obligation against the real property under the provisions of the property settlement of May 22, 1935. At the time the property settlement was executed, the community real property consisted of three parcels of land encumbered with trust deeds aggregating \$46,000. Subsequently, one parcel was withdrawn from the provisions of the property settlement by virtue of a consent and waiver executed by plaintiff, and when the mortgage for \$40,000 was executed by defendant, which was done without the consent of plaintiff, this apparently effected a reduction in the encumbrances existing against the two remaining lots. One of the meanings attributed to the word "finance" is the borrowing of money at interest, and according to Webster's New International Dictionary, Second Edition, "refinance" is "To finance again or anew * * *." In addition, the practice by which real property is made security for loans evidenced by mortgages and trust deeds, and the renewal of such loans, has come to be known in financial circles as "refinancing." At any rate, defendant by obtaining said loan

changed the financial status of said property and assumed a new and different obligation, which we believe constituted a refinancing as contemplated by the property settlement agreement.

[6] There is nothing in the record from which it can reasonably be inferred that plaintiff had any knowledge of the mortgage until she filed her complaint in this action. Under the circumstances, her acceptance of the monthly payments would not constitute a ratification of the continuance of such payments, nor a waiver of the acceleration clause contained in the settlement agreement.

The judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.



24 Cal.App.2d 69

REES v. ROBERTS et al.

Civ. 2149.

District Court of Appeal, Fourth District,
California.

Dec. 15, 1937.

Appeal and error ⇐787

Where no proceedings for settlement of bill of exceptions or of transcript on appeal were pending in trial court and no notice for preparation of transcript had been filed, although more than two years had elapsed since filing of notice of appeal, and where no redemption had been made within statutory time after sale of property at execution sale in enforcing judgment, dismissal of appeal was required (Code Civ.Proc. § 953a; Rules for the Supreme Court and District Courts of Appeal, rule 5, § 1).

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by William D. Rees against Edward Davis Roberts. Judgment for plaintiff, defendant appeals, and the assignee of the certificate of sale of interest in property sold in enforcing judgment filed a motion for dismissal of appeal.

Appeal dismissed.

Joseph A. Spray, of Los Angeles, and Albert Launer and Elmer R. Guy, both of Fullerton, for appellant.

Carl C. Cowles, of Santa Ana, for plaintiff.

Best & Best, of Riverside, for respondent.

JENNINGS, Justice.

The motion to dismiss the appeal taken in this case is supported by the certificate of the county clerk of the county wherein the action was tried and by the affidavit of the moving party. From these documents it appears that no proceedings for a settlement of the bill of exceptions or of a transcript on appeal are pending in the trial court and that no notice for the preparation of a transcript in accordance with the provisions of section 953a of the Code of Civil Procedure has been filed. It also appears that more than two years have elapsed since the filing of the notice of appeal and it is therefore apparent that the statutory time within which a record on appeal may be prepared and filed under either method of appeal allowed by our law has expired. It further appears from the affidavit of the party making this motion that after the rendition of judgment in favor of the plaintiff in the action a writ of execution issued for the purpose of enforcing the judgment and that said writ was levied upon an interest in certain real property, which interest was thereafter sold by the sheriff under said writ of execution to the plaintiff and certificate of sale was executed in plaintiff's favor, and that thereafter the said certificate of sale was duly assigned to William J. Roberts who makes this motion for dismissal and that no redemption having been made within the time provided by statute a sheriff's deed was executed to said William J. Roberts, as grantee.

From the above-recited facts it is apparent that the motion for dismissal of the appeal is in order and should be granted. *Union Trust Company v. Novotny*, 125 Cal. App. 417, 418, 13 P.2d 974; *Stewart v. Marple*, 126 Cal.App. 771, 772, 15 P.2d 202. The order for dismissal of the appeal is made by this court in which the appeal is pending on its own motion. Section 1, rule V, Rules for the Supreme Court and District Courts of Appeal.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

23 Cal.App.2d 726

Ex parte WENZLER.

Cr. 2002.

District Court of Appeal, First District,
Division 1, California.

Dec. 7, 1937.

1. Habeas corpus $\S$ 92(1)

Where order had been made restraining defendant from soliciting customers of former employer and employee had been held in contempt for violation thereof, conclusion reached by trial court on conflicting evidence on whether customers solicited were customers of former employer was controlling on habeas corpus.

2. Contempt $\S$ 54(4)

In proceeding to punish for constructive contempt, affidavit of contempt served purpose of complaint or pleading, and, unless it showed that contempt had been committed, court is without jurisdiction to proceed.

3. Injunction $\S$ 230(2)

Where affidavit of contempt alleged issuance of restraining order, a copy of which was attached to affidavit and made part thereof, and affidavit then went on to allege specific facts showing violation of such order, it was sufficient to give court jurisdiction.

4. Contempt $\S$ 60(2)

Affidavit initiating contempt proceeding may be considered by court as evidence in determining issue before it.

Application by Jack Wenzler for writ of habeas corpus.

Application denied.

John J. Taheny, of San Francisco, for petitioner.

PER CURIAM.

On December 6, 1937, petitioner was adjudged guilty of contempt of court by the superior court in and for the city and county of San Francisco for the violation of the terms of a restraining order theretofore issued by said court, and as a punishment therefor he was sentenced to imprisonment in the county jail of said city and county for a period of twenty-four hours. Late in the afternoon of said day petitioner filed in this court a petition for a writ of habeas corpus, wherein he attacked the ju-

risdiction of the trial court on some six grounds.

After examining the petition together with the exhibits attached thereto, and the points and authorities submitted in support of petitioner's contention, we are of the opinion, as stated in the memorandum heretofore filed, that no legal ground has been shown to justify the issuance of the writ. It appears from the record that petitioner entered into a contract of employment with the New Process Laundry, wherein petitioner agreed among other things that "two (2) years after leaving such employ, he will abstain from calling upon, soliciting or delivering for himself or for any other persons, copartnership or corporation any laundered or dry cleaned or unlaundered or laundered goods from any customer of the first party, whether brought by him to the first party or any other customer which the first party may have * * *." Petitioner terminated his employment with said company during the month of August, 1937, and entered the employ of another laundry company as driver. Thereafter and on October 9, 1937, the New Process Laundry, alleging that petitioner was then and had been violating the above-quoted provisions of said contract, commenced an action in the superior court to enjoin petitioner from any further violation thereof; and incidental to the filing of the verified complaint therein the court issued a restraining order which was duly served on petitioner, whereby he was restrained from committing any of the acts above quoted. On October 29, 1937, Eugene J. Corbett, the secretary of the New Process Laundry, made and filed an affidavit charging petitioner with contempt of court, it being alleged in the affidavit among other things "that ever since the said 9th day of October, 1937, to and including the time hereof, the defendant Jack Wenzler has been and now is wilfully and with the intent of disobeying said Temporary Restraining Order issued as aforesaid and after receiving notice and a copy of said Temporary Restraining Order, called upon, received and delivered laundered and dry cleaned, and unlaundered and laundered goods from and to numerous customers of the plaintiff New Process Laundry, a corporation; that the names and addresses of some of the said customers above referred to are: * * *" and then follow the names and addresses of seven persons, and the name of another person whose address is not given.

The contempt proceeding came on for hearing on November 3, 1937, at which time petitioner filed a verified answer to the complaint and also an affidavit in the contempt matter; and in said affidavit he expressly admitted "that it is true that he received unlaundered goods from the persons named in the affidavit of Eugene J. Corbett, dated October 29, 1937," and he admitted also that "it is true that he returned such goods to such persons after having been laundered and dry-cleaned"; but he then went on to aver that "none of such persons were customers of the plaintiff, New Process Laundry, at the time" petitioner called on said persons for such purpose.

[1-4] It will be seen, therefore, that the single disputed issue of fact raised by the allegations of said affidavits was whether at the time petitioner admittedly transacted said business with the persons named, they were customers of the New Process Laundry; and since there is a direct conflict on this point between the averment in Corbett's affidavit that they were, and the averment in petitioner's affidavit that they were not, the conclusion reached thereon by the trial court in resolving such conflict is controlling on habeas corpus. In this connection it may be stated that it does not appear from the petition that any oral testimony was adduced at said hearing on behalf of petitioner; but assuming that it was, it could do no more than add to the conflict. It is doubtless true, as petitioner contends, in a proceeding to punish for a constructive contempt the affidavit of contempt serves the purpose of a complaint or pleading, and unless it shows that a contempt has been committed the court is without jurisdiction to proceed in the matter. *Frowley v. Superior Court*, 158 Cal. 220, 110 P. 817. But here, as pointed out, the affidavit of Corbett shows that a contempt was committed. It alleged the issuance of the restraining order, a copy of which was attached to the affidavit and made part thereof, and the affidavit then went on to allege specific facts showing the violation of said order; and the affidavit initiating the contempt proceeding may be considered by the court as evidence in determining the issue before it.

With respect to the attack petitioner makes upon the validity of the contract, it will suffice to say that so far as any showing has been made in this particular proceeding, and in the light of the authorities upon the subject, we are not prepared to hold at this time as a matter of law that the particular

provisions of the contract called into question here are not unenforceable. The case of *New Method Laundry Co. v. MacCann*, 174 Cal. 26, 161 P. 990, Ann.Cas.1918C, 1022, cited by petitioner, may be distinguished from the present case because of the absence therein of a covenant to refrain from doing the acts prohibited by the contract in the present case. It should be understood, however, that the conclusion thus reached in this proceeding on this point shall not in any way preclude a full hearing and complete determination of that issue on the trial on the merits before the superior court, at which time evidence will doubtless be received on this particular issue.

Supplemental Opinion.

After examining the petition for the writ herein, together with the exhibits attached thereto and the points and authorities submitted in support of petitioner's contentions, we are of the opinion that no legal ground has been shown to justify the issuance of the writ. The application is therefore denied.



23 Cal.App.2d 730

CASNER v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10624.

District Court of Appeal, First District,
Division 1, California.

Dec. 8, 1937.

1. Dismissal and nonsuit ☞27

Abandonment of action by plaintiff so as to warrant dismissal by court may be made by motion by plaintiff to dismiss (Code Civ.Proc. § 581, as amended by St.1933, p. 1868).

2. Appeal and error ☞82(3)

Order vacating judgment of dismissal was "special order made after final judgment" which was appealable (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

3. Appeal and error ☞82(3)

Order for judgment in defendant's favor made after order vacating judgment of

dismissal was "special order made after final judgment" and as such was appealable (Code Civ.Proc. § 963, as amended by St. 1933, p. 2472).

4. Certiorari ☞5(1)

Where law allows appeal from an order or judgment, even when tribunal making such order or rendering such judgment exceeded its authority in so doing, a writ of review may not be granted (Code Civ.Proc. § 1068, as amended by St.1935, p. 386).

Petition for writ of review by Cannie Casner against the Superior Court of the State of California in and for the City and County of San Francisco and others. Writ theretofore issued, discharged.

Freidenrich & Selig and Phillip Barnett, all of San Francisco, for petitioner.

William M. Abbott, Cyril Appel, Ivores R. Dains, and George M. Naus, all of San Francisco, for respondents.

PER CURIAM.

This is a petition for a writ of review, praying that an order and a judgment of the respondent court be annulled.

It appears from the petition and a return made thereto that on and prior to April 7, 1937, there was pending in said superior court an action for the recovery of damages brought by the petitioner herein against Daily News Company Limited, William Cohn, Market Street Railway Company, and John Bartlett. On said date the evidence had been closed, and those of the defendants who had appeared and answered moved the court for a directed verdict in their favor. The jury was excused until 2 p. m. of said day and the parties argued the motion. It appears that this argument or the concluding part of it took place in the chambers of the judge shortly before the reconvening of the court in the regular courtroom, but participating in the proceedings were the clerk of the court and the official reporter. When the argument and discussion were ended, the court announced that the motion for a directed verdict would be granted in favor of all defendants. The judge, officials, and attorneys then repaired to the courtroom, where the proceeding was resumed in the presence of the jury. At this point the record shows as follows:

"Mr. Barnett (plaintiff's attorney): Your honor, at this time I want to make a

motion in behalf of the plaintiff. * * * We desire to dismiss the case as against all defendants without prejudice. * * *

"Mr. Appel (attorney for defendant Market Street Railway Company): Your honor has made an order here already I think.

"The Court: If the record shows such an order was made I will set it aside. Let the record show that if any order was made in chambers about an instructed verdict it is set aside * * * and the motion to dismiss as to all defendants is granted * * * without prejudice."

An exception to this ruling was noted and the jury was thereupon discharged. On the same day a judgment of dismissal without prejudice was entered.

On April 27th the defendants Market Street Railway Company and John Bartlett moved the court to set aside said order and judgment of dismissal, and to enter judgment in their favor upon the ground that the court, in granting said order, had exceeded its authority; and on June 5th defendants Daily News Company, Limited, and William Cohn made a similar motion. The first of these motions was granted by the court on June 28th, and the second on July 1st, and judgments were entered accordingly. Copies of the orders granting the motions and of the judgments thereafter entered were annexed to the petition.

Annulment of the order vacating the prior order and judgment dismissing the action and of the judgments subsequently entered is sought upon the ground that the trial court exceeded its jurisdiction in the making of said order and said judgments.

Section 581 of the Code of Civil Procedure (as amended by St.1933, p. 1868) provides that an action may be dismissed or a judgment of nonsuit entered "4. By the court, when upon the trial and before the final submission of the case, the plaintiff abandons it," and that such a dismissal must be entered on the minutes of the court, and when so entered is effective for all purposes.

[1] The abandonment mentioned in said subdivision 4 may be made by a motion by the plaintiff to dismiss. *Franks v. Cesena*, 192 Cal. 1, 218 P. 437; *Richards v. Bradley*, 129 Cal. 670, 62 P. 316; *McDonald v. California Timber Co.*, 2 Cal.App. 165, 83 P. 172; *Menotti v. Marchese*, 63 Cal.App. 49, 218 P. 439.

[2, 3] The order of the court vacating the judgment of dismissal was a special order made after final judgment, as were also the respective orders for judgment in defendants' favor, and, as such, were appealable under the provisions of section 963 of the Code of Civil Procedure (as amended by St.1933, p. 2472). *Wolters v. Rossi*, 126 Cal. 644, 59 P. 143; *Robinson v. Southland Produce Co.*, 98 Cal.App. 365, 276 P. 1036; *Livermore v. Campbell*, 52 Cal. 75; *Coley v. Super. Ct.*, 89 Cal.App. 330, 264 P. 1110; *Colby v. Pierce*, 15 Cal. App.2d 723, 59 P.2d 1046; *Christie v. Super. Ct.*, 218 Cal. 423, 23 P.2d 757; *Ericksen v. Mun. Ct.*, 219 Cal. 737, 29 P.2d 192; *Leach v. Super. Ct.*, 215 Cal. 531, 12 P. 2d 1.

[4] Where the law allows an appeal from an order or judgment, even when the tribunal making such order or rendering such judgment exceeded its authority in so doing, a writ of review may not be granted. Code Civ.Proc. § 1068 (as amended by St.1935, p. 386); *Hildebrand v. Super. Ct.*, 173 Cal. 86, 159 P. 147; *Olcese v. Justice's Ct.*, 156 Cal. 82, 103 P. 317; *Anglo-Californian Bank v. Super. Ct.*, 153 Cal. 753, 96 P. 803. Many more cases might be cited to the same effect. See 4 Cal.Jur. Certiorari, § 24, p. 1052.

It follows from the foregoing that the writ heretofore issued in this cause should be discharged. It is so ordered.



24 Cal.App.2d 32

CHILCOTE v. PACIFIC AIR TRANSPORT et al.

Civ. 10415.

District Court of Appeal, First District,
Division 2, California.

Dec. 13, 1937.

1. Process ⇨131

Where summons is not returned within three years after date of commencement of action, trial court has no jurisdiction to proceed with action, unless defendant appears before motion to dismiss is made (Code Civ. Proc. § 581a, as amended by St.1933, p. 1869).

2. Appearance ⇨8(1)

Though statutory definition of what constitutes "appearance" is not exclusive, other facts relied on as showing an appearance must amount to a request for affirmative relief, and show purpose of obtaining a ruling or order of court going to merits of case (Code Civ.Proc. § 1014).

[Ed. Note.—For other definitions of "Appearance," see Words & Phrases.]

3. Appearance ⇨9(5)

That defendants asked for and obtained stipulation and order extending their time to plead did not constitute a "general appearance" such as would preclude dismissal of action for failure to return summons within three years, especially where such acts did not occur within the three-year period (Code Civ.Proc. § 581a, as amended by St.1933, p. 1869; § 1014).

[Ed. Note.—For other definitions of "General Appearance," see Words & Phrases.]

4. Dismissal and nonsuit ⇨60(2)

Where plaintiff allegedly attempted to serve process twice in 1933, in action begun July 11, 1933, and thereafter allegedly attempted in vain to see defendants' agent, though such agent was in his office 25 days in each month, but sheriff made service July 7, 1936, after receiving papers July 3, finding that plaintiff did not prosecute action with due diligence was not error (Code Civ. Proc. §§ 581a, as amended by St.1933, p. 1869).

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Lois L. Chilcote against the Pacific Air Transport and others. From an order dismissing the action, plaintiff appeals.

Affirmed.

Laurence R. Chilcote, of Oakland, for appellant.

Donahue, Hynes & Hamlin, of Oakland, for respondents.

STURTEVANT, Justice.

From an order made dismissing the above-entitled action the plaintiff has appealed. The transcript discloses the defendant corporations are foreign corporations; that C. E. Johnson is their resident agent designated by them as the person on whom process may be served; that the said

action was commenced July 11, 1933; that it was brought to recover damages for injuries sustained by the plaintiff in an aircraft accident which happened on July 11, 1932; that an amended complaint was filed July 3, 1936; that the summons was issued on July 11, 1933; that the complaint and the summons were delivered to the sheriff of Alameda county on July 3, 1936, and were served on July 7, 1936; that on August 15, 1936, the summons had not been returned; that on August 18, 1936, the defendants served on the plaintiff a notice that they would move to dismiss said action on the grounds, (1) that the summons had not been returned within three years after the commencement of the action, and (2) plaintiff's lack of prosecution of said action and her failure to serve process for two years, eleven months, twenty-six days after the action was commenced; that on the hearing of said motion the affidavits of C. E. Johnson and Adrien Hynes were offered in evidence in support of said motion and the affidavits of Lawrence R. Chilcote and H. A. Ilmanen were offered in opposition to said motion; that certain written instruments were incorporated in the affidavit of Lawrence R. Chilcote and, on the hearing, they were offered in evidence; and that thereafter, on September 1, 1936, the trial court made an order granting said motion. From that order the plaintiff has appealed.

[1-3] We will first discuss the first ground of the defendants' motion. Section 581a of the Code of Civil Procedure, as amended by St.1933, p. 1869, contains the following provisions: "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served." It is not claimed the summons was returned within three years after the date of the commencement of the action. Unless the

defendant appeared before the motion was made the trial court had no jurisdiction to proceed. *Pearson v. Superior Court*, 122 Cal.App. 571, 574, 10 P.2d 489. The question then arises: Did the defendant appear? Section 1014 of the Code of Civil Procedure provides: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." The record before us does not show that the defendants answered, demurred, or filed a written appearance. Said section is not exclusive but, if other facts are relied on as showing an appearance, such facts must amount to a request for affirmative relief. *Altpeter v. Postal Telegraph-Cable Co.*, 26 Cal.App. 705, 713, 148 P. 241. No showing is made that the defendants made such a request. They asked the plaintiff for and obtained a stipulation extending their time to plead. That fact did not constitute a general appearance. *Powers v. Braley*, 75 Cal. 237, 17 P. 197. They also obtained from the court an order to the same effect but such fact did not constitute a general appearance. *Davenport v. Superior Court*, 183 Cal. 506, 509, 191 P. 911, 913. The acts claimed to constitute a general appearance must amount to a showing of a "purpose of obtaining any ruling or order of the court going to the merits of the case." *Davenport v. Superior Court*, supra. Here, there was no such showing. Moreover, none of said acts occurred within the period of three years prescribed by section 581a of the Code of Civil Procedure.

The plaintiff claims her affidavit contained averments which entitled her to relief under the provisions of section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851. We think the averments did not do so. It has been so held on a set of facts as strong or stronger than in the instant case. *Cruse v. Superior Court*, 102 Cal.App. 290, 297, 283 P. 73.

[4] In defense of the second ground stated in the motion made by the defendants, the plaintiff's attorney set forth in his affidavit that for the purpose of serving process on the defendants "once in the fall of 1933 and once about Thanksgiving in 1933" (twice on the same day?) he called at the office of, but failed to see, the agent of the defendants. He further stated: "Affiant on numerous occasions at least a dozen times, since then has called, by telephone, the office of defendants and asked for Mr. Johnson, and on each occasion was told that Mr.

Johnson was out of town." In her brief the plaintiff states she wanted to avoid litigation and desired to arrange a settlement of her claim without litigation. In support of the order made on the second ground stated in their motion, the defendants call attention to the fact that since the date of the accident their agent has been in his office twenty-five days in each month; that the plaintiff, her attorney, and Mr. Johnson all reside in Oakland and that both plaintiff's attorney and Mr. Johnson have offices in Oakland; that the particular airplane in which the accident occurred has been sold and is now in South America; and that Dr. Mason, one of the witnesses of the defendants, has since died. They might have added that the plaintiff delivered her papers to the sheriff on Friday, July 3, 1936, and asked him to make an early service. The papers were served on July 7, 1936. Two holidays intervened, the fourth of July and a Sunday, but the sheriff made the service within two working days after the papers were delivered to him. A consideration of the foregoing facts shows that the plaintiff did not prosecute her action with due diligence. The trial court did not err in so holding. *Kreiss v. Hotaling*, 99 Cal. 383, 385, 33 P. 1125.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



24 Cal.App.2d 1

WINKIE et al. v. TURLOCK IRR. DIST.
Civ. 5680.

District Court of Appeal, Third District,
California.

Dec. 9, 1937.

1. Electricity ⇐13

Under statute authorizing irrigation districts to construct electric light and power lines along any street with city's consent, district operating system for distribution of electricity in city had a valid "franchise" from state and not from city, notwithstanding district's acceptance recited that city had granted franchise, since use of word "franchise" did not establish nature of right involved, and hence system was not a nuisance for lack of franchise so as to render district liable for death of house mover who was electrocuted while lifting sagging wires (St.1923, p. 449).

[Ed. Note.—For other definitions of "Franchise," see Words & Phrases.]

2. Municipal corporations ⇐106(2)

Under statute authorizing irrigation districts to construct electric light and power lines along any street with city's consent, proceeding wherein city gives consent is not the granting of a "franchise," and statute providing that no ordinance granting any franchise can be passed on day of its introduction, nor within five days thereafter, nor at any other than a general meeting, is inapplicable (Gen.Laws 1920, Act 3094, § 861; St.1923, p. 449).

3. Electricity ⇐19(6)

Violation, if any, of safety rules of Railroad Commission by irrigation district in construction and maintenance of system for distribution of electricity in city was not negligence per se, since those rules do not, as a matter of law, constitute the measure of ordinary care, but negligence is a question for jury to determine from facts in particular case.

4. Negligence ⇐136(14, 26)

Negligence and contributory negligence are proper jury questions.

5. Continuance ⇐44

A showing for a continuance may be made by affidavit or by other proof, as against contention that a continuation granted on motion in open court violates statute, that filing of affidavit in support of continuance is jurisdictional, and that trial court has no discretion to grant continuance in absence of such affidavit (Code Civ. Proc. § 2027, and § 595, as amended by St. 1933, p. 1873).

6. Appeal and error ⇐966(2)

The granting of continuances over a period of several months at defendant's request was not prejudicial to plaintiffs because of length of time between presentation of their evidence and that of defendant, where affidavits showed that defendant was endeavoring to locate one of the plaintiffs, and that defendant failed to get any assistance from plaintiffs' counsel, from parents of plaintiff whom it was endeavoring to locate, or from other sources, since delay could not be charged to any fault of defendant.

ant (Code Civ.Proc. § 2027, and § 595, as amended by St.1933, p. 1873).

7. Trial ⇨122

Counsel may comment upon opposing party's failure to produce certain persons as witnesses, unless the witness is equally available to both parties.

8. Trial ⇨122

Argument of defendant's counsel alluding to unsuccessful efforts to locate one plaintiff and telling jury that they could assume that that plaintiff's testimony would have been adverse to plaintiffs and for that reason she was not called as a witness and her deposition was not offered was not reversible error, where that plaintiff was not equally available to both parties, defendant, after due diligence, was unable to locate her, and testimony in deposition was material and partly unfavorable to plaintiffs and partly favorable to defendant.

9. Trial ⇨234(8)

An instruction, given at defendant's request, stating that a litigant's nonappearance or failure to testify, unless satisfactorily explained, creates inference that litigant refuses to testify because the truth would be unfavorable was not reversible error because of failure of one plaintiff to appear and failure of other plaintiffs to offer her deposition, where that plaintiff was not equally available to both parties, defendant, after due diligence, was unable to locate her, and testimony in deposition was material and partly unfavorable to plaintiffs and partly favorable to defendant.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Florence Winkie and another against the Turlock Irrigation District. Upon motion, a nonsuit was granted as to one cause of action, and, from a judgment for defendant on another cause, plaintiffs appeal.

Affirmed.

W. Coburn Cook, of Turlock, and Samuel V. Cornell, of Modesto, for appellants.

Thomas C. Boone, of Modesto, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The appellants herein are the widow and minor children of Horton Winkie, who

brought this action for damages against the Turlock Irrigation District for his death by electrocution.

The Turlock Irrigation District is a corporation engaged in the business of generating and selling electrical energy, both within and without the boundaries of the Turlock Irrigation District. In the course of such business it had constructed a distribution system in the city of Turlock for the sale of electricity within that city.

On the date of his death, Horton Winkie was employed by a house mover, and was assisting at that time in the moving of a house along one of the streets of the city of Turlock. One of the distributing lines of the irrigation district extended along a certain alley which intersected the street along which the house was being moved and passed over this street by means of poles some 174 feet apart. On the highest cross-arms of these poles were strung four uninsulated copper wires; three of these wires carried electrical current of some 4,000 volts, and the fourth was a ground wire. The height above the ground of the four wires at a point where they rested on the cross-arms on the poles was 29 feet. At the lowest point above the street they sagged to a point 27 feet, 6 inches above the ground. Upon these poles also were strung two insulated wires of 110 volts, which were 22 feet, 6 inches above the street; fourteen telephone wires at a lower level, and two guy wires. These two guy wires crossed each other some 18½ feet above the level of the street. The highest point of the house above the surface of the street when it was being moved was approximately 24 feet; some 3 feet below the lowest point of the high-voltage wires.

It was the duty of the decedent, standing on the roof of the house, to so lift any sagging wires as to enable the house to be moved beneath the same. The guy wires, because of their tension, were difficult to handle, and it was while engaged with the guy wires that decedent apparently came in contact with the high-voltage circuit and was electrocuted.

Two causes of action were set forth in the complaint; the first cause of action being that the Turlock Irrigation District's distribution system in the city of Turlock was not authorized by law, and therefore constituted a nuisance; and the second cause of action charged that the Turlock Irrigation District had been guilty of negli-

gence in the construction, operation, and maintenance of its distribution system.

Upon the trial plaintiff introduced evidence showing that on a certain date the Turlock Irrigation District applied to the city council of Turlock for a franchise to construct and maintain an electrical distribution system in the city of Turlock, and upon the same day a resolution granting such franchise was adopted by the city council, and that the purported franchise was later accepted by the irrigation district. It was also shown that a permit had been granted for moving the house along the public streets of the city of Turlock.

Plaintiff then offered in evidence an ordinance of the city of Turlock making it a misdemeanor to obstruct the use of a highway. Objection to introduction of this evidence was sustained by the court, and plaintiffs were not permitted to introduce any further evidence on their first cause of action, and upon motion a nonsuit was granted as to the first cause of action.

Defendant opened its cause by offering in evidence a deposition of Florence Winkie, which had been taken on notice by the plaintiffs, in the state of New York. Objection to the introduction of this deposition was interposed on the ground that the certificate of the notary was not properly authenticated and the objection sustained. A continuance was requested to correct the certificate, and the court, over objection of plaintiffs, granted a continuance to October 31, 1933, and thereafter from time to time at the further request of defendant, and over plaintiffs' objection, until the cause was finally brought to trial in May, 1934.

[1,2] It is the contention of appellants that the irrigation district had no franchise to erect its electrical distribution system in the city of Turlock, and that its system therefore constituted a nuisance, and, being a nuisance, the district was guilty of negligence per se.

Appellants further contend that the irrigation district violated certain safety rules of the California Railroad Commission, which also constituted negligence. It is conceded by appellants that the irrigation district was not subject to the rules of the Railroad Commission, but it was urged that these rules, as a matter of law, constitute the measure of ordinary care, and that the district in the erection of its electrical system did not conform to these rules, and therefore the question of ordinary care was

removed from the determination of the jury, as such failure established negligence on the part of the respondent.

Examination of chapter 225, Statutes of 1923 (page 449), discloses that every irrigation district has the right to construct, operate, and maintain electric light and power lines along or upon any street, road, or highway, provided that such irrigation district may not use any street within any city for such purposes unless the right so to use the same is granted by the governing body of such city, which shall have the right to impose reasonable conditions upon such use. It is apparent from a reading of this statute that the franchise for the district to operate its system comes not from the city, but from the state, although the consent of the city must be obtained before such franchise is available within the limits of such city. While it is true that in the acceptance of the irrigation district it is recited that " * * * the City of Turlock has granted to the Turlock Irrigation District, a public corporation, a franchise and permission to construct * * * a power system, * * *" the use of the word "franchise" does not establish the nature of the right involved. In 26 C.J. page 1024, the rule is stated to be as follows: "The fact that a grant is called a 'franchise' and that it is couched in terms frequently used in granting franchises is not conclusive as to its character. If the purpose is simply to provide regulations a franchise will not be created, even though the word 'franchise' is used."

It would therefore appear in this instance, a valid franchise existed in favor of the respondent, coming not from the municipality, but from the state. If the proceeding by the city was not the granting of a franchise, then the provisions of Henning's General Laws 1920, Act 3094, § 861, which provides that no ordinance granting any franchise can be passed on the day of its introduction, nor within five days thereafter, nor at any other than a general meeting, was inapplicable.

[3,4] The contention also of appellants, that a violation of the rules of the Railroad Commission by the irrigation district constituted negligence per se, is likewise not tenable. If this were the rule it would have the effect of substituting the regulations of the Railroad Commission for the discretion and judgment of the trustees of a city, and would in effect hold that no incorporated city had any discretion in determining the

extent to which the streets of the city might be subject to various uses, and no discretion as to what were reasonable or necessary regulations for the use thereof. Also, if the rules of the Railroad Commission were held to establish as a matter of law the measure of ordinary care, it would do away with the principle that negligence is a question for the jury to determine from the facts in the particular case. That negligence and contributory negligence are proper questions for a jury has been long settled in this state. *Carty v. Boeseke-Dawe Co.*, 2 Cal. App. 646, 648, 84 P. 267; *Davoust v. City of Alameda*, 149 Cal. 69, 84 P. 760, 5 L.R.A. (N.S.) 536, 9 Ann.Cas. 847; *Pittman v. City of Riverside*, 128 Cal.App. 57, 16 P.2d 768; *Eldridge v. Clark & Henry Const. Co.*, 75 Cal.App. 516, 243 P. 43.

Further objection by appellant is that the court erred in granting continuances. Two reasons are assigned, first, that the continuances were not upon a proper showing or foundation, and, secondly, that the plaintiffs were prejudiced by the long interval between the presentation of their evidence and that of the defendant.

[5] As to the first point, that the continuances were not made upon proper showing, appellant in effect claims that a continuance granted on motion in open court violates the provisions of section 595 (as amended by St.1933, p. 1873) and section 2027 of the Code of Civil Procedure, and the filing of an affidavit in support of a continuance is jurisdictional and that the court has no discretion to grant a continuance in the absence of such affidavit. That a showing for a continuance may be made by affidavit or by other proof is established by *Bassi v. Walden*, 64 Cal.App. 764, 222 P. 866. A case very similar to the case here in point is *Neil v. Gane*, 124 Cal.App. 51, 12 P.2d 131. In that case considerable delay was caused and continuances granted because of failure to stipulate as to the taking of a deposition or to submit cross-interrogatories. The court there said, quoting from *Flynn v. Fink*, 60 Cal.App. 670, 213 P. 716, 717: "On a motion for a continuance of a trial of a case it is the duty of the trial judge, which the law presumes he will faithfully perform, to work out the justice of the situation; his action in the exercise of a sound discretion is final and cannot be disturbed."

[6] In regard to the complaint of the plaintiffs that they were prejudiced by the length of time between the presentation of their evidence and that of defendant, the

record discloses that defendant was endeavoring to locate Florence Winkie, one of the plaintiffs, and in their search they requested counsel for plaintiffs to advise them of the whereabouts of plaintiff, and inquired of the parents of plaintiff, and from other sources, all shown by affidavit, but defendant failed to get any assistance from these sources, and so the delay could not be charged to any fault on the part of the defendant.

[7-9] Another objection of appellants was that counsel for defendant committed prejudicial error, and the court erred in its instructions with respect to the absence and failure of Florence Winkie to testify. It will be recalled that plaintiff took the deposition of Florence Winkie, but did not offer the same in evidence, and when defendant offered the same as a part of its case objection was made that it was not properly verified, and the objection sustained. Counsel for defendant, in his argument, alluded to unsuccessful efforts that had been made to locate Florence Winkie, and told the jury they were entitled to assume that upon any facts within her knowledge the testimony of Mrs. Winkie would have been adverse to plaintiff, and for that reason she was not called by plaintiffs as a witness, nor her testimony given. At the request of defendant the court in effect instructed the jury that the nonappearance of a litigant at the trial or her failure to testify, by deposition or otherwise, as to material facts within her knowledge, unless satisfactorily explained, created an inference that she refuses to testify because the truth, if made to appear, would have been adverse to her. Plaintiffs claim the argument and instruction amounted to a charge that plaintiff was willfully suppressing the evidence. We cannot so hold.

It is within the legitimate range of argument for counsel to comment upon the failure of the opposing party to produce certain persons as witnesses unless the witness is equally available to both parties. Here, plaintiff Florence Winkie was not equally available to both parties; defendant, after due diligence, was unable to locate her. The testimony in the deposition, properly subscribed by the witness was material, and in part unfavorable to plaintiffs, and in part favorable to defendant. These facts refuted the charge that the statement and instruction constituted reversible error.

We find nothing in the record or in the argument of appellant that would justify a reversal.

The judgment entered herein should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



24 Cal.App.2d 119

PEOPLE v. ROMO.

Cr. 354.

District Court of Appeal, Fourth District,
California.

Dec. 17, 1937.

1. Criminal law Ⓒ774, 786(3)

Where prosecution for violation of sex perversion statute was defended on ground that defendant was too intoxicated to understand and consent to what was going on, instruction, in effect, that matter of intoxication could have no bearing in case was error which was increased by further unnecessary instruction inviting jury to particularly consider whether defendant's interest had not led him to color his testimony (Pen. Code, §§ 22, 288a).

2. Criminal law Ⓒ786(3)

Instruction that it was proper for jury to consider situation of accused, manner in which he might be affected by verdict, and whether his interest might not affect his credibility and color his testimony, should not be given.

3. Criminal law Ⓒ823(6)

Where prosecution for violation of sex perversion statute was defended on ground that defendant was too intoxicated to understand and consent to what was going on, error in giving instruction that matter of intoxication could have no bearing in case was not cured by instruction that question of intent is to be determined from facts and that all persons are presumed to intend the natural consequences of their voluntary acts (Pen. Code, §§ 22, 288a).

4. Criminal law Ⓒ772(5)

In prosecution for violation of sex perversion statute, instruction that question of intent is to be determined from facts and that all persons are presumed to intend the natural consequences of their voluntary acts was not sufficient to cover issue whether act

was committed on person of defendant without his consent or knowledge or without any intent on his part to commit the act (Pen. Code, § 288a).

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Charles Romo was convicted of violating Penal Code, § 288a, regarding sex perversion, and he appeals.

Judgment reversed, and cause remanded for a new trial.

Albert Ford, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged, jointly with one Jim Cay, with a violation of section 288a of the Penal Code. Cay pleaded guilty and the defendant was convicted by the verdict of a jury. He appeals from the judgment on the grounds that the court erred in giving and refusing certain instructions, coupled with the claim that the evidence is sufficient to raise a reasonable doubt as to whether he consented to or participated in the act charged.

The appellant, who had lived all of his life in Riverside county, had been arrested for intoxication on many occasions but had never been arrested for any other offense. At 7:30 p. m. on July 19, 1937, he was arrested for intoxication and placed in the city jail in a tank which had several cells opening from it, and in which one other prisoner was confined. At 8 p. m. Jim Cay was arrested and placed in this tank. About 8:30 p. m. a trusty in the jail went down to take a bath. After he had completed his bath he heard Cay saying to Romo "Come on, just give me a chance," which was repeated several times. This was followed by a "rumpus" and Romo stumbled or fell, and the trusty saw him getting up from the floor. The trusty went back upstairs where he heard Cay repeating "just give me a chance" about three times, and went back down to see what was wrong. At this time he observed the act being committed by Cay upon the person of Romo. The trusty called two officers, who also observed the act being committed. The third person who was in the tank testified that he heard Cay telling Romo to "give it to him or something like that" continually for several minutes and heard

Romo say "Leave me alone" several times, and heard a scuffle like someone had dropped to the floor.

The appellant's defense was based entirely upon the contention that because of his intoxication he did not know what occurred on this occasion and that if any violation of the act in question occurred, it was without his consent and without any intent on his part to commit the same. His testimony supports this contention, as does part of the other evidence. While the officers admitted that the appellant was intoxicated when he was placed in jail one of them testified that he was "not as drunk" at the time in question as when he was put in jail and the other testified that at the later time he did not seem to be drunk and was able to handle himself and "do what he was told to do." While the evidence is conflicting, it is sufficient to support either conclusion which might have been reached by the jury upon the question as to whether or not the appellant was so intoxicated at the time as not to have been able to give his consent and as not to have understood what was being done.

The following instruction was given: "It is a well settled rule that drunkenness is no excuse for the commission of crime. Intoxication does not destroy responsibility when the party made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt; for, when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution." A little later this instruction was given: "You are instructed that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition." After the jury had been correctly instructed as to the rules which should be followed in determining the credibility of witnesses, including the fact that their interest in the case might be taken into consideration, an instruction was given particularly setting forth rules which were to be applied in considering the testimony of the appellant in which the jurors were told that it was proper for them to bear in mind "the situation of the defendant, the

manner in which he may be affected by your verdict, and the very grave interest he must feel in it; and it is proper for the jury to consider whether this position and interest may not affect his credibility and color his testimony."

[1] In effect the jury was instructed that the matter of intoxication could have no bearing in this case and the appellant was thus prevented from having his defense, lack of knowledge and consent, considered by the jury. In *People v. Siegel*, 2 Cal.App.2d 620, 38 P.2d 450, the court said: "Section 22 of the Penal Code specifies that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act. The instructions of the court specifically covered the question of intoxication and directed the jury if they found such a degree of intoxication that defendant was unable to give his consent, then and in that case, a verdict of not guilty should be returned. This, of course, covers the question of motive and intent as clearly as though the section had been read to the jury."

[2] In the instant case the court did not read section 22 to the jury, the instruction given omitted an important provision of that section, and the jury was neither directly nor impliedly told that a verdict of not guilty should be returned if they found that the appellant was at the time in such a degree of intoxication as to be unable to give his consent. The effect of the first instruction on drunkenness was emphasized by a second instruction on the same subject, which contains the further statement, erroneous when not qualified, that no act committed by a person while in a state of intoxication is less criminal by reason of his having been in that condition. The errors thus appearing were increased by the further entirely unnecessary instruction inviting the jury to particularly consider whether the interest of the appellant had not led him to color his testimony. Regardless of whether or not the latter instruction would be sufficiently prejudicial, in itself, to justify a reversal, it has been held that

instructions of that character should not be given. *People v. Quon Foo*, 57 Cal. App. 237, 206 P. 1028.

[3, 4] Several instructions were refused which would have submitted to the jury the issue as to whether the act charged was committed by Cay upon the person of the appellant without his consent or knowledge or without any intent on his part to commit the act. The respondent argues that all of these matters were fully covered by two instructions to the effect that the word "participate" implies knowledge and intent, that the question of intent is to be determined from all the facts, that all persons are presumed to intend the natural consequences of their voluntary acts, and that in this case no specific intent was involved. While such instructions as those last referred to are ordinarily sufficient on the question of intent, it cannot be said that they are sufficient, where the jury had been told that intoxication could not be a defense, to cure the errors referred to and to cover the issue which should have been presented to the jury.

In *People v. Nichols*, 69 Cal.App. 214, 230 P. 997, 1000, the court said: "Under the provisions of section 4½ of article 6 of the state Constitution, whether the giving of an erroneous instruction does or does not constitute reversible error depends, in large measure, upon the conclusion of the Court of Appeal as to whether there has or has not been a miscarriage of justice by reason thereof. If it appears to the appellate court that the conclusion of the jury would have been the same with or without the instruction, then and in that case it cannot be said that a miscarriage of justice has resulted, but, where there is a strong conflict in the evidence, and the determination of the cause depends upon the credibility to be given to certain witnesses by the jury, and the court gives an erroneous instruction which tends to disparage such witnesses in the estimation of the jury, then and in that case we think that the people are not entitled to rely upon the provisions of the constitutional provision referred to, but that the defendant has not, under such circumstances, been given the fair and impartial trial to which all persons accused of crime are entitled."

It is not possible to say that the result would have been the same if this jury had been permitted, under proper instructions, to pass upon the question of whether or not the appellant was intoxicated to a degree

which deprived him of the power to understand and consent to what was going on. Under such circumstances it cannot be said that a miscarriage of justice has not occurred. The appellant was entitled to have the issue of the effect of his intoxication fairly presented to the jury and, in our opinion, this was not done.

For the reasons given the judgment is reversed, and the cause remanded for a new trial.

We concur: JENNINGS, J.; MARKS, J.



24 Cal.App.2d 18

Ex parte HAMMOND.

Cr. 1596.

District Court of Appeal, Third District.
California.

Dec. 10, 1937.

1. Criminal law ☞980(2)

A judgment of conviction sentencing defendant to life imprisonment after he had pleaded guilty to a charge of murder is not void for failure to disclose the degree of the crime as required by statute, so as to entitle defendant to be discharged (Pen.Code, § 1192).

2. Criminal law ☞995(3)

A judgment of conviction need only indicate that the court has fixed the degree of crime prior to pronouncing of judgment, and no particular or formal language is required (Pen.Code, § 1192).

3. Criminal law ☞980(2)

A defendant's voluntary admission that he is guilty of a particular degree of a crime which is divided into degrees is a sufficient predicate upon which the court may base its determination of the degree but does not obviate the necessity for such determination (Pen.Code, § 1192).

4. Criminal law ☞995(3)

The degree of a crime which is divided into degrees must be fixed prior to the pronouncing of sentence and is not excused by fact that there are sufficient facts disclosed by the record, including the informa-

tion and the defendant's plea to justify the court in fixing the degree (Pen.Code, § 1192).

5. Criminal law ⇨1177

Whether defendant has been disadvantaged by reason of trial court's failure to find the degree of defendant's offense prior to pronouncing sentence is not for appellate determination (Pen.Code, § 1192).

6. Criminal law ⇨1188

A judgment of conviction sentencing defendant to life imprisonment upon his plea of guilty to a charge of murder will not be reversed because of court's failure to determine degree of offense prior to pronouncing sentence, but prisoner will be remanded to the trial court for procedure in accordance with statute (Pen.Code, § 1192).

Habeas corpus proceeding by C. L. Hammond to secure release from the custody of Clyde L. Plummer, Warden of the State Prison at Folsom, Cal.

Writ discharged and prisoner remanded.

Horace F. Frye, of Sacramento, and S. W. Green, of Isleton, for petitioner.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The application of the above-named petitioner for a writ of habeas corpus has been heard and the cause submitted for our consideration. The petition shows that on or about the 7th day of May, 1917, an information was filed in the superior court of Fresno county, charging that the petitioner and one other did, on or about the 30th day of March, 1917, in the county of Fresno, state of California, willfully, unlawfully, feloniously, and with premeditation and malice aforethought, kill and murder Faustin Lassare, a human being.

Upon being arraigned the petitioner, in the first instance, entered a plea of not guilty, but on or about the 7th day of June, 1917, thereafter withdrew his plea of not guilty, and entered a plea of guilty, whereupon sentence was thereupon pronounced upon the petition, ordering and decreeing that the petitioner be confined in the state prison at Folsom for the period of his natural life. While the facts of the case appear to have been presented to the court by a statement of the district attorney, the court made no determination of the degree of the

offense as required by section 1192 of the Penal Code.

The petitioner prays that he be discharged by reason of the failure of the court to take the proceedings specified in section 1192, supra.

[1] There is no question but that the judgment fails to disclose the degree of the crime. The judgment however, is not void, and the petitioner is not entitled to a discharge.

[2] A like question has been before the court in a number of cases which we will hereafter simply cite without making extended quotations therefrom. A number of the cases discuss the question as to what shall be expressed in a judgment where a crime committed by a defendant is divisible into degrees. Our conclusion arrived at from a study of the several cases is that the judgment need only indicate that the court has fixed the degree of the crime prior to the pronouncing of judgment, and no particular or formal language is required.

[3] In the case of *People v. Paraskevo-
polis*, 42 Cal.App. 325, 183 P. 585, 587 (a leading case where the question now before us was under consideration), the court said: "We are not, however, to be understood as holding that the voluntary admission by the defendant, whether in the form of a mere statement or in that of a plea to the charge, that he is guilty of a particular degree of a crime divided into degrees, will not constitute a sufficient evidentiary predicate for the determination by the court of the degree notwithstanding that such statement may not be, or such plea is not, given under oath. To the contrary, we think a voluntary statement or plea by the accused would be sufficient to uphold the determination by the court of the degree. But, even in such case, there must nevertheless be a determination by the court of the degree. In brief, there must be such a determination regardless of the character or nature of the evidence by which the fact is ascertained." The defendant in that case was charged with the crime of murder. The court failed to follow the provisions of section 1192, supra, and the judgment was reversed. In that case the defendant entered a plea of guilty, just as in the present case. Since the decision in the above-named case a somewhat similar question has been presented and considered, and the judgments were not reversed.

In *People v. Stratton*, 133 Cal.App. 309, 24 P.2d 174, the cause was before this court

upon an appeal. There, the degree of the offense was not determined by the court before passing judgment. The judgment was not reversed, but the cause was remanded to the trial court to proceed in accordance with section 1192, *supra*.

In the case of *In re Stroff*, 132 Cal.App. 351, 22 P.2d 770, the court, holding that a judgment was defective by reason of failure of the court to find the degree of the offense, remanded the cause to the trial court in order that proceedings might be had in accordance with section 1192, *supra*.

A number of other cases might be cited, but the foregoing and the cases cited in the opinions are sufficient to support the procedure adopted in all instances where a judgment appears to be defective by reason of the failure of the court to comply with the provisions of section 1192, *supra*. However, we may also call attention to the more recent case of *People v. Bayne*, 136 Cal.App. 341, 28 P.2d 1068, where numerous decisions upholding the rule above stated are cited. Hearing in this case was denied by the Supreme Court on February 19, 1934.

[4] That there are sufficient facts disclosed by the record, including the information and the plea of the petitioner, to justify the trial court in fixing the degree of the offense, does not obviate the requirement of the Code that such degree must be fixed prior to the pronouncing of sentence.

[5] The point is also made by the People that the petitioner is not disadvantaged in any particular by reason of the failure of the court to find the degree of the offense. However, this cannot be determined by appellate court. If the trial court should fix the degree of the offense as murder in the second degree, the question is presented for consideration, is the petitioner in a better position to ask for favorable action by the board of prison terms and paroles than if the offense is determined by the trial court to be murder in the first degree?

Parenthetically we may add that, if the statement of the district attorney which appears in the record is found to be a true statement of the facts by the trial court, a much severer penalty might be awarded than that fixed by the court, of which petitioner now complains. This, however, is the petitioner's peril and not ours.

[6] The writ is discharged and the prisoner is remanded, with direction to the warden of Folsom state prison to deliver the petitioner into the custody of the sheriff of

Fresno county at a time to be fixed by the superior court of that county, without unnecessary delay, for the purpose of allowing the department of said court having charge of criminal cases to ascertain and fix a degree of the offense of which the defendant has pleaded guilty, and thereupon pronouncing such sentence upon the petitioner as may appear to said court to be just and proper, and order the return of the petitioner to the warden of the Folsom state prison, to be there held in execution of the judgment that may be so pronounced upon the petitioner.

We concur: PULLEN, P. J.; THOMPSON, J.



24 Cal.App.2d 160

JESSE et al. v. GIGUIERE.

Civ. 10388.

District Court of Appeal, First District,
Division 2, California.

Dec. 22, 1937.

Rehearing Denied Jan. 21, 1938.

1. Automobiles ⇨244(36)

In guests' action against motorist for injuries sustained in collision occurring at or near obstructed intersection where motorist turned into road and collided with oncoming automobile in which guests were riding, evidence supported implied finding that acts of motorist were proximate cause of accident.

2. Automobiles ⇨246(9)

Instruction that prior entry into intersection at negligent speed would not entitle motorist to right of way was improper, where accident giving rise to suit occurred after amendment of statutes (St.1929, p. 541, § 131).

3. Appeal and error ⇨882(12)

Defendant motorist's request for instruction giving defendant right of way at intersection if he entered first "and at a lawful rate of speed" invited error in instruction given that prior entry of defendant's automobile "at a negligent rate of speed" would not give defendant right of way at intersection and precluded complaint of given instruction.

4. Appeal and error ⇨699(4)

A complaint that court inserted modification before giving instruction requested by appellant was not supported by record which showed that court gave instruction after appellant made modification complained of.

5. Automobiles ⇨171(13)

An instruction that, if defendant had right of way at intersection "and was then and there using ordinary care," defendant had right to assume that driver of other automobile would yield right of way, was proper.

6. Trial ⇨260(8)

In automobile accident case, refused instruction on imminent peril was sufficiently covered by instructions given.

7. Trial ⇨244(4)

In automobile accident case, instructions singling out one of numerous claims were properly refused as attempting to stress specific part of evidence, rather than to present theory of case, and as attempting to fix standard of care under specific facts for one confronted with imminent peril.

8. Trial ⇨244(4)

In automobile accident case, instruction to consider distance automobile traveled after accident in determining whether driver was exceeding speed limit was properly refused as constituting attempt to stress isolated portions of evidence.

9. Damages ⇨130(1)

In spouses' action against motorist for injuries sustained in collision between motorist and automobile in which spouses were riding, award of \$9,000 to wife was not inconsistent with award of \$1,000 to husband.

10. Damages ⇨132(2)

\$9,000 held not excessive for injuries to woman consisting of fractures of all of transverse processes of lumbar vertebrae, with considerable damage to tissue and muscles, requiring confinement in hospital for one month, where there was evidence that injury was permanent, and that woman would have to wear steel corset and could not thereafter do her housework.

Action by Pauline Jesse and husband against E. J. Giguere. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Prior opinion, 71 P.2d 928.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

Ingemar E. Hoberg, of San Francisco, for respondents.

STURTEVANT, Justice.

From a judgment rendered against him for damages for injuries sustained in an automobile collision, the defendant has appealed.

[1] He contends that the judgment is without support in the evidence for the reason that the evidence will not support a finding that any negligence of defendant proximately caused or contributed to plaintiffs' injuries. The accident occurred on the afternoon of the 9th day of June, 1936, in the city of Burlingame. Burlingame avenue runs east and west. On the north side is a polo field. From the south Channing road runs north to Burlingame avenue opposite the polo field. The intersection of those two streets is, within the meaning of the California Vehicle Act, St.1923, p 517, as amended, an obstructed highway. Eucalyptus trees of considerable growth stand somewhat close together along both sides of Burlingame avenue. The curbs of the sidewalks on both the southeast corner and the southwest corner of the intersection are rounded. No marker indicated the center of the intersection and, as we understand the record, no marker indicated the middle line of either Burlingame avenue or Channing road. The plaintiffs were riding as the guests of their son-in-law Sterling L. Hammack. Mrs. Hammack was also riding in the car. Mr. Hammack was driving a Studebaker sedan and was proceeding from the west toward the east along the right-hand side of Burlingame avenue. The defendant and his wife were in the defendant's car, an Oldsmobile sedan, and the defendant was proceeding from the south toward the north along Channing road. The theories of the parties were distinctly different. The defendant contended that he drove north into the intersection, passed to the right of the center of the intersection, and then made a left-hand turn to go west on Burlingame avenue, and as

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

he was about to leave the intersection the accident happened. The plaintiffs contended that Mr. Hammack was driving along the right-hand side of Burlingame avenue at a speed of from 15 to 20 miles an hour, and that when his car reached the westerly property line on Channing road the defendant's car cut the southwest corner of the intersection from 2 to 3 feet north of the rounded curb, dashed into the right-hand side of the Studebaker, and knocked it 15 to 20 feet toward the north with such violence that it was overturned. The defendant asserts that the impact occurred while his automobile was still within the intersection, that his entry into the intersection was senior in time, and he therefore had the right of way, and that the sole proximate cause of the accident was negligence on the part of the driver of the Studebaker. Under his theory of the case that contention would be sound. However, the plaintiffs introduced evidence from which the jury might have inferred that the defendant cut the corner of the intersection in such a manner as to strike the Studebaker under any circumstances. The diagram used at the trial and contained in the transcript, and on which the witnesses called by the plaintiffs marked the course of the Oldsmobile, discloses facts indicating that when the rear end of the Oldsmobile was entering the intersection the front end thereof was leaving the intersection, and that the collision took place west of the intersection and when the Oldsmobile had wholly cleared the intersection and was on its left-hand side of Burlingame avenue. Moreover, the markings indicate that the Oldsmobile was not at any time on the north side of the middle line of the avenue. The diagram further indicates that before the impact the Studebaker had not reached the intersection but by the impact it was knocked to a place about one-half within and one-half without the intersection.

There was evidence that the defendant drove down Channing road in the middle thereof at a speed of from 40 to 50 miles per hour and, without giving any signal of his intention to make a left-hand turn, at a high rate of speed he so swerved around the corner as to make decided marks in the streets for a distance of 25 feet back of the place of the impact. There was evidence that the Studebaker car was proceeding at a rate of from 15 to 20 miles per hour and that the driver did not know the defendant's speed nor his intention of making the turn until the two cars were only

about 60 feet apart, measuring the arc around the southwest corner of the intersection. Giving effect to the foregoing facts, we are unable to say there was no factual support to the implied finding that the acts of the defendant were the proximate cause of the accident.

[2,3] It was one of the claims of the defendant that the impact occurred while he was still in the intersection and that he was the first to enter the intersection and therefore he had the right of way and the sole proximate cause of the collision was the failure of Hammack to yield the right of way. He complains of the trial court's ruling in giving or refusing instructions on that subject. Of its own motion, or on the request of the plaintiffs, the court gave an instruction that the defendant was not, under the facts recited, entitled to the right of way if he "was traveling at a negligent rate of speed." It was a proper instruction as our statutes were formerly worded. *Lindenbaum v. Barbour*, 213 Cal. 277, 281, 2 P.2d 161. But, prior to June 9, 1935, the date of the accident, the statutes (St.1929, p. 541, § 131) had been amended and the instruction as given, was not a correct statement of the law. *Morrow v. Mendelson*, 15 Cal.App.2d 15, 19, 58 P.2d 1302. The plaintiffs say the record does not show that said instruction was not asked by defendant. We think it does. It sets forth a list of all instructions asked by defendant and said instruction is not on the list. Again the plaintiffs assert that the error, if any, was invited by defendant because he asked, and the court gave, an instruction which substantially stated the same rule in the same language. That assertion must be sustained. The defendant requested, and the trial court gave, the following instruction: "If you find that the Oldsmobile driven by Mr. Giguere entered the intersection of Channing road and Burlingame avenue in advance of the Studebaker, and at a lawful rate of speed, then I instruct you that the Oldsmobile driven by Mr. Giguere had the right of way, and it is the duty of the driver of the other automobile under such circumstances to yield the right of way to Mr. Giguere's automobile." (Rep.Tr. 426 and 415.)

The trial court of its own motion, or on request of the plaintiffs, also gave the instruction complained of. It is as follows: "If you find from the evidence that the defendant's automobile entered the intersection first or at the same time as the Studebaker automobile, and you further find that

at said time and place the defendant was traveling at a negligent rate of speed, then I instruct you that the defendant was not entitled to the right of way at the intersection." In other words, the instruction as given of the court's own motion was substantially in the language of the instruction given at the request of the defendant. The latter may not complain. 24 Cal.Jur. 870; 3 Am.Jur. 432; 5 C.J.S. Appeal and Error, 205.

[4, 5] Defendant claims he asked an instruction, the trial court inserted a modification, and then gave it. He objects to the modification. We have italicized the insertion. As so modified, the instruction was as follows: "If you find that Mr. Giguere in driving the Oldsmobile had the right of way, *and was then and there using ordinary care and caution*, then I instruct you that he had the right to assume, and until he knew the contrary, to act upon the assumption that the driver of the other automobile would yield the right of way to him." The objection has no merit. The defendant is not supported by the record, which shows (Rep.Tr. 428-9) that defendant made the modification complained of and then the court gave the instruction. Furthermore, under the general law applicable to negligence cases, the instruction seems to be unobjectionable (19 Cal.Jur. 596) and it was applicable in the instant case (Crabbe v. Rhoades, 101 Cal. App. 503, 507, 282 P. 10).

[6] The defendant asked, and the trial court refused to give, an instruction on the subject of imminent peril. That refusal was based on the statement of the trial court "given elsewhere." That statement is supported by the record. The subject was fully covered by instructions 27 and 28. In the order numbered they are:

(27) "In time of imminent danger, a person is not necessarily negligent because he failed to take every precaution or adopt every means of safety that a careful calculation subsequently shows he might have taken or adopted. Where, however, two courses are open to the imperiled party, he should not take voluntarily a chance of obvious danger when a safe course is open and apparent to him."

(28) "You are further instructed that this doctrine of imminent peril does not apply to a party who by reason of his own negligence creates the sudden peril which confronts him."

[7] The defendant also asked the trial court to give several specific instructions. The trial court refused to give them, and defendant assigns such refusal as error. We think the assignment is without merit. Each was a formula instruction. During the trial the plaintiffs contended that the defendant was, at the time of the accident, driving at an excessive speed; that in making the turn into Burlingame avenue he did not first give a signal of his intention, neither did he drive around the right-hand side of the center of the intersection; and that in traversing the intersection he did not use due care or any care. The defendant contended that he did not do any of those things; that Hammack drove on his left-hand side of Burlingame avenue; that he drove at an excessive speed; that, after defendant entered the intersection, Hammack also entered and did not yield the right of way; that in so entering, and when he saw the defendant was turning to his left, Hammack attempted to pass at close range in front of defendant and to drive on the north side of Burlingame avenue. The instructions fully covered every issue so made. The said refused instructions were restricted to the single claim that Hammack attempted to pass in front of and at close range to defendant's car. They may not properly be said to be addressed to a theory of one of the parties. *Graham v. Consolidated M. T. Co.*, 112 Cal.App. 648, 651, 297 P. 617. They were but an attempt to stress a specific part of the evidence in violation of well-settled rules. 24 Cal.Jur. "Trial," § 102; *Stuart v. Preston*, 2 Cal.App.2d 310, 322, 38 P.2d 155. Furthermore, instructions on such specific facts would, under the facts, have been an attempt to fix a standard of care when confronted with an imminent peril. That subject was, as we have shown, fully and completely covered. To have gone further was to create a conflict with the very essence of the doctrine of imminent peril. It is patent when the jury was properly told that, when confronted with an imminent peril, " * * * a person is not necessarily negligent because he fails to take every precaution or adopt every means of safety that a careful calculation subsequently shows he might have taken or adopted," it would be error to specifically analyze the facts and state to the jury that such acts did or did not constitute negligence.

[8] The defendant requested, and the trial court refused to give, another instruction: "In considering whether the driver

of the automobile in which Mr. and Mrs. Jesse were riding was or was not exceeding the speed limit, you have the right to consider, for such weight as you deem proper to give the evidence, the distance that his car traveled after the accident, and its movements before it came to a stop." In so refusing the trial court did not err. It was another attempt to pick out isolated portions of evidence and instruct thereon. 24 Cal.Jur. "Trial," § 102.

[9,10] By its verdict the jury awarded Mr. Jesse damages in the sum of \$1,000. The defendant makes no objection. It awarded Mrs. Jesse damages in the sum of \$9,000, and the defendant contends that sum is excessive. He bases that contention on the claim that the two awards are inconsistent. We think not. It is not claimed their injuries were the same. There was evidence that Mrs. Jesse sustained fractures of all of the transverse processes of the lumbar vertebrae with considerable damage to the tissue and muscles. She was confined in a hospital for one month. At the time of the trial (nine months after the accident) she had recovered to a considerable extent. But she had lost thirty pounds in weight and complained of pains and restricted motion in her back. There was evidence that such injury was permanent, that it would be necessary for her to wear a steel corset, and that she could not hereafter do her housework as she had done before the accident. Considering all of these facts, we may not, as a matter of law, say that the verdict was excessive. *Kimic v. San Jose-Los Gatos, etc., Ry. Co.*, 156 Cal. 273, 277, 104 P. 312.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.;
OGDEN, Justice pro tem.



24 Cal.App.2d 60

KOHLSTEDT v. HAUSEUR et al.

Civ. 11588.

District Court of Appeal, Second District,
Division 2, California.

Dec. 14, 1937.

Hearing Denied by Supreme Court
Feb. 10, 1938.

1. Courts ⇨116(4)

The superior court has inherent power, regardless of lapse of time, to amend or

correct clerical errors or misprisions in its records so as to make them speak the truth.

2. Judgment ⇨303

The superior court may correct misprision in judgment even though misprision was that of court.

3. Judgment ⇨323

The superior court has jurisdiction to amend clerical errors in judgment *ex parte*.

4. Judgment ⇨297

A judge who has made a decision may thereafter determine whether judgment as written expresses decision, but he should not direct amendment unless he is satisfied that original entry does not clearly express order which was made.

5. Judgment ⇨306

That original judgment followed findings of fact and conclusions of law did not preclude court from thereafter determining whether alleged error in judgment was a judicial error or a clerical error.

6. Judgment ⇨323

An order amending judgment on plaintiff's *ex parte* application so as to render liable a defendant who had appeared and filed answer and had been held not liable to plaintiff, although he had not taken part in trial, was valid.

7. New trial ⇨109

One failing to observe statutory procedure is without right to move for new trial as against one standing upon statute and insisting upon strict compliance therewith (Code Civ.Proc. §§ 658, 659, and § 660, as amended by St.1933, p. 305).

8. New trial ⇨136

The granting of new trial as to adverse party upon whom notice of intention to move for new trial had not been served was improper (Code Civ.Proc. §§ 658, 659, and § 660, as amended by St.1933, p. 305).

McCOMB, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Clara Kohlstedt against Frederick J. Hauseur and others. From orders setting aside an order amending a judgment and setting aside an order granting a new trial, plaintiff appeals.

Order setting aside order amending judgment reversed, and order setting aside order granting new trial affirmed.

Frederick G. Stoehr, of Pasadena, for appellant.

Robert F. Shippee and Don L. Gilman, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

After devoting a week to the trial of the case, the trial court on October 24, 1934, signed findings of fact and conclusions of law. The first conclusion of law was that the plaintiff was entitled to judgment against defendant Hauseur, and the second, "That plaintiff is not entitled to any judgment as against any other defendant herein." Pursuant to said findings and conclusions, judgment was entered against the defendant Hauseur only and in favor of the other defendants, including Gold. Gold had appeared in the action and filed his answer, but neither he nor his attorney took part in the trial. On November 8, 1934, plaintiff filed a notice of intention to move for new trial. This notice was not addressed to defendant Gold or his attorney, and was not served upon him. The motion for new trial having been submitted was on December 28, 1934, granted as to defendant Gold. On June 15, 1936, plaintiff made an ex parte application to amend the judgment of October 24, 1934, nunc pro tunc as of that date, which was supported by his affidavit, to which was attached a transcript of the trial judge's remarks at the close of the trial. Based on this application and the supporting affidavit and transcription and the court's memory, the court amended the judgment of October 24, 1934, by adding the words "and Ben Gold" after the name "Frederick J. Hauseur" in the first paragraph, and striking the words "or Ben Gold" in the second paragraph. In addition the court signed a judgment dated June 12, 1936, nunc pro tunc as of October 24, 1934, covering the same situation.

Defendant Gold made two motions: (1) In general to set aside the proceedings had to amend the judgment; and (2) to set aside the order granting the motion for new trial as to defendant Gold. Each motion was granted on December 21, 1936, and plaintiff has appealed therefrom.

The sole question necessary for a determination of this appeal is whether the court's order of December 21, 1936, setting aside former orders of the court was

erroneous. And this depends upon whether the orders which were set aside were void for lack of jurisdiction in the court to make them.

[1,2] The superior court has inherent power to correct its records so as to make them speak the truth (*Crim v. Kessing*, 89 Cal. 478, 26 P. 1074, 23 Am.St.Rep. 491; *Kaufman v. Shain*, 111 Cal. 16, 43 P. 393, 52 Am.St.Rep. 139; *Halpern v. Superior Court*, 190 Cal. 384, 212 P. 916; *Lauchere v. Lambert*, 210 Cal. 274, 291 P. 412; *Security-First National Bank v. Ruddle Properties*, 211 Cal. 346, 295 P. 343; *Norton v. City of Pomona*, 5 Cal.2d 54, 53 P. 2d 952; *Christie v. Christie*, 99 Cal.App. 53, 277 P. 872; *Dutton Dredge Co. v. Goss*, 77 Cal.App. 727, 247 P. 594), and this is true, regardless of the lapse of time, to amend or correct clerical errors or misprisions. *Crim v. Kessing*, supra; *Kaufman v. Shain*, supra; *City and County of San Francisco v. Brown*, 153 Cal. 644, 96 P. 281; *Halpern v. Superior Court*, supra. The court has power to correct its judgment even though the misprision was that of the court. 14 Cal.Jur. 995, § 72; *Bemmerly v. Woodward*, 124 Cal. 568, 569, 57 P. 561; *Kowalsky v. Nicholson*, 23 Cal. App. 160, 137 P. 607; *Christie v. Christie*, supra; *King v. Emerson*, 110 Cal.App. 414, 288 P. 1099, 294 P. 768; *Dalley v. B. & H. Transportation Co.*, 114 Cal.App. 320, 299 P. 748.

[3] The respondent contends that the court did not have jurisdiction to make the orders amending the judgment ex parte. The law is that the court may make the correction ex parte and of its own motion. *Crim v. Kessing*, supra; *Lauchere v. Lambert*, supra; *Livesay v. Deibert*, 3 Cal.App.2d 140, 39 P.2d 466, 469. In the case of *Livesay v. Deibert*, supra, the Court of Appeal said: "Appellant makes the further claim that the court could not make the order ex parte, but only on motion after notice given. This view, however, is contrary to the settled rule that the court not only has the power but is also under the duty, upon its own motion, to correct such mistakes when they are called to its attention. *Robson v. Superior Court*, 171 Cal. 588, 154 P. 8."

[4] It is for the judge who made the original decision to decide whether the judgment as written expresses his decision. *Kaufman v. Shain*, supra; *Kowalsky v. Nicholson*, supra. In acting upon the matter the judge is exercising one of the

functions of his judicial office, and he will not direct the amendment unless he is satisfied that the original entry does not clearly express the order which was made. *Kaufman v. Shain*, supra.

In the case of *Livesay v. Deibert*, supra, the court further said: "It was for the trial judge to determine whether the order was complete and all that he intended it to be or whether it was deficient. If the mistake was clerical, it could be corrected. If it was judicial, it could not be. It must be presumed that he found it to be his own clerical error; otherwise he would have had no right to make the second order. The facts were completely and solely within his own knowledge. He alone knew whether a mistake had been made and how it had been made. He had a right to rely upon his own memory (*King v. Emerson*, supra), and his determination of the fact is conclusive. *People v. Curtis*, 113 Cal. 68, 45 P. 180; *Kaufman v. Shain*, 111 Cal. 16, 43 P. 393, 52 Am.St.Rep. 139; *Harman v. Cabaniss*, 207 Cal. 60, 276 P. 569. This disposes of the claim that the second order was an afterthought or an attempt to correct a judicial error. It follows that the fact was as stated in the amending order and that that order attempted to do no more than correct the record to make it speak the truth."

[5] The defendant admits that it is generally true that it is for the trial judge to determine whether or not the error was a judicial error or a clerical one, but he contends that his conclusion that it was clerical does not make it so, if the record shows to the contrary, and he contends that the error, if there was error, in failing to include him as a judgment debtor in the judgment was judicial by reason of the fact that the original judgment followed the findings of fact and conclusions of law, citing 14 California Jurisprudence 1000. That does not necessarily follow, as appears from the case of *Harman v. Cabaniss*, 207 Cal. 60, 276 P. 569, 570. In that case findings had been made and judgment entered according to the findings. About three years later defendant moved for an order to correct the findings and judgment. The superior court refused to entertain the motion, believing, as defendant Gold contends, that since the judgment was supported by findings he had no jurisdiction to correct either. On petition for writ of mandate the Supreme Court said: "Unquestionably the court, under

the circumstances here presented, had and has the power to entertain and pass upon the motion. It has full power to determine whether the alleged error was clerical or judicial in character, and, if clerical, to set aside the interlocutory decree, correct the error, and enter judgment on the findings as corrected and conclusions of law to be drawn therefrom."

[6] In our view the order amending the judgment was a valid order rendered within the scope of the court's jurisdiction, and such order was subject to review only in the manner prescribed by law.

[7,8] With regard to the order granting the motion for new trial, the right to a new trial is statutory and the manner of applying for and procuring it is prescribed in the Code of Civil Procedure, §§ 658, 659 and section 660, as amended by St.1933, p. 305. The statutory procedure must be observed, and, unless the prescribed steps are taken in accordance with the Code, the right to move for new trial does not exist as against one who stands on the statute and insists upon strict compliance therewith. 20 Cal.Jur. 145; *Diamond v. Superior Court*, 189 Cal. 732, 210 P. 36. When the order was granted the plaintiff had not served upon the adverse party a notice of his intention to move for a new trial, and the court had no authority to grant such motion. *Title Insurance & Trust Co. v. California Development Co.*, 171 Cal. 173, 152 P. 542. The order setting aside the order granting a new trial was therefore proper.

The order setting aside the order amending the judgment is reversed. The order setting aside the order granting a new trial is affirmed.

I concur: WOOD, J.

McCOMB, Justice (dissenting in part).

I concur in the affirmance of the order setting aside the order granting a new trial, but I dissent from the order reversing the order of the trial court in setting aside its previous order amending its judgment. In my opinion the error in the original judgment which the trial court attempted to amend was a "judicial error" and not a "clerical error" and therefore, as stated in the majority opinion, not subject to correction by a subsequent amendment by the trial court. See 14 Cal.Jur. 999, § 74.

The foregoing conclusion is supported by *Schattinger v. Schattinger*, 80 Colo. 261, 250 P. 851, at page 852, in which case the Supreme Court of Colorado, in holding that a mistake in a decree is not a clerical error but a judicial error which may be rectified only in the ordinary way for reviewing judicial errors, says: "The court, in making these findings and decree, was exercising a judicial discretion and performing a judicial function, and, if it made a mistake therein, either through inadvertence or otherwise, such mistake cannot be rectified in a motion or in an equitable action brought for the purpose of making the decree speak the truth. In such an action as this, the court may not correct such judicial mistakes or errors. * * * It may be that the court improperly found that the source of supply was the wastage from a ditch not then in existence, but the court in doing so was exercising a judicial function and its mistake may be corrected, if at all, not in an action like this, but in the ordinary way for reviewing judicial error committed by a trial court."



TEN WINKEL v. ANGLO CALIFORNIA SECURITIES CO.*

Civ. 10566.

District Court of Appeal, First District,
Division 2, California.

Dec. 17, 1937.

Rehearing Denied Jan. 15, 1938.

Hearing Granted by Supreme Court
Feb. 15, 1938.

1. Exchange of property ⇨3(1)

In action to quiet title, where plaintiff introduced plaintiff's duly acknowledged offer to exchange real property, which in effect constituted agreement for exchange of real property, admitting in evidence acceptance of offer purportedly signed by alleged acceptor, but not proved to be so signed and not duly acknowledged by alleged acceptor, was error.

2. Records ⇨8

Where agreement to exchange real estate was delivered to recorder in two parts, consisting of offer and acceptance, and offer was duly acknowledged, but acceptance was not, recorder was required to record

whole agreement, but to index it merely in name of offeror.

3. Vendor and purchaser ⇨231(15)

Where party to exchange of real property did not acknowledge acceptance of offer to exchange real property, although both offer and acceptance were recorded, recordation did not constitute constructive notice of existence of acceptance as against grantees or mortgagees of acceptor.

4. Mortgages ⇨186(5)

In action to quiet title against trust deed grantee's assignee, evidence held to show that assignee had actual notice of agreement between plaintiff and trust deed grantee to exchange real property.

5. Exchange of property ⇨3(1)

In action to quiet title against trust deed grantee's assignee, acceptance purportedly by trust deed grantee of plaintiff's offer to exchange real property was not competent to establish that plaintiff took real property received in exchange subject to trust deed, where acceptance was not acknowledged by trust deed grantee, and no evidence was introduced that trust deed grantee executed acceptance.

6. Mortgages ⇨186(4)

In action to quiet title to apartment in community apartment house received by plaintiff in exchange for real property, agreement between plaintiff and corporation to be formed, which corporation never was formed, was incompetent to show that plaintiff took apartment subject to defendant's trust deed.

7. Evidence ⇨99

In action to quiet title to apartment in community apartment house, involving question of whether apartment plaintiff received in exchange for real property was subject to defendant's trust deed, documents executed by corporation which took over apartment house and by plaintiff after execution of exchange agreement were incompetent to show that plaintiff took apartment subject to trust deed; such documents being *res inter alios acta* as to defendant.

8. Mortgages ⇨186(5)

In action to quiet title to apartment in community apartment house, evidence held insufficient to show that plaintiff took apartment subject to trust deed on apartment house executed by promoter of apartment house project.

*For subsequent opinion see 81 P.2d 958.

9. Vendor and purchaser ⇨70

To hold cash purchaser of apartment in community apartment house liable for pro rata share of building cost, there must be clear language showing assumption of such payment.

10. Mortgages ⇨186(5)

In action to quiet title to apartment in community apartment house, evidence held to show that plaintiff did not agree to pay any part of loan secured by trust deed to apartment house, were not parties to trust deed, and that trust deed was subordinate to contract whereby plaintiff acquired apartment.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Florence L. Ten Winkel against the Anglo California Securities Company. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Tobias J. Bricca, of San Francisco, for appellant.

Young, Hudson & Rabinowitz, of San Francisco, for respondent.

STURTEVANT, Justice.

In an action to quiet title to an apartment in a community apartment house, the court rendered judgment in favor of the defendant and the plaintiff has appealed therefrom. If the plaintiff's interest in the apartment was subject to a certain deed of trust hereinafter discussed, the judgment should be affirmed, otherwise it should be reversed, because that is the sole material point presented by the record. The rights and liabilities of the respective parties are novel and involve a consideration and interpretation of many written documents. The pertinency of each requires a chronological statement of the following facts:

In 1926, or prior thereto, Mary Thomas owned a lot on the east line of Hyde street north of Greenwich street. F. W. Ten Winkel and his wife, this plaintiff, owned a lot on the east line of Southard place. The first lot extends back to Southard place and the second lot is immediately across Southard place. On the second lot was a two-story building consisting of an upper apartment occupied by the Ten Winkels and a lower apartment occupied by their tenant.

Both lots stand on high ground, and, from each, one has an extensive marine view except as the building on the second lot may obstruct the view from the building on the first lot. In 1926, Cleve Shaffer and Geneva Shaffer, his sister, commenced the promotion of a building plan. It contemplated the construction of a community apartment house on the Thomas lot. The building was to be fifteen stories high, and each floor consisting of one apartment. A sales price was to be put on each apartment and the total thereof, \$320,365, was to cover the costs. To protect the view of the several apartments, the property of the plaintiff and her husband was to be purchased, the building thereon was to be torn down, and that lot was to remain vacant. A nonstock, non-profit corporation was to be formed, "View Tower, Inc.," and in due time one apartment was to be transferred to each member, each member was to enter into a lease, and all members acting through the corporation would operate the apartment house. (At times the parties used different names for the corporation. We have not corrected that misuse.)

An escrow was opened with the California Pacific Title & Trust Company. Later an instrument was executed which was (omitting irrelevant parts) as follows:

"It is agreed that F. W. Ten Winkel and wife, residents of the City and County of San Francisco, State of California, owners of the following described property situated in the City and County of San Francisco, State of California, to wit:

"All that certain lot, piece or parcel of land situated on the East line of Southard Court, about 107 feet North of Greenwich Terrace designated and known as No. 1 Southard Court, size of lot being 30 feet by 56 feet, which we desire to exchange for property owned or to be acquired by Tower View, (a corporation to be organized), which said property is now in the name of Mary Thomas, widow and is situated in the City and County of San Francisco, State of California, and described as follows, to wit:

"All that certain second floor and its appurtenances, in that certain Class 'A' building to be erected on the lot situated on the East line of Hyde Street, 112 feet 9 inches north of Greenwich Street running thence Easterly to the Westerly line of Southard Court. Lot 25 feet by 56 feet. Said apartment to be built and constructed as per

plans and specifications hereto attached and made a part hereof.

"Terms of Exchange, being as follows:

"In lieu of a cash payment, grant, bargain and sale deed to first property hereinabove described, shall be immediately deposited in escrow with the Title Insurance Company of San Francisco, upon conditions and terms herein specified and not otherwise. * * *

"4. It is further understood and agreed that all costs of upkeep, and expenses for maintaining and running said Tower View apartment building, shall be based and proportioned to said Ten Winkel, his heirs, successors or assigns, on a valuation of Fifteen Thousand (\$15,000) Dollars, and no more.

"B. A. Shaffer is authorized to act as agent in negotiating said exchange, and we agree that if the owner of the property secondly above described will exchange said property on said terms and conditions herein specified, we will, within ten days furnish a certificate of title from a reliable abstract company, and a good and sufficient grant, bargain and sale deed, with the restriction above mentioned, conveying title to the property firstly above described.

"It is also agreed that when said agent has secured an acceptance in writing upon the terms and conditions herein contained to make said exchange, and when notice in writing is given to said Ten Winkel that half the apartments in said Tower View are sold, we will deposit with said Title Insurance Company, Fifteen Hundred (\$1,500) Dollars, balance of purchase price of said apartment, being the total purchase price of Fifteen Thousand (\$15,000) Dollars, and will allow sixty (60) days for the furnishing of satisfactory certificate of title or title search of said property secondly described.

"Dated October 18, 1926

"Florence L. Ten Winkel

"F. W. Ten Winkel."

"(Duly acknowledged.)

"Acceptance

"This agreement witnesseth: That Mary Thomas, or Tower View (a corporation to be organized) or agents or assigns, owner of the piece of real estate secondly herein described, hereby accepts the said proposition of exchange upon the terms and conditions herein mentioned, and agree to furnish a certificate of title to said second floor cooperative apartment, the price of which is

Fifteen Thousand (\$15,000) Dollars, free and clear of all liens or incumbrances except those on building as a whole and then to deliver a proprietary lease and proportionate interest in the said cooperative apartment building to F. W. Ten Winkel and wife, or their assigns, or agrees to pay said Ten Winkel the sum of Thirteen Thousand Five Hundred (\$13,500.00) Dollars for said real property first above described, or re-deed said property to said Ten Winkel.

"And we further agree to pay customary commission.

"Dated at 560 Sutter St. this 25 day of September, 1926.

"Mary Thomas"

"(Not acknowledged.)

"Recorded at the request of G. A. Shaffer, Oct. 25, 1926, at 42 min. past 2 p. m."

It was recorded at the time written thereon. On October 25, 1926, Mr. Ten Winkel deposited in the escrow said agreement and a deed executed by himself and wife. No claim is made that they did not do and perform all things by them agreed to be done. Later, View Tower, Inc., was incorporated, it adopted by-laws, a certificate of membership was issued to the Ten Winkels, they took a lease on their apartment, and on November 14, 1928, they took possession of their apartment and commenced to occupy it. Ever since they have continued to occupy it by themselves or by their duly authorized tenant.

In the meantime, the promoters and their assignees and transferees proceeded as follows:

On November 23, 1926, Mary Thomas conveyed to Cleve Shaffer, both of the above-mentioned lots. On April 30, 1927, Cleve Shaffer executed a deed of trust to the Anglo California Trust Company in favor of Mary Thomas to secure the payment of an installment promissory note of \$175,000. The note was payable \$1,486.74 per month commencing on the 1st day of March, 1928. Mary Thomas indorsed and transferred said note and assigned her interest in said deed of trust to this defendant. But the record does not disclose the date. It was recorded May 23, 1927. Except as we will note, neither View Tower, Inc., nor the Ten Winkels have ever assumed or agreed to pay said note or any part thereof.

Mr. Ten Winkel died September 29, 1933. His wife was appointed executrix of his will. Later the interest of the decedent

was distributed to her under the terms of the will.

Certain installments on the note not having been paid the defendant foreclosed the deed of trust and at the sale it claims to have purchased the entire property.

[1] The original executory agreement of exchange was not produced at the trial. The plaintiff produced a certified copy from the recorder's office and introduced in evidence the offer of Mr. and Mrs. Ten Winkel to wit, all of said instrument down to the word "Acceptance." The defendant offered all of the rest of said instrument. Before doing so it introduced no evidence whatever that said acceptance was ever signed by Mary Thomas, nor any evidence as to the contents of any instrument that may have been signed by Mary Thomas. The plaintiff objected to said offer, the objection was overruled, and she asserts that the ruling was erroneous. We think that assertion is well founded. The offer to exchange was in effect an agreement that the Ten Winkels would grant to Mary Thomas their lot and at the same time it was an agreement that Mary Thomas would grant to the Ten Winkels an interest in real estate held by her. In other words, each agreed to grant. That agreement was acknowledged by the Ten Winkels and was binding on them. Mary Thomas did not acknowledge the instrument, and it was not, as to her, entitled to recordation and the recordation thereof was not constructive notice to the defendant. *Keese v. Beardsley*, 190 Cal. 465, 472, 213 P. 500, 26 A.L.R. 1538; *Mayhew v. Melby*, 206 Cal. 396, 397, 398, 274 P. 517; *Harjo v. Collins*, 146 Okl. 131, 293 P. 179, 72 A.L.R. 1034, and note. It follows that the "Acceptance" should not have been admitted in evidence.

The plaintiff contends that the execution of the trust deed was subordinate to her title, and that she is not responsible for the payment of the debt secured by the trust deed or any part thereof. That contention is broken up into the statement of several points. She first asserts that she and her husband acquired an interest in real property. *Estate of Pitts*, 218 Cal. 184, 22 P. 2d 694. The defendant does not argue to the contrary. That contention may therefore be taken as admitted.

[2, 3] The plaintiff further contends that she and her husband were never divested of their interest in apartment No. 2, that the defendant had notice of their interest,

and that there is no evidence to support the findings to the contrary. That contention she supports by three separate arguments. In the first one she claims that when on April 30, 1927, Cleve Shaffer executed a promissory note in the sum of \$175,000 in favor of Mary Thomas, and executed a deed of trust to the Anglo California Trust Company to secure said note, the above-mentioned offer to convey had been executed by the plaintiff and her husband and had been duly recorded. Continuing, she argues that the record of their said offer to convey was constructive notice of its contents. That argument is not sustained by the authorities. When the agreement to exchange was delivered to the recorder as noted above, it was in two parts; the offer by the Ten Winkels and the acceptance by Mary Thomas. On receipt of it, it was the duty of the recorder to record the whole, but to index it merely in the name of the Ten Winkels. *People v. Donegan*, 226 N.Y. 84, 123 N.E. 71. As the grantor of the property in suit had not acknowledged the acceptance, that portion was not entitled to recordation, and the fact it was recorded would not be constructive notice of its existence against the grantees and mortgagees of Mary Thomas. *Keese v. Beardsley*, supra, 190 Cal. 465, 473, 213 P. 500, 26 A.L.R. 1538.

[4] However, the plaintiff goes further. She claims the defendant had actual knowledge of the existence of the agreement to exchange. In support of that claim she calls attention to the following matters: It was stipulated that notice to the Anglo California Trust Company was notice to the defendant Anglo California Securities Company. On April 12, 1922, Mary Thomas executed to Western American Realty Company as trustee a deed of trust in favor of Anglo California Trust Company to secure a promissory note in the sum of \$13,000. That trust deed covered the Hyde street lot. On March 30, 1927, when the transactions involved in this action were being had the obligation last mentioned was renewed. Mary Thomas executed another trust deed to the same trustee in favor of the same party to secure the payment of a promissory note in the sum of \$10,000. It was stipulated that said act was for the purpose of renewing the existing debt. Before accepting the documents, Anglo California Trust Company required the Ten Winkels to jointly execute the documents with Mary Thomas. Such demand the plaintiff asserts showed knowledge on the

part of the trust company, and therefore on the part of this defendant, that the Ten Winkels had an interest in the Hyde street property. However, there is no evidence that the Ten Winkels had any interest whatever excepting through the above-mentioned agreement to exchange. The record supports no other inference than this, that the Anglo California Trust Company knew of the existence of said agreement and the terms thereof. It is a significant fact that the trust company and its affiliate thereafter cause the \$10,000 trust deed to be recorded April 4, 1927, and the \$175,000 trust deed to be recorded May 23, 1927. In this same connection it should be noted that Mr. Laughner, assistant trust officer of the Anglo California Trust Company, on May 13, 1927, wrote an acknowledgment of the receipt of \$13,500 from the Ten Winkels (being the value of their lot) upon the face of the agreement between Tower View Community, Inc., and the Ten Winkels. Moreover, in this same connection, as hereinabove noted, from April 30, 1927, the date of the \$175,000 trust deed, down to November, 1933, no demand was ever made on Tower View, Inc., or on the Ten Winkels for any part or portion of the \$175,000 loan. These facts we think sustain the claim of the plaintiff that the defendant had actual notice of the exchange agreement.

[5-10] The defendant does not claim that it did not have notice but asserts that under the terms of certain written instruments the plaintiff took subject to its trust deed securing the payment of the loan for \$175,000. It first relies on the "Acceptance." But as shown above said document was not acknowledged by Mary Thomas and it has no standing as a recorded instrument. No evidence was introduced that Mary Thomas executed a document of which it was a copy, and therefore it was merely a scrap of paper and not entitled to be received in evidence. Defendant then relies on a purported exchange agreement dated May 9, 1927. That document refers back to the "trade agreement," meaning perhaps the first agreement written by the plaintiff and Mary Thomas. But the instrument dated May 9, 1927, was, on its face, an agreement between the Ten Winkels and "Tower View Community, Inc. (a corporation to be formed)." No such corporation was ever formed. Tower View, Inc., was formed July 11, 1928. On May 9, 1927, it had no power to contract. It then relies on passages contained in the articles of incorpora-

tion, by-laws, certificate of membership, and the lease by Tower View, Inc., to the Ten Winkels. Each and all of those documents were executed many months subsequent to the exchange agreement. Each and all were executed by Tower View, Inc., and the Ten Winkels. As to the Anglo California Securities Company and its affiliates, said documents were *res inter alios acta*. It is not claimed and there is no evidence that after the exchange agreement was made in October, 1926, any additional contract was made which purported to modify, change, or alter the original agreement of exchange. It follows there was no evidence that the Ten Winkels took their interest in the apartment house subject to the trust deed held by the defendant to secure the payment of its loan of \$175,000 to Cleve Shaffer. The conclusions just stated are in accord with the acts of the parties. Although the Ten Winkels were required by the Anglo California Trust Company to join with Mary Thomas in executing a trust deed to Western American Realty Company to secure the payment of the \$10,000 loan, they were not asked to join with Cleve Shaffer in executing the trust deed executed to secure the payment of the \$175,000 loan. Furthermore, at no time from the date of the execution of the trust deed last mentioned down to November, 1933, were the Ten Winkels asked to make any payments on said loan. This, notwithstanding the fact that as each apartment was sold or leased the contract was deposited with this defendant and this defendant thereafter made the collections under such contracts according to the terms thereof. The Ten Winkels' contract was also deposited, but thereon Mr. Laughner, an officer of the defendant, indorsed the fact of the first payment and its date and of the second payment. Such indorsements were made before the defendant recorded its deed and before it had made any advancements whatsoever.

Bearing in mind the basic fact that the parties were contemplating the construction of a community apartment house of approximately fifteen separate apartments, it is clear that an intending purchaser might desire to purchase an apartment paying the whole of the purchase price in advance. It is equally clear that to construct a class A building fifteen stories high and purchase the ground to build on, a total cost of \$320,365, the promoters might be called upon to negotiate a building loan. It is further clear that such transactions would require

accounts to be kept with the building and with each apartment. However, it is also clear that if an intending purchaser agreed to pay cash for his apartment in advance, it would require clear language to show that he also assumed to pay in addition thereto his pro rata of the building cost. Such clear language does not appear in any single document called to our attention. It follows that under their contract the Ten Winkels did not agree to pay any part of the loan made by the defendant, that they were not parties to the trust deed in any respect, and that the trust deed was subordinate to their contract. As the plaintiff contends, portions of findings 3, 4, and 5 to the contrary are not supported by the evidence.

The judgment is reversed, and the trial court is directed to reframe its findings interpreting the contract in a manner not inconsistent with what has been said, and thereupon to enter judgment in favor of the plaintiff.

We concur: NOURSE, P. J.; SPENCE, J.



HENSLEE v. FOX et al.*

Civ. 10444.

District Court of Appeal, First District,
Division 2, California.

Nov. 29, 1937.

Rehearing Granted Dec. 29, 1937.

1. Automobiles ⇨245(82)

Whether motorcyclist who collided with truck was contributorily negligent in driving on left-hand side of street held for jury, in view of automobiles parked on street and other conditions (St.1923, p. 557, as amended by St.1931, p. 2124).

2. Automobiles ⇨173(1)

A truck driver who collided with plaintiff's motorcycle was bound to look before starting to move truck from place where it was parked (St.1925, p. 413, § 130(a).

3. Appeal and error ⇨930(1)

On review of judgment for plaintiff in action arising out of collision between plaintiff's motorcycle and defendant's truck, court

was required to assume that jury did not accept testimony of truck driver in conflict with motorcyclist's testimony as to whether truck was standing still or moving, and was required to assume that jury found truck driver guilty of negligence.

4. Appeal and error ⇨1195(1)

Opinion on former appeal does not constitute "law of the case" governing second trial, unless evidence on second trial is same as on first trial.

5. Appeal and error ⇨1064(1)

In automobile accident case, charge that Motor Vehicle Act did not apply if accident occurred in place not "customarily" used by general public as thoroughfare, but that defendant owed duty to exercise ordinary care in any event, was not prejudicial to defendant, although statute defining "public highway" does not employ word "customarily" (St.1931, p. 2102, § 21).

6. Trial ⇨296(4)

In action arising out of collision between plaintiff's motorcycle and defendant's truck, instruction predicated recovery on finding that truck driver failed to give plainly visible signal to motorcyclist of his intention to start or turn truck upon highway and that such negligence was "sole" proximate cause of motorcyclist's injury, considered with other instructions, was not erroneous because of failure to require finding that plaintiff was free from negligence, since use of word "sole" implied such a limitation.

7. New trial ⇨9

In personal injury action, granting plaintiff new trial on sole issue of damages was not abuse of discretion, under evidence indicating that issue of damages could be separately tried apart from the facts of the accident.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by James Henslee against John Fox and others. From a judgment against defendants and from an order granting plaintiff a new trial on the sole issue of damages, defendants appeal.

Affirmed.

Cooley, Crowley & Supple, of San Francisco, for appellants.

*For subsequent opinion see 77 P.2d 307.

Ingemar E. Hoberg, of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal taken by the defendants from a judgment against them in a personal injury case and from an order granting plaintiff a new trial on the sole issue of damages. It is the second appeal. *Henslee v. Fox*, 10 Cal.App.2d 202, 51 P.2d 1176.

[1] The accident happened at about 10:30 a. m. on November 7, 1932. The place was in Berry street, between Third street and Fourth street, in San Francisco. Berry street runs east and west and Third and Fourth streets run north and south. Grocers Terminal Building extends along the entire southern side of Berry street and a railroad track extends along the entire northern side. The space between, 57 feet wide, is used as a street, although the fee is vested in the Southern Pacific Company. On the second trial the plaintiff produced a diagram which became known as Plaintiff's Exhibit 2 and a photostatic copy of which is inserted in the brief of the defendants. The original was drawn to a scale, eight feet to one inch. To what extent the size of the copy was decreased the record does not show. From the record some approximations can be made, but no measurements can be accurately computed. When the case went to the jury, the record showed that at the time of the accident there were lined up in Berry street on the south side nine different vehicles. Each stood at a right angle to the line of the street. The majority of them stood closely abutting the Grocers Terminal Building. One, about 125 feet west of the accident, was abutting the middle line of Berry street. That vehicle was marked H—2. Another stood about 75 feet east. It extended from the south line to the middle line of the street. Between those two another stood at a point almost opposite the truck being operated by Forrest, one of the defendants. On the north side of the street there were, including said truck, five different vehicles, all of which, except the truck, stood at right angles to and closely abutting the railroad track. The street is 57 feet wide measuring from the north line of the Grocers Terminal Building to the railroad track. The evidence was conflicting as to whether the defendants' truck was moving or at a standstill. But it was in a position north-

west to southeast with its front wheels turned somewhat to the right with the rear end toward the railroad. It was about 25 feet long.

The plaintiff entered Berry street from Third street, drove down the space between the fronts of the trucks, and delivered a package at the premises occupied by Sussman-Wormser & Co. at the west end of the block. He then turned his motorcar around and started to return to Third street. He was driving a motorcycle with a sidecar attached. Including the extension of the handles, it was about as wide as an automobile. He testified that as he started east he was at once compelled to drive in the middle of Berry street or on his left to pass the vehicle H—2. As he continued farther he was in the middle or partly on his left hand side of the street. When he was 50 or 60 feet west of the defendants' truck, it was standing still. The plaintiff testified he continued on his course and that when he was 3 or 4 feet from the truck it moved forward, the front wheel ran over the left pedal of the motorcycle and broke his left leg.

The defendants contend the plaintiff was guilty of contributory negligence as a matter of law because he was driving in part, at least, on his left hand side of the street. That contention may not be sustained by the record before us. Section 122 of the California Vehicle Act (St.1923, p. 557, as amended by St.1931, p. 2124), omitting irrelevant parts, provides: "Upon all highways of sufficient width * * * the driver of a vehicle shall drive the same upon the right half of the highway * * * (b) In driving upon the right half of a highway the driver shall drive as closely as practicable to the right hand edge or curb of the highway." From what has been said above, it is clear the plaintiff could not have driven near the curb. The diagram before us shows none of the other vehicles stood across the middle line of the street. It does not show the width of the unoccupied zone between the fronts of the parked vehicles. It does show such zone was of irregular widths. In particular it does not show the width of said zone in front of the defendants' truck. In attempting to go from the door in front of Sussman-Wormser & Co. out to Third street it is clear that any driver in that particular locality in the exercise of ordinary care would endeavor not to drive so close to the bumpers of the parked vehicles

as to brush the same. Furthermore, said driver would be aware that any one of the parked vehicles might move forward at any moment. As to when it was or was not impracticable to drive nearer the right hand edge or curb became a question to be decided by a consideration of many different facts and circumstances. By its verdict the jury found the plaintiff was not negligent. Considering all of the facts we may not say the verdict was not supported by the evidence. Much less may we say the plaintiff was guilty of negligence as a matter of law.

[2, 3] As stated above, when the plaintiff was within 3 or 4 feet of the truck, he then saw it move. Before that it had been still. When he was in that place he testified the driver of the truck started forward and collided with the plaintiff's motorcycle. Immediately before the impact, under the uncontroverted evidence, the plaintiff had proceeded in the unoccupied zone and had traversed it for a distance of about 150 feet on the defendants' right going toward Third street. He says he was given no warning. Before the driver of the truck started to move he was bound to look. Our statute provides: "The driver of any vehicle upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety, and if it can not be made in safety, shall wait until it can be made in safety." California Vehicle Act, § 130(a), St.1923, p. 558, as amended by St.1925, p. 413. The view of the driver of the truck was not obstructed. In fact, he testified he was looking at the movements of the plaintiff. However, he also claimed his truck was at a standstill and, without looking, the plaintiff ran into the parked truck. In support of the verdict we must assume the jury did not believe and did not accept as true the statement of the truck driver, and found him guilty of negligence.

[4] The defendants press the contention that *Henslee v. Fox*, supra, is the law of the case. However, they do not even claim the evidence on the second trial was the same as on the first trial. Their contention cannot therefore be sustained. *Erllin v. National Union Fire Ins. Co.*, 7 Cal. 2d 547, 549, 61 P.2d 756.

[5] Acting upon the request of the plaintiff, the trial court instructed the jury as follows:

"If you find from the evidence that the place where this accident occurred was

not customarily used by the general public as a thoroughfare, then the provisions of the Motor Vehicle Act do not apply.

"However, in either event, the defendants are not absolved from the duty of exercising ordinary care for the safety of others. In determining whether or not ordinary care was exercised, you may ask yourselves this question: 'Did the defendant Forrest exercise that degree of care and caution that would have been exercised by an ordinarily careful and prudent person acting in same or similar circumstances?'"

The defendants complain of the presence of the word "customarily." They contend that the statute contains no such limitation. The statute is section 21 of the California Vehicle Act (St.1923, p. 519, as amended by St.1931, p. 2102). It does not contain the limitation complained of. But the error was not prejudicial. Conceding their criticism to be sound, the concession does not help the defendants. Taken as a whole, the instruction clearly stated that both the general law and the California Vehicle Act impose on the operators of vehicles the duty to exercise reasonable care not to injure others. Other instructions stated the same rule. Read as a whole, the charge of the court correctly stated the law on the subject.

[6] The court in like manner gave another instruction: "If you find from the evidence in this case that the place where the accident occurred was a highway customarily used by the general public, and you further find that the driver of the truck in question started or turned his truck upon such highway at a time when the plaintiff might reasonably be affected by such movement, and failed or omitted to give a plainly visible signal to plaintiff of his intention to make such movement, then the driver of the truck was negligent. If such negligence, if any, was the sole proximate cause of plaintiff's injury, then your verdict must be in favor of the plaintiff without the necessity of further proof of negligence on the part of the defendants." Defendants contend that as given it was a formula instruction and failed to state "and that the plaintiff was free from negligence." That criticism is not well founded. The use of the word "sole" implied the limitation, the omission of which the defendants complain. When read in connection with the other instruc-

tions which were given, the instruction was not an incorrect statement of the law.

[7] After the verdict had been recorded, each party separately made a motion for a new trial. The court denied the motion of the defendants, but granted the motion of the plaintiff "on the sole issue of damages on ground of insufficiency of evidence to justify the verdict." From that order the defendants also appealed.

In support of the order of the trial court the plaintiff calls our attention to the facts that the verdict was for \$5000; that, as an employee, his right to recover for loss of wages under the Workmen's Compensation, Insurance & Safety Act (St.1917, p. 831, as amended) amounted to \$2,583; that he expended \$2,053.31 for medical care; and that the verdict allowed him only the difference, \$363.69, as compensation for pain, suffering, and permanent disability. The latter allowance the plaintiff asserts is wholly inadequate under the facts.

The defendants reply that the power to grant a new trial of part of the issues of a case is dependent upon the undoubted separability and distinctness of the issues and the absence of a resulting prejudice to the rights of the other party. Continuing, they claim that the facts in the instant case show the order should not have been made, and therefore it was an abuse of discretion to make it. They concede the rule in this state is as stated in *Re Estate of Everts*, 163 Cal. 449, at page 452, 125 P. 1058, 1059: "It is within the power of the trial court, where there is more than one issue of fact in a case, and such issues are distinct and separable in their nature, to order a new trial of one issue and refuse it as to the others. *San Diego L. & T. Co. v. Neale*, 78 Cal. [63] 64, 20 P. 372, 3 L.R.A. 83; *Duff v. Duff*, 101 Cal. [1] 4, 35 P. 437; *Mountain, etc., Co. v. Bryan*, 111 Cal. [36] 38, 43 P. 410." However, they claim the facts of this case do not bring it within said rule. We think they do. As pointed out above, both the amount and the mode of calculation of the loss of wages, if allowed at all, is provided by statute. The medical outlays are not enumerated by statute, but are computed under well-settled rules. The amount to be allowed for pain, suffering, and permanent disability will involve many inquiries and the taking of expert evidence. Proof of that amount will not require the taking of a particle of evidence involving the manner of the breaking of the plaintiff's leg, that

is, the facts of the accident. The new trial will be on matters wholly distinct and separable from the issues on which a new trial was denied. We see nothing in the nature of abuse of discretion in making the order.

The order and judgment complained of are affirmed.

We concur: SPENCE, Acting P. J.; GRAY, Justice pro tem.



24 Cal.App.2d 65

Ex parte COTHAN.

Cr. 1995.

District Court of Appeal, First District,
Division 1, California.

Dec. 15, 1937.

1. Habeas corpus ☞89

A habeas corpus proceeding for release from custody of sheriff, who filed supplemental return certifying that petitioner had been discharged from county jail, must be dismissed as involving moot questions.

2. Habeas corpus ☞89

A habeas corpus proceeding by one committed to county jail by justice of peace until he gave an undertaking to keep peace toward one whom he was charged with having threatened to murder must be dismissed after his discharge from jail without prejudice to his right to apply to Court of Appeal for appropriate remedy to determine justice's jurisdiction, where none of his alleged unlawful acts took place in such justice's judicial township (Pen.Code, §§ 701-707; § 706).

Proceeding by Ralph Cothran for a writ of habeas corpus to the sheriff of Santa Clara county.

Dismissed without prejudice.

W. E. Foley, John D. Foley, and James W. Foley, all of San Jose, for petitioner.

Fred L. Thomas, Dist. Atty., Allan P. Lindsay, Asst. Dist. Atty., and H. A. Gabriel, all of San Jose, for respondent.

PER CURIAM.

Habeas corpus. On June 2, 1937, an information was laid before a justice of the peace of San Jose judicial township in and for Santa Clara county, charging that petitioner, Ralph Cothran, had threatened to commit an offense against the person of another, to wit, to kill and murder one E. A. Waibel. The proceeding so initiated was afterwards heard on the merits by said justice, and he found that there was reason to fear the commission of such offense. Thereupon he ordered that petitioner enter into an undertaking in the sum of \$2,000 to keep the peace towards the people of the state and particularly toward the said E. A. Waibel. Petitioner failed to give such undertaking, and on June 10, 1937, a commitment was issued by said justice committing petitioner to the county jail of said county "until he gives such undertaking." All of the foregoing proceedings were had under the authority of part 2, title 1, chapter 3, of the Penal Code §§ 701-707.

[1] During the succeeding four months petitioner instituted three separate proceedings in habeas corpus before the superior court in and for said county, and each proceeding was heard before a different judge and decided adversely to petitioner. The last of such proceedings was determined on October 11, 1937; and later on, at the end of said month, petitioner applied to this court for a writ of habeas corpus. The writ was issued and a hearing was had on the merits, at which time the parties requested and were granted permission to submit additional briefs. The final brief was filed herein on November 27, 1937; but on December 11, 1937, the sheriff of said county filed herein a supplemental return certifying that petitioner was no longer in his custody; that on the preceding day, to wit, on December 10, 1937, he had been discharged from the county jail. Obviously, therefore, all questions involved in the present proceeding become moot, and it follows that the proceeding must be dismissed.

[2] However, at the hearing on the merits, the facts adduced showed without contradiction that none of the alleged unlawful acts committed by petitioner took place in San Jose judicial township; that the entire transaction constituting the basis of the charge happened in Redwood judicial township in said county. For that reason petitioner contended, as one of the several grounds urged for his release, that

the justice of the peace of San Jose township was without jurisdiction to hear or determine said proceeding. Furthermore, section 706 of said Code provides that any undertaking which shall be given pursuant to the order of the magistrate is valid and binding for six months "and may, upon the renewal of the information, be extended for a longer period, or a new undertaking may be required." Therefore, in view of the foregoing situation, it is ordered that the present proceeding be dismissed without prejudice, so as to afford petitioner an opportunity hereafter to apply to this court for an appropriate remedy to have said question of jurisdiction determined, in the event an application be made to said justice of the peace of San Jose township for a continuation or renewal of the proceeding heretofore instituted before him.



24 Cal.App.2d 8

**PEOPLE v. SUPERIOR COURT IN AND
FOR CITY AND COUNTY OF SAN
FRANCISCO.**

Civ. 10676.

District Court of Appeal, First District,
Division 1, California.

Dec. 10, 1937.

1. Action ☞6

In the determination of legal duties and rights in an action for declaratory relief, the court may determine disputed questions of fact.

2. Trial ☞388(2)

Where questions of fact are put in issue by pleadings in action for declaratory relief, statute requiring findings where questions of fact are tried by court applies (Code Civ. Proc. § 632, as amended by St.1933, p. 1876).

3. Mandamus ☞48

Where action for declaratory relief was brought by holder of license to practice chiropractic seeking an interpretation of the Chiropractic Act, and issues were presented and evidence introduced regarding teachings in chiropractic schools and mechanical, hygienic, and sanitary measures used in such practice, and whether fields of medicine, surgery, dentistry, or osteopathy were encroach-

ed upon, the issues required special findings entitling a party to writ of mandate directing court to make findings (Code Civ.Proc. § 632, as amended by St.1933, p. 1876; Chiropractic Act, § 7 [St.1923, p. lxxxviii]).

Proceeding for a writ of mandate by the People of the State of California, by U. S. Webb, Attorney General, against the Superior Court of the State of California in and for the City and County of San Francisco.

Writ of mandate granted.

U. S. Webb, Atty. Gen., and Lionel Browne and Leon French, Deputy Attys. Gen., for the People.

M. Jas. McGranaghan, of San Francisco, for respondent.

Irene Brooks, of Los Angeles, and Clarence Stephens Brooks, of Hollywood, amici curiæ for and on behalf of California Drugless Physicians Ass'n supporting contention of petitioner.

PER CURIAM.

A petition for a writ of mandate, directing the respondent court to make and file findings of fact in an action for declaratory relief.

The action was brought by a holder of a license to practice chiropractic, seeking an interpretation of section 7 of the Chiropractic Act (St.1923, p. lxxxviii) which reads as follows: "One form of certificate shall be issued by the board of chiropractic examiners, which said certificate shall be designated 'License to practice chiropractic,' which licence shall authorize the holder thereof to practice chiropractic in the state of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica." By leave of court several pleadings in intervention were filed by persons similarly interested. The Attorney General also filed a petition on behalf of the People of the State of California. These pleadings presented several material issues of fact. It is admitted that at the trial evidence was adduced by the respective parties on the questions presented. At the conclusion thereof the trial court filed an opinion, stating its

interpretation of the act, but not the facts established by the evidence as the basis for its conclusions and which evidence is not before us. The People—who are petitioners here—requested respondent to make or cause to be made and filed findings of fact, and to that end proposed certain findings in writing. It is alleged, and not denied, that the request was refused and that no findings upon the issues of fact have been filed.

[1, 2] It is well settled that in the determination of legal duties and rights in an action for declaratory relief the court may determine the disputed questions of fact (*R. G. Hamilton Corp. v. Corum*, 218 Cal. 92, 21 P.2d 413); and, where such are put in issue by the pleadings, as appears to have been the case here, section 632 of the Code of Civil Procedure, as amended by St.1933, p. 1876, requiring findings where questions of fact are tried by the court, would seem to apply.

The act authorizes the holder of a certificate issued by the board of chiropractic examiners "to practice chiropractic in the state of California as taught in chiropractic schools or colleges," and "to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body," but not "the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica."

It is stated in the opinion in the Matter of Hartman, 10 Cal.App.2d 213, 51 P.2d 1104, 1106, referring to chiropractic schools: "It is not sufficient that a particular practice is taught in such a school. Under the terms of the statute it must meet the further test that it is a part of chiropractic, whatever that philosophy or method may be, and, further, that it shall not violate the provision which expressly forbids the practice of medicine. If such a practice is not a part of chiropractic but does constitute the practice of medicine, it is not authorized under this license even though it may be taught in such a school." And, as held in *Evans v. McGranaghan*, 4 Cal.App.2d 202, 41 P.2d 937, the act is so worded as to make the question of its construction depend upon evidence of facts.

[3] In the present instance issues were presented, and much evidence introduced as to the teachings in the schools mentioned and the mechanical, hygienic, and sanitary measures used in this practice; and there was also presented for determination the questions whether the fields of medicine, surgery, dentistry, or osteopathy were en-

croached upon by such teachings or practice, or whether drugs or medicines included in *Materia Medica* are used by such practitioners. Other issues, which may or may not be material, were made by the pleadings. These, however, need not be considered, as we are of the opinion that the issues referred to were of a character calling for specific findings.

It is therefore ordered that a writ of mandate issue as prayed.



MUDRICK v. MARKET ST. RY. CO. et al.*

Civ. 10386.

District Court of Appeal, First District,
Division 2, California.

Dec. 16, 1937.

Rehearing Denied Jan. 15, 1938.

Hearing Granted by Supreme Court
Feb. 11, 1938.

1. Carriers ⇨320(19)

Evidence whether unusual jerking of cable car caused 13 year old boy who was alleged to have been a passenger thereon to fall therefrom *held* for jury, as respects street railway company's liability for injuries sustained by boy.

2. Carriers ⇨316(3)

In action for injuries sustained by 13 year old boy passenger who was alleged to have been precipitated from cable car by sudden jerks of car, *res ipsa loquitur* doctrine was applicable, notwithstanding that both general and specific negligence were alleged.

3. Carriers ⇨321(21)

In action for injuries sustained by 13 year old boy passenger who was alleged to have been precipitated from cable car by sudden jerks of car, instructions, that proof that injury was caused by operation or movement of car raised presumption of negligence of carrier, were error for failure to limit operation or movement of car to an "unusual" operation or movement.

4. Carriers ⇨321(21)

In action for injuries sustained by 13 year old boy passenger who was alleged to have been precipitated from cable car by sudden jerks of car, instructions stating that proof that injuries were caused by opera-

tion of car raised "presumption" of negligence of carrier were prejudicial error, as requiring jury to presume facts stated in instructions until contrary was proved.

5. Carriers ⇨348(2)

In action for injuries sustained by 13 year old boy passenger who was alleged to have been precipitated from cable car by sudden jerks of car, instruction that 13 year old boy is not required to use same degree of care and caution that an adult is required to use, and is only bound to employ that degree of care and caution which boys of his age and condition customarily exercise, was an erroneous statement of law.

6. Carriers ⇨321(3)

An instruction that carrier owes to children who are passengers a greater degree of care than it owes to adults, and that conduct which might be careful with regard to grown persons might be gross negligence as regards child, when coupled with instruction that carrier owes highest degree of care to passengers, was an erroneous statement of the law.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Charles Mudrick, a minor, by Antonio Mosloff, his guardian ad litem, against the Market Street Railway Company and others. From a judgment for the plaintiff, the defendants appeal.

Reversed.

William M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

Vincent W. Hallinan and Charles H. Fish, both of San Francisco, for respondent.

STURTEVANT, Justice.

From a judgment awarding the plaintiff damages in the sum of \$42,500, the defendants have appealed and have brought up a typewritten record.

On September 18, 1934, the plaintiff, then thirteen years of age, was injured in an accident between Eighteenth and Nineteenth streets on Castro. In the accident a street car operated by Market Street Railway Company, herein after referred to as railway, ran over the feet of the plaintiff, and both legs were amputated below the knees. One of the defendants, G. Hageman, was

*For subsequent opinion see 81 P.2d 950.

the gripman, and C. J. Heffernan was the conductor. It was the theory of the plaintiff that he boarded a Fillmore street car, paid his fare, took a transfer to a Castro street car, transferred at Church and Market, took a transfer, and at Eighteenth and Castro he changed to the cable car. Continuing, he claimed that in doing so he took a position standing on the running board at the extreme front end on the right-hand side, and was facing to the south, that is, to the front, and was holding onto a stanchion with his left hand. After the car had moved about half a block, the plaintiff claimed that the car jerked several times, that he lost his grip, slid down the stanchion, fell off the car, and that his legs passed forward under the front wheel and were run over. On the other hand it was claimed by the defendants that immediately prior to the accident the plaintiff ran along the street by the side of the car, attempted to board it, slid and fell, and that his legs pressed forward under the right front wheel of the car and were run over.

Castro street cable car No. 5, the car involved in this accident, left Eighteenth street and was traveling south in the direction of the Lick school. There were on board several adults, but the larger part of the passenger list was made up of students on their way to attend the Lick school.

On the day of the accident, Arthur B. Minaker, a police officer, called on the plaintiff at the hospital, asked him certain questions, and later made a report to his superior officer. Either on the day of the accident or the following day, Mr. J. C. Bowman, principal of Lick school, called all students who had been on the car into the auditorium. He asked each child who claimed to know anything about the accident to write out and hand in a written statement. Many such statements were handed in. After the accident and before the trial, representatives of the plaintiff called on various witnesses and obtained written statements. During the same period representatives of the defendants called on several of the witnesses and obtained written statements. Many of those written statements were produced at the trial.

[1] The defendants earnestly contend there is no testimony, credible or otherwise, from which it could be fairly inferred that there was any unusual jerking of the car of sufficient violence to cause plaintiff to fall therefrom, and giving full faith and credit to every scrap of testimony in the

record pertaining to jerking, results in the inevitable conclusion that such jerking as did occur was not the cause of plaintiff's fall or injury. The plaintiff took the stand as a witness in his own behalf, and testified that when car No. 5 was at a standstill at Eighteenth and Castro he boarded the car and took the position hereinabove indicated. He testified regarding several jerks of the car, and that finally he was thrown to the street, run over, and suffered the injuries complained of. Herbert McCulla testified that he boarded the car at the same time and place, took a position on the same side of the car about three feet behind the plaintiff, and was holding onto the second stanchion. Continuing, he gave testimony corroborating the plaintiff. Frank Petalas, another schoolmate, testified that he boarded the car at the same time and place, took a position at the extreme rear end on the right-hand side, and from that position he observed the plaintiff at all times and saw him fall off the car into the street. Other schoolmates testified to other facts corroborating the plaintiff at least in part. The plaintiff did introduce some testimony that the car jerked. Taking that testimony in connection with the fact that the plaintiff fell or was thrown to the street, the determination of the issue was properly left to the jury. *McIntosh v. Los Angeles Ry. Corp.*, 7 Cal.2d 90, 96, 59 P.2d 959. In this connection, we understand the defendants to claim that the plaintiff did not say his fall and the jerking happened simultaneously. As we read his testimony we gather the same impression. The defendants contend the plaintiff testified the jerking occurred at one spot and that he fell off the car at a point 260 feet distant therefrom. That statement is true, but the witness testified to several different jerks. He did not testify his falling and jerking were simultaneous events, nor did he testify to the contrary. However, taking all of the testimony given by all of the witnesses produced by the plaintiff, the record was such that the jury was entitled to find that from the time the plaintiff boarded the car and until he fell into the street there were several jerks, and that one of the jerks caused him to fall. That there was evidence to the contrary will be freely conceded. However, we think it is equally true there was sufficient evidence for the jury to base a finding and it may not be said, as a matter of law, that such evidence was incredible, improbable, or impossible.

[2] The next point made by the defendants is that the trial court erred in instructing the jury on the doctrine of *res ipsa loquitur*. It was the contention of the plaintiff, as set forth in his amended complaint, that the accident arose by reason of (1) the negligent operation of the car and (2) the negligent overcrowding of the car. To those claims, in his opening statement, the plaintiff attempted to add that the car (3) was old and obsolete; (4) that the car was undermanned; (5) that the railway jammed the school children into the car like sardines; (6) that when the car was overcrowded the cable would move the car by jerks; and (7) at such times the children would be jerked forward and backward. In his brief the plaintiff adds a further specification; (8) that immediately before he fell the plaintiff called to the gripman to stop the car, and the call was ignored. Pointing to the fact that after alleging general negligence the plaintiff alleged specific negligence, to wit, overcrowding of the car, the defendants assert that there was no place in this case for the application of the doctrine of *res ipsa loquitur*. The point has been directly ruled against the contention of the defendants. *McComas v. Al. G. Barnes Shows Co.*, 215 Cal. 685, 697, 12 P.2d 630. The other contentions made by the plaintiff during the presentation of his case and by us numbered 3, 4, 5, 6, 7, and 8, if they had also been alleged in his pleading, would have constituted other specific allegations of negligence and would not have changed the rule.

[3] Not waiving their contention just discussed, the defendants claim the instructions on the application of the doctrine of *res ipsa loquitur* were so improperly worded that they constituted prejudicial error. The instructions complained of were numbered XVIII, XIX, and XX. In brackets we have inserted certain words; otherwise the instructions were as follows:

"XVIII.

"Proof of an injury to a passenger on the car of a common carrier, caused by the (unusual) operation of the car, raised the legal presumption that the injury was caused by the negligence of the carrier and casts upon the carrier the burden of proving that such injury was caused by some unavoidable casualty or by some other cause which human care and foresight could not prevent or by the contributory negligence of the passenger, unless these

facts be shown by evidence adduced by the plaintiff.

"XIX.

"When it is shown that a passenger is injured from some (unusual) movement of the car by those in charge of it or from something connected therewith or in the control of the defendant, the law presumes *prima facie* that the particular thing thus shown to have caused the injuries was due to the defendant's neglect, and the burden is then thrown upon the defendant to establish that such injury was not caused by its neglect but by some inevitable casualty or other cause which human care and foresight could not have prevented or by the contributory negligence of the passenger, unless such facts be shown by evidence adduced by the plaintiff.

"XX.

"If you believe from the evidence that the plaintiff became a passenger upon the cable car of the defendant Market Street Railway Company and that thereafter, owing to some (unusual) operation of the car by the persons in charge of it, he was injured, then the law presumes that he was injured through the negligence of the defendant Market Street Railway Company, and if you find that his injury was caused by some negligence, however slight, of defendant or of its agents or employees acting in the course and scope of their employment, and that the plaintiff was free from contributory negligence, then your verdict shall be in favor of the plaintiff and against the defendant Market Street Railway Company."

The defendants claim the parenthetical words should have been inserted, and that in the absence of such expressions the instructions did not state the law. The claim is well founded. The point has been directly adjudged in this state and seems to be the settled law in other jurisdictions. In the case of *Steele v. Pacific Electric Ry. Co.*, 168 Cal. 375, 143 P. 718, 719, a similar instruction was before the court. It was as follows: "On the other hand, the proof of injury of plaintiff on a car of the defendant casts upon the defendant the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff." It was attacked as not being sound. The court made an extended examination and comparison of the authorities. Then the court said, 168

Cal. 375, on page 381, 143 P. 718: "Here the essential fact in issue was: How did the accident occur? Was it through the act of defendant in starting up the car while plaintiff was attempting to alight, or did it result from an attempt on her part to get off while it was still in motion? And the vice of the instruction was in ignoring any necessity on the part of the jury of finding adversely to the defendant on this issue as a prerequisite to applying the presumption against it, but, on the contrary, instructing them that such presumption arose and could be applied simply from proof of injury sustained by the plaintiff."

In the case of *Rystinki v. Central California T. Co.*, 175 Cal. 336, 165 P. 952, the point was again before the court. On page 344 of 175 Cal., 165 P. 952, 956, the court said: "The court gave the following instruction: 'You are instructed that contributory negligence on the part of the plaintiff cannot be presumed from the mere fact of injury but must be proved. On the other hand, proof of the injury, *coupled with proof that it proceeded from a sudden, unusual or violent jerking, or swinging, or swaying of the car, while the plaintiff was preparing to alight*, casts upon the defendant, the burden of proving that the injury, was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff.' (The italics are ours.) With the exception of the italicized portion, this is the same instruction condemned by this department in *Steele v. Pacific Electric Ry. Co.*, 168 Cal. 375-377, 143 P. 718; but the addition of the words in italics rescues the instruction from the vice of the court's direction to the jury which we there reviewed. It is true that the mere injury to the passenger does not place upon the carrier the duty of explanation but the establishment of such injury, coupled with proof of coincident and causal collision, derailment, or other unusual happening to the car does cast upon defendant the burden of exculpation as indicated by the instruction." Finally, in the recent case, *McIntosh v. Los Angeles Ry. Corp.*, 7 Cal.2d 90, at page 95, 59 P.2d 959, 962 the court states the rule to be as follows: "We are in perfect accord with the decisions cited by appellant which hold that ordinary street or electric cars are liable to start with more or less of a sudden lurch or jerk; that some swaying is inherent and unavoidable in any moving car; that passengers in such cars must

assume these ordinary risks when they voluntarily enter a car for the purpose of being transported therein; and that any injury sustained by a passenger by such ordinary movements of the car cannot be attributed to the negligent operation of the car." Now in the instant case the defendants contended: (1) That the plaintiff tried to board a moving car, slipped, and fell, and that he was guilty of contributory negligence; and (2) that in no event was the car operated by any unusual jerks, etc. If, perchance, the jury found that the plaintiff was not guilty of contributory negligence then under instruction XX it was directed to bring in a verdict in favor of the plaintiff, whether the accident occurred from usual or unusual jerks of the car being operated by the defendants. The said instructions were not modified by any other instructions.

[4] It will be noted that in the foregoing instructions the words "presumed" and "legal presumption" are used and repeated. No statute authorizes such usage. They are strong words, and are looked upon as strong expressions by the profession as well as by laymen. In *Davis v. Hearst*, 160 Cal. 143, 116 P. 530, the court, after an extensive examination of the law, pointed out that if there is a presumption then one must be able to turn to the statute so declaring, as a presumption is a deduction which the law expressly directs to be made from particular facts. That decision has never been modified nor reversed. However, in some instances it has been held that although a certain instruction was erroneous because of the improper use of the word, the instruction was not prejudicial. But in the instant case, considering the particular facts before the court, and considering the repeated use in three consecutive instructions, we think it clear that the jury must have been impressed to the effect that, as indicated in each of said instructions, it was bound to presume the facts stated in said instructions until the contrary was proved. In other words, the expressions referred to were not only erroneously used, but the error was clearly prejudicial.

[5] Instruction XXII, as given by the court, was very long and contained several propositions. Among others it directed the jury as follows: "A boy thirteen years old is not required to use the same degree of care and caution that an adult is required to use, and is only bound to employ that degree of care and caution which

boys of his age and condition customarily exercise." The defendants contend that the rule as stated was too drastic. They contend that the beginning of the sentence would be more correct if worded, "A boy thirteen years old may or may not be required to use," etc. They argue that as written the court took from the jury its right to determine whether the plaintiff in the instant case exercised due care. They cite and rely on *Cahill v. E. B. & A. L. Stone Co.*, 167 Cal. 126, 138 P. 712. At page 139 of 167 Cal., 138 P. 712, 717 the court said: "The care which a child is required to exercise is only that degree of care which children of his maturity and capacity under similar circumstances ordinarily exercise, and this, except in a case where there can be no doubt under the evidence that the child not only knew, but at the time realized and appreciated, the danger of his conduct is to be determined from the circumstances of the particular case in which his conduct is involved and under the evidence there presented to the jury." Further down on the same page, the court quoted with approval as follows: "The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger, is one of fact, falling within the province of a jury to determine." The passage quoted from said instruction was an erroneous statement of the law.

[6] The same instruction contained another passage as follows: "On the other hand a carrier of passengers owes to children who are passengers on its cars a greater degree of care than it owes to adults and that conduct which might be careful with regard to a grown person might be gross negligence as regards a child." The defendants call to our attention that in another instruction the jury was informed a common carrier owes to its passengers the highest degree of care. Then turning back to the passage just quoted, the defendants contend the instruction, in effect, advised the jury that the defendants were insurers of the plaintiff. The plaintiff replies that the case of *Brizzolari v.*

Market St. Ry. Co., 7 Cal.App.2d 246, 46 P.2d 783, is authority sustaining the instruction under attack. But an examination of that case discloses the language of an instruction was not involved. Furthermore, the court was there speaking of the quantum of care and not of the degree of care. The expressions are not synonymous. *Raymond v. Hill*, 168 Cal. 473, 483, 143 P. 743. The second passage was also an erroneous statement of the law.

In their next point the defendants claim the verdict is excessive. The jury returned a verdict for \$50,000. It was attacked on a motion for a new trial. The trial court made a conditional order that if the plaintiff should waive \$7,500 of said sum the motion would stand denied. A stipulation was promptly filed, and the judgment as appealed from is \$42,500. The defendants support the point which they now make by citing many cases in which the damages for similar injuries have been reviewed. As no two cases are entirely similar in their facts, other cases are not, ordinarily, helpful in ruling the point before us. As the judgment must be reversed for other reasons, it is unnecessary to discuss the point further.

Finally, it is claimed that Mr. Hallinan, the plaintiff's attorney, was guilty of prejudicial misconduct. They cite a large number of instances. The reasonable length of this decision precludes us from restating them. It is sufficient to state that such conduct falls within the doctrine of *Keena v. United Railroads*, 197 Cal. 148, 156-160, 239 P. 1061; *Gackstetter v. Market Street Ry. Co.*, 130 Cal.App. 316, 20 P.2d 93; and *Hanley v. Milwaukee Electric Ry. & Light Co.*, 220 Wis. 281, 263 N. W. 638, and would be sufficient grounds for reversing the judgment. But, by reason of the conclusions reached above, we do not deem it necessary to further discuss the point.

The judgment is reversed.

We concur: SPENCE, Acting P. J.;
GOODELL, Justice pro tem.

23 Cal.App.2d 587

**BRODERICK, Superintendent of Banks, v.
KUNDE et al.**
Civ. 5713.

District Court of Appeal, Third District.
California.

Nov. 24, 1937.

1. Appeal and error $\S$ 171(1)

Where counsel for both parties on appeal had assumed that a particular section of statute governed and had tried case and prepared briefs upon that theory, reviewing court assumed that such section was controlling, even though it was in doubt as to whether that section or another act should apply (Code Civ.Proc. $\S$ 359; St.1909, p. 87, as amended).

2. Limitation of actions $\S$ 58(5)

An action by New York bank superintendent against stockholders for unpaid double liability assessment, brought within three years from date fixed by superintendent for payment of assessment, was not barred by limitations, since accrual of cause of action to recover and liability to pay assessment arose concurrently on date fixed for payment (Banking Law N.Y. $\S$ 57 and $\S$ 80, as enacted by Laws 1914, c. 369; Code Civ.Proc. $\S$ 359).

3. Banks and banking $\S$ 47(1)

The provision of New York Banking Law giving superintendent of banks cause of action against stockholders for unpaid double liability assessment levied by superintendent creates in superintendent a property right in and to assessment and imposes upon stockholders a corresponding obligation to pay assessment (Banking Law N.Y. $\S$ 80, as enacted by Laws 1914, c. 369).

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

On rehearing.

Original opinion adhered to.

Prior opinion, 69 P.2d 451.

R. M. Quackenbush, of Santa Rosa, for appellants.

Dockweiler & Dockweiler, of Los Angeles, for respondent.

John L. Fleming, Henry G. Bodkin, and Clock, McWhinney & Clock, all of Los Angeles, and Sullivan, Roche & Johnson, of San Francisco, amici curiæ.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

[1] Although having had the benefit of extended oral argument and able briefs presented by amici curiæ upon rehearing of the above matter, we adhere to our original opinion. Further study has cast some doubt in our minds as to whether or not section 359 of the Code of Civil Procedure should govern or whether that section under the circumstances here involved has not been superseded by the appropriate provisions of the California Bank Act (St. 1909, p. 87, as amended), but, inasmuch as counsel for both sides here have assumed that the Code of Civil Procedure governs and have tried the case and prepared their briefs upon that theory, we will not attempt to pass upon the question as to whether the Bank Act or section 359 of the Code of Civil Procedure applies, but shall assume the Code is controlling.

It is also urged upon us that it was not necessary to determine in this case whether the liability was created when the assessment was levied or when the assessment remained unpaid after the date fixed for payment, but, in order to determine whether or not the action was barred, it was necessary to fix the date upon which the period of limitation actually commenced to run. We believe, therefore, that it was within the legitimate scope of our inquiry to distinguish between the accrual of the cause of action and the creation of the liability.

We therefore readopt the original opinion heretofore filed in this matter on June 10, 1937, with certain corrections, as follows:

Defendants, residents of California, were stockholders in the Bank of the United States, a banking corporation organized under the banking laws of the state of New York, having its principal place of business in that state.

On the 11th day of December, 1930, plaintiff as superintendent of banks, finding this bank unable financially to continue its business, took possession pursuant to the provisions of the Banking Law (Consol.Laws N.Y. c. 2) $\S$ 57, of the state of New York, and since December 11, 1930, has been engaged in liquidation of said bank. After determining that the assets of the bank were not sufficient to pay its creditors in full, plaintiff, on July 6, 1932, as such superintendent of banks, pursuant to the provisions of the Banking Law, de-

terminated an assessment of \$25 per share was required from each stockholder for each share of stock so held to pay said claims and required that the assessment be paid on or before the 8th day of August, 1932. Defendants, as stockholders, were duly notified of said assessment but failed to pay the same, whereupon this action was commenced. Judgment was rendered against them, from which this appeal is taken.

Both parties here agree that the sole question on this appeal is the application of section 359 of the Code of Civil Procedure as a statute of limitations to the facts at issue, and the question presents a twofold aspect, viz.: When did the three-year limitation declared in said section begin to run on the liability sued on? and, Has the action been barred by the running of the limitation fixed in said section?

Section 359 of the Code of Civil Procedure provides: "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

Respondent admits that this section controls any action filed in California predicated upon the New York Banking Law and that such action "must be brought within three years * * * after * * * the liability was created," but contends that the liability here is for and upon the unpaid assessment, and that this is an action for the amount of such assessment. The liability, according to respondent, was created when, and only when, it was levied and a date fixed for the payment, which was August 8, 1932, and that this action, having been filed December 8, 1933, was commenced in ample time. Section 80 of the New York Banking Law, Laws 1914, c. 369, Consol.Laws, c. 2, provides: "In case any such stockholder shall fail or neglect to pay such assessment," (the stockholder's double liability assessment levied by the Superintendent of Banks) "within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder * * * for the amount of such unpaid assessment, * * * together with interest thereon from the

date when such assessment was, by the terms of said notice, due and payable."

[2,3] Defendant relies upon the distinction between the accrual of a cause of action and the creation of the liability, but from our view of the matter we agree with plaintiff that here the accrual of the cause of action for, and the creation of the liability with respect to, the assessment are concurrent, both having arisen on August 8, 1932, that being the date fixed by the superintendent of banks for the payment of the assessment. The Banking Law, N. Y. § 80 (supra), provides, "the superintendent shall have a cause of action * * * against such stockholder * * * for the amount of such unpaid assessment." This provision has the effect of creating in the superintendent a property right in and to the assessment, and imposes upon the stockholder a corresponding obligation to pay the same.

In *Frost v. Witter*, 132 Cal. 421, 64 P. 705, 707, 84 Am.St.Rep. 53, the court, considering "action" and "cause of action," has this to say:

"Some confusion has resulted from the neglect to define the terms 'cause of action' and 'action.' * * *

"The latter term is very commonly confounded with the suit (litis) in which the action is enforced. But this is not the technical meaning of the term. * * * 'An action is nothing else than the right or power of prosecuting in a judicial proceeding what is owed to one,'—which is but to say, an obligation. * * * The action therefore springs from the obligation, and hence the 'cause of action' is simply the obligation. This is in accordance with the view of Mr. Pomeroy. * * *

"The 'cause of action' is therefore to be distinguished also from the 'remedy,' which is simply the means by which the obligation or the corresponding action is effectuated; and also from the 'relief' sought."

Appellant cites a number of California cases, some of which, however, arose under the now superseded liability of stockholders, which made each stockholder liable for his appropriate part of the debts incurred during the time he was a stockholder. Two cases, however, are cited which deal particularly with the provisions of bank stockholder's liability laws in jurisdictions outside of California. In the case of *Smith v. Shepler*, 8 Cal.App.2d 717, 48 P. 2d 999, plaintiff, as liquidator, sought and obtained a judgment against defendant

stockholder based upon ownership of certain shares in a Florida state bank. That case, however, deals principally with the methods of procedure and provides that the foreign plaintiff must follow the California law and is subject to our period of limitations, regardless of the period of similar limitations under the jurisdiction of Florida.

The other case upon which appellant strongly relies is *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 P. 139, 140. That case involves the application of the Canadian Banking Law. That law provides that "the amount which he [the shareholder] is liable to contribute [to pay the bank's debts] shall be deemed an asset of the company, and a debt due to the company [bank], payable as directed or appointed under this act [Canadian Winding-Up Act]."

This act further provides that "the liability of any person to contribute to the assets of a company under this act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when his liability commenced, but payable at the respective times when calls are made, as hereinafter provided, for enforcing such liability."

Considering this provision, the court held that "the commencement of the liability must be taken to be the time when, under the act of incorporation (the bank act) such liability is declared to arise, i. e., in the event of the inability of the corporation to pay its debts. The bank suspended payment in October, 1906. Under the law, it became insolvent 90 days thereafter. The liability was created, at the latest, upon the beginning of the status of insolvency, and the three year period of limitations began to run then."

This act is further considered in the case of *Clarkson, Liquidator, v. Moir*, 53 Cal.App. 775, 201 P. 474, which was decided a few years after the *Royal Trust Co. Case*, supra. The effect of the ruling in this case was that the statute of limitations did not commence to run in favor of the stockholders until the bank acquired the status of insolvency, and such status was acquired under the Canadian law 90 days after the bank suspended payment, which obviously was after the bank incurred its corporate debts and obligations.

In considering these cases, however, as well as the California cases based upon the

original Stockholder's Liability Act of California (St.1931, p. 338) it must be remembered that the New York law contains a special provision vesting in the liquidating officer a cause of action upon, and a property right in, the assessment itself which attaches upon default in payment of the assessment.

Cases arising under the National Bank Act, 12 U.S.C.A. § 21 et seq., are enlightening and of particular significance in view of the circumstance that many years ago the New York State Banking Act was amended to conform with the national bank system. *Broderick, Superintendent of Banks, v. Aaron et al.*, 151 Misc. 516, 272 N.Y.S. 219, 231.

In *Deweese v. Smith*, 106 F. 438, 442, 66 L.R.A. 971 (C.C.A.8th), affirmed by the Supreme Court of the United States in *Smith v. Brown*, 187 U.S. 637, 23 S.Ct. 845, 47 L.Ed. 344, it was held that the National Bank Act, considering the liability of a stockholder for a deposit by a depositor holds that no liability is imposed until the comptroller of the currency levies the assessment and demands payment. In this connection the court said:

"The agreement of the shareholder with the bank and its creditors thus becomes a contract that, to an amount not exceeding the par value of his shares of stock, and not exceeding his equal and ratable proportion, he will pay, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligations of his bank. Rev.St. §§ 5151, 5234; *Kennedy v. Gibson*, 8 Wall. 498, 19 L.Ed. 476.
* * *

"The statute of limitations does not commence to run against the enforcement of the entire liability or against the enforcement of any particular portion of it until the comptroller of the currency has called the entire liability or the particular part of it in issue"—citing many federal cases. See, also, *Johnson v. Greene* (D.C. 1936) 14 F.Supp. 945.

The courts of New York have considered this question, and in the following two cases has considered these provisions in connection with the liquidation of the very bank here involved. *Broderick, Superintendent of Banks, v. Aaron et al.*, supra, and *Broderick, Superintendent of Banks, v. Adamson et al.* (1933) 148 Misc. 355, 265 N.Y.S. 804.

In *Broderick v. Aaron et al.*, *supra*, the court there said:

"Under this statute the assessment becomes 'due and payable' after the determination by the superintendent to assess and upon the maturity of the demand for its payment, and the right or cause of action to enforce the assessment accrues at that time.

"This is the rule of the federal courts in actions to enforce the statutory liability of stockholders of national banks"—citing authorities.

We are of the opinion, therefore, the judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

10 Cal.2d 368

STOCKWELL et al. v. McALVAY et al.

L. A. 14793.

Supreme Court of California.

Dec. 16, 1937.

Rehearing Denied Jan. 13, 1938.

1. Judgment ⇨675(3)

A judgment quieting title in execution purchaser to stock for which judgment debtor's wife held certificate was not binding on judgment debtor, who was not a party to the action and filed no pleading therein, notwithstanding that judgment debtor testified for wife (Civ.Code, § 328).

2. Judgment ⇨739

Where, in action by execution purchaser to quiet title to stock for which judgment debtor's wife held certificate, wife filed cross-complaint making execution purchaser's attorneys parties and sought to have execution sale set aside for fraud, and cross-defendants, by motion to strike parts of cross-complaint, prevented trial of issue of fraud, such cross-defendants could not set up favorable judgment in such action as bar to subsequent action by judgment debtor and wife to set aside execution sale for fraud (Civ.Code, § 328).

3. Attorney and client ⇨103

Where execution sale of stock could have been prevented except for fraud of execution purchaser's attorneys, and execution purchaser received stock and retained it after having notice of fraud, he could not contend that he was not bound by such fraud.

4. Equity ⇨65(2)

In action by judgment debtor and wife to set aside execution sale of stock for fraud of attorneys of judgment creditor, who was execution purchaser, evidence as to whether debtor caused transfer of property, including stock, to wife and made declarations disavowing ownership of stock with intent to defraud creditor, and as to whether creditor and attorneys relied on debtor's disavowal of ownership of stock, authorized refusal to apply doctrine of clean hands to prevent setting aside sale, in view of statutory presumption that private transactions are fair and regular (Code Civ.Proc. § 1963, subd. 19).

5. Equity ⇨65(2)

Where debtor fraudulently caused transfer of his property, including stock, to his wife and made declarations disavowing own-

ership of stock, which was worth \$60,000, creditor, after obtaining judgment, bought stock at execution sale for \$50, execution sale could have been prevented except for fraud of attorneys of creditor, and creditor subsequently obtained full satisfaction of judgment, debtor and wife were not barred from having sale set aside under doctrine of clean hands, since their fraud caused no injury.

6. Bankruptcy ⇨438

Where bankrupt conceals or fails to list asset with trustee, bankrupt cannot, even after discharge, assert any right to asset so concealed against his creditor.

7. Bankruptcy ⇨150

Where bankrupt presents asset to trustee and trustee abandons or rejects asset, bankrupt may assert his rights in asset against his creditors.

8. Bankruptcy ⇨150

Where bankrupt and wife, to whom bankrupt had fraudulently caused stock to be transferred, demanded that trustee assume title of stock claimed by purchaser at execution sale for bankrupt's debt, but trustee refused, and rejected right to any cause of action pertaining to stock, title to stock did not vest in trustee so as to bar action by bankrupt and wife to set aside execution sale for fraud.

9. Limitation of actions ⇨127(3)

In action by judgment debtor and wife, to whom judgment debtor had fraudulently caused stock to be transferred, to set aside execution sale of stock for fraud, amendment of complaint after running of limitation of action to allege, for first time, that judgment creditor had an interest in stock, did not cause action to become barred by limitation.

10. Limitation of actions ⇨127(2)

Where there is no attempt to state new cause of action in amended complaint, but merely addition of matters to make original cause of action complete, amendment, though made after expiration of period of limitation, relates back to time of commencement of action.

11. Limitation of actions ⇨127(11)

The mere fact that new cause of action is pleaded does not prevent relation back of amendment to time of original complaint so as to avoid bar of limitation arising before time of amendment, but action is only barred where plaintiff seeks, by amendment, to

recover on facts entirely unrelated to those pleaded in original complaint.

12. Execution ⇨256(2)

Where action by judgment debtor and wife, to whom judgment debtor had fraudulently caused stock to be transferred, to set aside execution sale of stock for fraud was commenced promptly after execution sale, parties were involved in continuous litigation, and no evidence was taken, prior to amendment of complaint six years after commencement of action, to allege for first time that judgment debtor had interest in stock, allowance of amendment was discretionary, as against contention that plaintiffs were guilty of laches.

13. Execution ⇨256(1)

In action to set aside execution sale of stock, rights as an innocent holder for value of pledgee of execution purchaser's transferee could not properly be adjudicated, where such pledgee was not a party.

14. Judgment ⇨707

In action to set aside execution sale of stock against execution purchaser and his attorneys, defendants could not complain of judgment setting aside execution sale on ground that judgment also attempted to adjudicate rights as innocent holder for value of pledgee of execution purchaser's transferee, which pledgee was not a party.

In Bank.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by B. C. Stockwell and husband against B. D. McAlvay and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

For prior opinion, see 65 P.2d 781.

Joseph L. Lewinson, Morris E. Cohn, Harry M. Irwin, Andrew H. Rose, and John W. Preston, all of Los Angeles, for appellants.

Newby & Newby, Nathan Newby, and Dee Holder, all of Los Angeles, for respondents.

NOURSE, Justice pro tem.

Defendants have appealed from a judgment in favor of plaintiffs setting aside a sheriff's sale of shares of Consumers Salt Company.

Plaintiffs V. E. Stockwell and B. C. Stockwell are husband and wife. Defend-

ants Irwin and Rose are attorneys for defendant McAlvay. On June 18, 1925, McAlvay obtained a judgment, hereinafter referred to as the fraud judgment, against V. E. Stockwell in the sum of \$16,000 based upon the fraud of the latter in the sale of real estate to McAlvay. Prior to the entry of this judgment, but subsequent to the accrual of the cause of action therein and after a threat of suit had been made, V. E. Stockwell conveyed his residence property to his wife, B. C. Stockwell, by deed of gift. In a separate action, a judgment was rendered on April 13, 1926, in which it was determined that this deed was "executed by said V. E. Stockwell with intent to delay and defraud his said creditor, said B. C. McAlvay." It was further determined that the title to the property was vested in the trustee in bankruptcy of V. E. Stockwell. Execution was issued on the fraud judgment, and on October 1, 1925, the sheriff levied upon 225,000 shares of stock of Consumers Salt Company, shown by the records of the company to be in the name of B. C. Stockwell. Consumers Salt Company made and delivered to the sheriff an answer in writing, signed by V. E. Stockwell as president and J. R. Riggins as secretary, to the effect that V. E. Stockwell did not own any interest in the shares so levied upon. The trial court found that on July 9, 1925, the shares were the property of V. E. Stockwell and that on that date he caused them to be transferred to B. C. Stockwell. The shares were sold by the sheriff to McAlvay on November 17, 1925, for the sum of \$50.

No charge is made that the sale was not made in accordance with law. Between the date of the levy and the date of the sale, certain negotiations occurred between attorney Rose for McAlvay and attorney Newby for V. E. Stockwell. On October 22, 1925, V. E. Stockwell verified a petition to be filed in bankruptcy proceedings and appended thereto a list of his property, except the residence property and the 225,000 shares levied upon. This petition was exhibited by Newby to Rose on October 28, 1925, with the assertion that V. E. Stockwell had stated that the list included all his property. Rose was informed that V. E. Stockwell did not wish to commence bankruptcy proceedings, but would do so unless the property listed was accepted by McAlvay in satisfaction of his judgment. Rose undertook to investigate the property listed and being satisfied that said property was of no value, ordered the sale to proceed. The day after the sale, the petition in bankruptcy was filed. On

November 19, 1925, V. E. Stockwell was adjudged bankrupt, and on December 17, 1925, a trustee was appointed.

[1, 2] On November 27, 1925, McAlvay commenced an action against Consumers Salt Company and B. C. Stockwell under provisions of section 328 of the Civil Code, as it was then in force. V. E. Stockwell is not bound by this judgment. He was not a party to the action and filed no pleading therein. While he appeared as a witness and testified in behalf of B. C. Stockwell, this alone is not enough to make the judgment binding upon him. On the first trial of this action, judgment was rendered against McAlvay, but his motion for new trial was granted. Upon the second trial, it was adjudged that B. C. Stockwell had no interest in the shares and that they were the property of McAlvay. This judgment was affirmed on appeal. *McAlvay v. Consumers' Salt Company*, 112 Cal.App. 383, 297 P. 135. In that action B. C. Stockwell filed a cross-complaint in which Rose and Irwin were made defendants and in which she alleged the fraud committed by appellants in the execution sale and sought to have the sale set aside. Appellants demurred to the cross-complaint and made a motion to strike parts of it. This motion was granted to such an extent that the question of fraud was eliminated. Since appellants prevented respondent's attempt to have the present issues tried therein, appellant cannot now assert that the former action is a bar to this action. *Corona Investment Co. v. Riedman*, 11 Cal.App.2d 648, 54 P.2d 85; *United Bank & Trust Co. v. Hunt*, 1 Cal.2d 340, 34 P.2d 1001.

The trial court found in substance that appellants Rose and Irwin falsely represented to Newby that they were investigating the value of the property listed in the bankruptcy petition; that appellants Rose and Irwin pretended to be negotiating a settlement for the purpose and with the intention of preventing V. E. Stockwell from filing his petition in bankruptcy until they could cause the shares of Consumers Salt Company to be sold; that by reason of their representation Newby was lulled into security and failed to file said petition in bankruptcy and to take action to prevent the sale; that the sale was made without any actual notice to Newby or V. E. Stockwell; and that the reasonable value of the shares sold was \$60,000. The evidence supports these findings and the judgment based thereon.

[3] It is argued by appellants that McAlvay is not bound by the acts of his attor-

neys Rose and Irwin. However, it is clear that except for the fraud of Rose and Irwin the sheriff's sale of the shares could have been prevented. McAlvay received the shares so obtained and retained them after he had notice of the fraud. Under these circumstances, he cannot contend that he is not bound by the fraud of Rose and Irwin. *A. L. I., Restatement of the Law, Agency*, § 99, and cases cited in the California Annotations thereto.

[4, 5] The evidence discloses that V. E. Stockwell attempted to place his property beyond the reach of his creditor McAlvay. He conveyed the residence property to his wife. He caused the shares of Consumers Salt Company to be transferred to her. He verified a petition in bankruptcy in which he failed to list all his assets, and caused it to be offered to McAlvay with the veiled threat that if McAlvay did not accept the assets therein listed in satisfaction of the fraud judgment, he would cause the petition to be filed. Appellants argue that because V. E. Stockwell fraudulently attempted to prevent the satisfaction of the fraud judgment, the doctrine of clean hands applies, and respondents have no standing to seek relief against the fraud of McAlvay's attorneys in attempting to obtain satisfaction of said judgment. However, this contention is without merit for two reasons. The trial court found that none of the acts above complained of were done with intent to defraud McAlvay and that appellants did not rely upon any of the declarations of V. E. Stockwell in which he disavowed ownership of the shares of Consumers Salt Company and were not misled by any of these transactions. There is a conflict in the evidence which, when considered with the presumption that private transactions have been fair and regular, amply supports these findings. *Code Civ. Proc.* § 1963, subd. 19. The second and more persuasive reason is that appellants have not been injured by the acts complained of. Upon the execution sale, which respondents seek to set aside, McAlvay purchased for \$50 the shares herein involved. The trial court has found the reasonable value of these shares to be \$60,000. On April 26, 1926, McAlvay presented to the trustee in bankruptcy of V. E. Stockwell his claim for the balance of the fraud judgment. In June, 1926, there was paid from the separate property of B. C. Stockwell the sum of \$25,000 to the trustee in bankruptcy under a stipulation that the claims against V. E. Stockwell should be paid in full and the assets held by the trustee transferred to B. C.

Stockwell. This stipulation was performed. As a result of it, McAlvay's claim was paid in full by the trustee in bankruptcy and the fraud judgment satisfied. Thus McAlvay has been paid in full and yet is seeking to retain shares worth \$60,000 for which he paid only \$50. Under these circumstances McAlvay has not been injured by the fraud of V. E. Stockwell and V. E. Stockwell has been purged of his fraud. It follows that the doctrine of clean hands has no application in this case. *McNair v. Benson*, 63 Or. 66, 126 P. 20; 4 A.L.R., pages 44, 59; 21 C.J. p. 187, § 172.

[6-8] Appellants contend that the title to the shares vested in the trustee in bankruptcy of V. E. Stockwell, and therefore respondents have no interest in the shares sufficient to support this action. It is true that V. E. Stockwell did not list the shares as an asset with the trustee in bankruptcy. Where the bankrupt conceals or fails to list an asset with the trustee in bankruptcy, the bankrupt cannot, even after discharge, assert any right to the asset so concealed against a creditor of the bankrupt. *First National Bank v. Lasater*, 196 U.S. 115, 25 S.Ct. 206, 49 L.Ed. 408. But if the bankrupt presents the asset to the trustee in bankruptcy and the trustee abandons or rejects the asset, the bankrupt may assert his rights in said asset against his creditors. *In re Webb*, 4 Cir., 54 F.2d 1065; *In re Frazin*, 2 Cir., 183 F. 28, 33 L.R.A., N.S., 745; *Dow v. Bradley*, 110 Me. 249, 85 A. 896, 44 L.R.A., N.S. 1041. In this case the trial court found that in April, 1926, the respondents demanded of the trustee in bankruptcy of V. E. Stockwell that he assume the title of the shares of Consumers Salt Company, and that he refused to do so. The court further found that the trustee in bankruptcy rejected any right to any cause of action pertaining to said shares. The evidence discloses that respondents filed with the trustee in bankruptcy a petition for an order directing McAlvay to surrender the shares to the trustee in bankruptcy as an asset of V. E. Stockwell. In the petition, the facts surrounding the execution sale were alleged. The order sought was made, but the Federal District Court made its order canceling and annulling this order. Under these facts, the findings of the trial court are amply supported, and, since the trustee rejected the right to sue to set aside the execution sale and disclaimed any interest in the shares after full disclosure by the bankrupt, no title to the shares ever vested in the trustee in bankruptcy of V. E. Stockwell.

[9-11] The original complaint in this action was filed on October 27, 1926. Nothing was done in the action until June of 1932. On June 3, 1932, and again on June 7, 1932, amendments to the complaint were filed, the latter amendment being the first in which there was an allegation that V. E. Stockwell had any interest in the shares. Trial was commenced on June 6, 1932. Appellants argue that the amendment of June 7, 1932, does not relate back to the time of filing of the original complaint because the last amendment changed the status of the plaintiff V. E. Stockwell, and therefore the action was barred by the statute of limitations. It must be noted that there was no change in the cause of action by the last amendment. It remained an action to set aside the sheriff's sale for fraud. It must be further emphasized that no substitution of a party is involved. At all times V. E. Stockwell was a party to this action and the sole effect of the amendment was to add a specific allegation that he had an interest in the shares. As was said in *Doolittle v. McConnell*, 178 Cal. 697, 701, 174 P. 305, 306: "Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action." There has been no change in the relief sought, and the situation presented in the original complaint does not differ essentially from that pleaded in the amended complaint. The mere fact that a new cause of action is pleaded does not prevent the relation back of the amendment to the time of the original complaint. *Cowell v. Snyder*, 171 Cal. 291, 294, 152 P. 920. It is only where the plaintiff seeks by amendment to recover upon a set of facts entirely unrelated to those pleaded in the original complaint.

[12] Appellants make the further contention that respondents are barred by laches. In making this contention, it is apparent that appellants are not using the term laches in a technical sense, because it is clear that this action was commenced promptly after the sale. Appellants' argument seems to be that because of the delay of six years prior to the amendment, respondents should be barred. However, in view of the practically continuous litigation between the parties and the fact that no evidence was taken before the amendment was made, no abuse of discretion by the trial court appears in the al-

lowance of the amendment. *Mackroth v. Sladky*, 27 Cal.App. 112, 148 P. 978.

[13, 14] Part of the shares sold at the sheriff's sale were transferred by McAlvay to Irwin who in turn pledged the stock as security with one Henry Merton. The court adjudged that certificate No. 53 for 112,500 shares issued to and held by Henry Merton "be declared null and void" and Merton was commanded to deliver the certificate to the clerk of the court. Merton was not a party to the action and his rights as an innocent holder for value could not properly be adjudicated. Therefore, appellants argue that the judgment must be reversed. But Merton is in no way bound by this judgment, and therefore appellants, standing in the position of a pledgor gratuitously protecting his pledgee's title, have no standing to object to this portion of the judgment.

For the reasons above given the judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; EDMONDS, J.; LANGDON, J.; SHENK, J.



10 Cal.2d 299

CARPENTER, Insurance Com'r, v. PEOPLES MUT. LIFE INS. CO. et al.
L. A. 15362.

Supreme Court of California.
Nov. 27, 1937.

Rehearing Denied Dec. 27, 1937.

1. Taxation ⇨140

The gross premiums tax is not a "property tax," but an "excise or privilege tax," and is properly assessed against life insurance company for year in which it received premiums taxed, though company was not doing business in state when tax accrued because of previous court order for liquidation (Gen.Laws 1931, Act 3739; Const. art. 13, § 14, as amended in 1930).

[Ed. Note.—For other definitions of "Excise," "Privilege Tax" and "Property Tax," see Words & Phrases.]

2. Licenses ⇨32(1)

The payment of a privilege tax may precede exercise of privilege or follow it, the choice of method being within legislative

discretion, and, where tax is proportionate to amount of business alone, it is equitable that it be paid after conclusion of year in which privilege is exercised.

3. Insurance ⇨72

A penalty for delinquency in payment of gross premiums tax which accrued against insurance company after appointment of insurance commissioner as liquidator was payable as part of the tax, though property was in custody of the law (Gen.Laws 1931, Act 3739; Const. art. 13, § 14, as amended in 1930).

4. Insurance ⇨72

The insurance commissioner as statutory liquidator of life insurance company was not liable for payment of interest on state's claim against company for delinquent gross premiums tax accruing after liquidation order (Gen.Laws 1931, Act 3739; Const. art. 13, § 14, as amended in 1930).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, by substitution, for liquidation of the Peoples Mutual Life Insurance Company, in which Ray L. Riley, State Controller, filed a claim for gross premiums taxes and penalties for default in payment thereof. From the judgment rendered, the commissioner and the controller appeal.

Reversed in part and affirmed in part. Prior opinion, 65 P.2d 827.

Frank L. Guereña, of San Francisco, for appellant and respondent Carpenter.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for appellant and respondent Riley.

Simpson & Simpson, of Los Angeles, for defendant Peoples Mut. Life Ins. Co.

LANGDON, Justice.

A hearing was granted in this case upon petition of both appellant and respondent state controller, after decision by the District Court of Appeal, Second District, Division 1, mainly for the purpose of giving consideration to a recent case from another jurisdiction just decided. Upon a study of this and other authorities, we are satisfied that the District Court of

Appeal has correctly decided the main issue involved herein, and we accordingly adopt the following part of the opinion of Mr. Justice pro tempore White as part of the opinion of this court:

"Two appeals are before us from the same judgment rendered by the trial court. One appeal is by the Insurance Commissioner of the State of California from that part of the judgment wherein it was decreed that the Peoples Mutual Life Insurance Company, a California corporation, was liable for the state insurance company tax which was assessed by the State Board of Equalization between the first Monday in March, 1933, and the first Monday in July of that year, notwithstanding the fact that the company was not doing business in this state on the first Monday in March, 1933, and had been prohibited from doing business in this state by order of the superior court, dated November 10, 1932, decreeing its insolvency and directing its liquidation. From that holding the insurance commissioner, as statutory liquidator of the company, takes this appeal.

"The second appeal is taken by the state controller from that part of the judgment which decreed that the insurance company, which was ordered liquidated by the superior court of the county of Los Angeles on November 10, 1932, and which thereafter did no business in California, was liable for penalties for default in the payment of taxes accruing prior to November 10, 1932, the date of the order of liquidation, but was not liable for penalties accruing after the date of such liquidation order.

"The facts are undisputed, and epitomized, are that Peoples Mutual Life Insurance Company was an insurance company doing business as such in the state of California during that portion of the calendar year 1932 prior to November 10, 1932, on which day the court below, after full hearing upon the petition of the state insurance commissioner, adjudged the company insolvent, terminated its right to do business, and ordered it liquidated pursuant to the provisions of Act 3739 of Deering's General Laws 1931 (St. 1919 p. 265, and amendments thereto). By said order the insurance commissioner was appointed liquidator. At no time after November 10, 1932, was the company engaged in the business of insurance or doing business as an insurance company, in

the state of California or elsewhere. Between the first Monday in March, 1933, and the first Monday in July, 1933, the State Board of Equalization purported to assess and levy a state tax against said company in the sum of \$2,284.70, representing the statutory percentage of the gross premiums received by the company from business done by it in California during the calendar year 1932, less the deductions provided by law. That tax was not paid. The state controller filed with the liquidator a claim of the state of California for the tax in question. The claim was rejected by the liquidator, whereupon the action of the liquidator was reviewed by trial had in the manner provided by section 8c of the liquidation statute (as added St.1933, p. 1422 [Gen. Laws Supp. 1933, Act 3739]).

[1] "On the appeal taken by the state insurance commissioner as liquidator, it is contended that the state insurance company tax imposed by section 14 of article 13 of the Constitution of California, as amended in 1930, is a property tax; that it is imposable only upon a company doing business on the tax accrual date; that the accrual date of said tax for the 1933 levy was the first Monday in March of 1933; and that Peoples Mutual Life Insurance Company was not subject to that tax for the year 1933 because it was not doing business and was prohibited from doing business on the first Monday in March, 1933. Appellant insurance commissioner earnestly asserts that the test of tax liability is the existence of taxable property on the first Monday in March, and that, because the insurance company was not engaged in the business of insurance on the first Monday in March, 1933, and had not been so engaged since November 10, 1932, the State Board of Equalization was without authority to levy what appellant insurance commissioner contends was a property tax as of the first Monday in March, 1933.

"Appellant insurance commissioner argues that under subdivision (a) of section 14 of article 13 of the Constitution, amended in 1930, there is imposed the so-called state gross receipts tax upon railroad companies, car companies, telegraph and telephone companies, and gas and electric companies; that our Supreme Court has declared that said tax upon each of these utilities was a property tax and not an excise or privilege tax; and that it follows

therefrom that subdivision (b) of the same constitutional provision which we have under consideration imposes the same so-called state gross premiums tax upon insurance companies, and that the same constitutes a property tax and not an excise or privilege tax. However, our Supreme Court, in the case of *Consolidated Title Sec. Co. v. Hopkins*, 1 Cal.2d 414, 417, 35 P.2d 320, certiorari denied 294 U.S. 716, 55 S.Ct. 515, 79 L.Ed. 1249, declared that there are important distinctions between those provisions of section 14, subdivision (a), of article 13, establishing the public utilities gross receipts tax, and the provisions of section 14, subdivision (b), under which insurance companies are required to pay a gross premiums tax, by reason of which the decisions under the public utilities tax provisions are not necessarily controlling as to insurance companies. In the case just referred to, the Supreme Court, 1 Cal.2d 414, at page 418, 35 P.2d 320, after explaining that the theory of the public utilities tax under section 14, subdivision (a), is that gross receipts from operation furnish a fair measure for estimating the value of operative property and computing the tax upon it, uses this decisive language with reference to the tax on insurance companies (1 Cal. 2d 414, at page 419, 35 P.2d 320, 323): 'The gross premiums tax required to be paid by insurance companies, although in lieu of certain taxes upon property, is not, like the public utilities gross receipts tax, by the terms of the constitutional provision itself a tax upon property. Rather, [italics added] it is a franchise tax exacted for the privilege of doing business in this state, and is recognized as such in the amendment to section 14 which goes into effect on January 1, 1935.' We therefore hold that the tax on insurance companies levied pursuant to section 14, subdivision (b), of article 13 of the Constitution, amended in 1930, is an excise or privilege tax and not, as contended by appellant insurance commissioner, a property tax. The trial court, therefore, was correct in holding that Peoples Mutual Life Insurance Company become liable for the tax here in question during 1932, because it received in the course of doing business the premiums upon which the tax was imposed, and such tax is for the privilege of doing business during the year in which the premiums were received by the insurance company."

[2] The recent decision called to our attention is *State v. General American Life*

Insurance Co. (Neb.) 272 N.W. 555, 559. It was therein held that the gross premiums tax on foreign insurance companies was not a property tax, but an excise tax upon their privilege of doing business in the state. In this respect the case is in complete accord with our own view, hereinabove expressed. The court further states that it is a "prospective" tax, and "it never became a valid obligation against the defendant, because the old company, which had failed and been taken over and sold by the superintendent of the insurance department of Missouri, never asked for the right to sell insurance in Nebraska for that year." This conclusion is stated without any discussion, and we are unable to follow it here in view of the obvious purpose of our own constitutional and statutory provisions; namely, to tax the company for the privilege of doing business, and to impose that tax on the gross premiums received in such business. And there is no reason why a tax based upon business done during one year may not be levied and collected in the following year. Payment of the tax may precede the exercise of the privilege or it may follow it, depending upon what system the Legislature chooses to provide; and where, as here, the tax is in proportion to the amount of business alone, it is both equitable and convenient that it be paid after the conclusion of the year in which the privilege is exercised. The choice of such a method is within the legislative discretion. See *William A. Slater Mills v. Gilpatric*, 97 Conn. 521, 117 A. 806; *Commonwealth of Massachusetts v. Meehan* (C. C.A.) 67 F.2d 638. The argument of the insurance commissioner would necessarily lead to a complete exemption of the company from taxation during the year 1932, in which it did a substantial business. Such an interpretation of the constitutional and statutory provisions is entirely unwarranted, and cannot be made where a more reasonable inference is possible. See *People v. Metropolitan Surety Co.*, 158 App.Div. 647, 144 N.Y.S. 201.

[3] The remaining question, raised by the state controller's appeal, is whether the penalty for delinquency was properly charged to the company. The trial court was of the opinion that, since the penalty accrued after appointment of the insurance commissioner as liquidator, the property was then in the custody of the law and no penalties could thereafter be imposed for acts in carrying on the liquidation. While

there is some difference of opinion in the cases, we think the better view is that property thus in the custody of the law is not removed from the power of taxation, for the percentage penalty for delinquency is as much a part of the tax as the principal amount. See *State of California v. Hisey* (C.C.A.) 84 F.2d 802, 805.

[4] With respect to the matter of interest, it appears to be conceded that the state's tax claim does not bear interest, and therefore the trial court ruled correctly in denying it.

That part of the judgment which denies recovery of penalties for delinquency is reversed, with directions to the trial court to give judgment for the state controller for such penalties; and the judgment is in all other respects affirmed.

We concur: WASTE, C. J.; CURTIS, J.; EDMONDS, J.; SHENK, J.; SEAWELL, J.



10 Cal.2d 304

CARPENTER, Insurance Com'r, v. PACIFIC COAST INS. ASS'N et al.

L. A. 15360.

Supreme Court of California.

Nov. 27, 1937.

Rehearing Denied Dec. 27, 1937.

1. Taxation ⇐140

The gross premiums tax is not a "property tax," but an "excise or privilege tax," which is properly assessed against life insurance company for year in which it received premiums taxed, though it was not doing business in state when tax accrued because of previous court order for liquidation (Gen. Laws 1931, Act 3739; Const. art. 13, § 14, as amended in 1930).

2. Taxation ⇐406

Where life insurance company was ordered liquidated by insurance commissioner January 19, 1932, but no tax report was filed with insurance commissioner or with State Board of Equalization in 1932, as required by statutes, board's failure to make assessment in March, 1932, did not preclude subsequent assessment of gross premiums for

1931, and company and commissioner were estopped to deny validity of subsequent assessment (Gen. Laws 1931, Act 3739; Const. art. 13, § 14, as amended in 1930; Pol. Code, § 3664b).

3. Taxation ⇐309

The tax liability imposed by Constitution and statutes is an obligation of taxpayer, irrespective of assessment thereof by Board of Equalization (Const. art. 13, § 14 as amended in 1930; Pol. Code, § 3664b).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, by substitution, for liquidation of the Pacific Coast Insurance Association and Pacific Coast Automobile Association Underwriters, Limited, wherein Ray L. Riley, State Controller, filed a claim for gross premium taxes and penalties. From a judgment holding the assessment of taxes a nullity, the controller appeals.

Reversed.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for appellant.

Frank L. Guereña, of San Francisco, for respondent.

Don Marlin, of Los Angeles, for defendants.

LANGDON, Justice.

Pacific Coast Insurance Association was an insurance company doing business in California throughout the year 1931, and until January 19, 1932. On that date it was adjudged insolvent and ordered liquidated by the insurance commissioner pursuant to statute. Deering's Gen. Law, 1931, Act 3739. The said company did not file a tax report with the insurance commissioner in 1932, and the insurance commissioner did not file a report in said year with the State Board of Equalization, as required by statute. Pol. Code, § 3666a. Consequently the board did not assess a tax in said year on the gross premiums of business done in 1931. The tax for such omitted year was eventually assessed in 1934 at the regular time for assessment of such taxes. The amount was \$7,653. The state controller filed his claim for tax and penalties with the insurance commissioner as liquidator of the company, which claim was rejected. The lower court

held the assessment a nullity, and the controller brought this appeal.

[1] The first and main issue is whether a tax and penalties on gross premiums may be assessed in March of a year following that in which the premiums were earned, notwithstanding the fact that at the time of the assessment the company is no longer engaged in business. On this issue the case is governed by *Carpenter v. Peoples Mutual Life Insurance Co.*, 74 P.2d 508, recently decided by this court. Under the holding in that case, it would have been entirely proper for the state to assess and collect its tax and penalties in 1932 for operations of defendant company during the year 1931.

[2,3] The second issue is whether the assessment may be made in a subsequent year. It is contended by respondent that, if a tax might be validly assessed, the only proper time was in March, 1932, and that, such time having passed, it was no longer possible to make a valid assessment. The authorities advanced in support of this contention merely hold that it is improper to modify the assessment roll in any period of a year other than that prescribed by law for the making of assessments. They are not determinative of the question whether in a subsequent year, at the regular time for making assessments, an omitted assessment may be made, and on this question we have found no authority squarely in point. Despite the lack of authority, however, we believe the circumstances of this case indicate clearly the proper decision. Respondent's position is, in substance, that by violation of its statutory duty to report, and thus accomplishing a concealment of its liability for the tax, the company or its representative has acquired a complete exemption therefrom. We cannot subscribe to this view, which would not only permit the company to profit by its own wrong, but would deprive the state of its legal claim for taxes in a wholly arbitrary manner. We are in accord with the contention of the state that the tax liability is imposed by the constitutional and statutory provisions (Cal.Const., art. 13, § 14, as amended in 1930; Pol.Code, § 3664b), and is an obligation of the taxpayer irrespective of the assessment thereof by the board. If the delayed assessment in the present case were an error caused by the board's own neglect, to the substantial injury of the taxpayer, it might be that a different conclusion would be indicated; but in the instant case the error was a direct result of the taxpayer's violation of its stat-

utory duty, and there is no showing that the delay in assessment has operated unfairly to its prejudice. And these facts which disprove any prejudice or injury to the taxpayer likewise make out a case of an estoppel against the company and its representative to deny the validity thereof.

While we are satisfied that the conclusion reached herein is sound in principle, we may observe that the situation is one which called for legislative action, and in 1937 the Political Code was amended by the addition of section 3669 (St.1937, pp. 80, 340) which authorizes assessment in a subsequent year after discovery of failure to make it in a prior year.

The order is reversed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; EDMONDS, J.



ELLISON v. LANG TRANSP. CO. *

ANDRADE v. SAME.

Civ. 11584.

District Court of Appeal, Second District,
Division 2, California.

Dec. 13, 1937.

Hearing Granted by Supreme Court
Feb. 10, 1938.

1. Courts ⇨82

Where court rule which was in effect on date of filing of motion to dismiss appeal provided that, on failure of appellant to observe provisions of such rule, appeal could be dismissed, but subsequent amendment thereto, in effect at time of hearing, removed such penal provision, respondent's motion to dismiss appeal, because of appellant's failure to comply with the rule, was denied (Rules for Supreme Court and District Courts of Appeal, rule VIII, § 4).

2. Appeal and error ⇨931(1)

After findings for respondent, evidence must be viewed most favorable to respondents on appeal.

3. Automobiles ⇨244(12)

In action for death of guest who was killed in collision when host drove his automobile into unlighted rear end of defendant's slowly moving trailer at night, evi-

*For subsequent opinion see 84 P.2d 510.

dence held sufficient, when considered with inferences which jury could reasonably have drawn therefrom, to support verdict for guest's administrator.

4. Witnesses ⇨216, 392(1)

In action for death of guest which resulted from collision, evidence of deputy sheriff's report of the accident was admissible, notwithstanding statutory provision that accident reports and reports supplemental thereto which are required to be made by drivers and owners of vehicles shall not be used as evidence in any trial, since such deputy sheriff's report was not a required report and it was admitted on cross-examination of officer who made it (St.1935, pp. 172, 173, §§ 484, 488).

5. Appeal and error ⇨207, 1060(1)

Discussion of damages by plaintiff's counsel in his closing argument, where no mention of damages had been made by him in opening argument nor by defendant in argument, though not the better practice, nevertheless was not error, since no prejudice was shown to result and defendant failed to ask permission to reply to such argument on damages.

6. Appeal and error ⇨757(4)

The failure of appellant to comply with court rule which provided that, where instructions are attacked as erroneous, all instructions on the subject must be printed in appellant's brief, and that where instructions are erroneously refused they must be printed in appellant's brief, together with those given on the subject, prevented review of appellant's claim of error as to instructions (Rules for Supreme Court and District Courts of Appeal, rule VIII, § 3).

7. Appeal and error ⇨1004(1)

A jury's verdict will not be set aside on appeal upon ground that damages are excessive unless verdict is so outrageously excessive as to suggest, at first blush, passion, prejudice, or corruption.

8. Death ⇨99(1)

\$12,000 and \$10,000 held not excessive for deaths of two guests which resulted from collision between host's automobile and defendant's trailer.

son, deceased, and by Caetano V. Andrade, as administrator of the estate of Nora Andrade, deceased, against the Lang Transportation Company, a corporation. Judgments for the plaintiffs, defendant appeals, and plaintiffs move to dismiss appeals.

Motions overruled, and judgments affirmed.

George H. Moore and Gerald O'C. Egan, both of Los Angeles, for appellant.

Clafin, Dorsey & Campbell, of Bakersfield, and Charles R. McCarty, of Los Angeles, for respondents.

McCOMB, Justice.

We have before us:

(1) Motions to dismiss the appeals on the ground that appellant has failed to meet the requirements of section 2 of rule VIII (Rules for the Supreme Court and District Courts of Appeal, 213 Cal. xlvii).

(2) Appeals from judgments in favor of respondents after trial before a jury in two actions to recover damages for wrongful deaths resulting from the alleged negligence of appellant.

The actions were consolidated for the purpose of the trial.

I.

October 21, 1937, the date the present motions were filed, section 4 of rule VIII of the Rules for the Supreme Court and District Courts of Appeal read as follows:

"Sec. 4. For any failure to observe this rule the court may, of its own motion, order the proper statement or index to be supplied or strike out the brief or petition, or for the failure of the appellant, dismiss the appeal, or for the failure of the petitioner, deny the petition." Rule VIII, sec. 4, 213 Cal. xlviii.

Subsequently the judicial council of the state of California emasculated the penal provision above set forth for the violation of a provision of rule VIII and substituted in lieu thereof the following:

"Sec. 4. For any failure to observe this rule the court shall not dismiss the appeal, but may, of its own motion, or on motion of an opposing party, order a proper statement or index to be made, or the transcript or brief to be amended or a supplement thereto to be filed, supplying such omissions and curing such defects as are in violation of this rule. In making the order the court may impose such terms and conditions on the offending party or

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Separate actions by Helen Ellison, as administratrix of the estate of Claude Elli-

his counsel as the circumstances appear to justify."

[1] This latter provision became effective November 24, 1937. Therefore, since the present rule is impuissant and prohibits the dismissing of an appeal for failure to comply with the provisions of rule VIII, respondents' motions to dismiss the appeal must be denied.

II.

[2] Viewing the evidence most favorable to respondents (Patten & Davies Lbr. Co. v. McConville, 219 Cal. 161, 164, 25 P.2d 429), the facts are these:

November 13, 1934, about 2:30 a. m. Claude Ellison was operating an automobile northerly on the Ridge Route between Castaic and Gorman, Cal. In the car with him were Nora Andrade, Rachel Keys, James N. Ellis, and three children. At approximately the time above mentioned Mr. Ellison drove his automobile, while traveling at about 35 miles an hour, into the rear end of one of appellant's trailers loaded with steel, which was moving slowly in a northerly direction on the extreme right-hand side of the highway, without lights on the rear thereof. Claude Ellison and Nora Andrade were both killed in the accident. The present suits were filed by the administratrix and administrator, respectively, of the decedents.

Appellant urges reversal of the judgments on the following propositions:

First. There is no substantial evidence to sustain the findings of fact upon which the judgments were necessarily predicated.

Second. It was error for the trial court to receive in evidence over objection a deputy sheriff's report of the accident.

Third. It was error to permit respondents' counsel to discuss the question of damages before the jury, this subject not having been touched upon by respondents' counsel in their opening argument nor by appellant's counsel in their argument.

Fourth. The trial court committed prejudicial error in (a) instructing the jury, and (b) refusing to give instructions requested by appellant.

Fifth. The damages awarded by the judgments are excessive.

[3] As to appellant's first proposition, an examination of the record discloses there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to

sustain every material finding of fact upon which the judgments were necessarily predicated. Further discussion of the evidence is unnecessary. Thatch v. Livingston, 13 Cal.App.2d 202, 56 P.2d 549; People v. Groves, 9 Cal.App.2d 317, 321, 49 P.2d 888, 50 P.2d 813; Leavens v. Pinkham & McKeivitt, 164 Cal. 242, 245, 128 P. 399.

[4] Appellant's second proposition is untenable. The law is settled that accident reports and reports supplemental thereto which are required to be made under section 484 of the Vehicle Code, St. 1935, p. 172, by drivers and owners of vehicles shall not be used as evidence in any trial, civil or criminal. Section 488, Vehicle Code, St.1935, p. 173. However, in the instant case the testimony discloses that the report which was received in evidence was not a *required report* but was one made by an officer for the information and benefit of the sheriff's department only, and was admitted on cross-examination of the officer who made it.

[5] Appellant's third proposition is likewise untenable. It is undoubtedly the better practice to limit plaintiff in his closing argument to subjects which he has touched upon in his opening argument or which have been discussed by defendant's counsel in argument; however, in the instant case there is a total absence of any showing of prejudice to appellant resulting from the practice which was actually followed nor is there any showing that appellant asked the trial court for permission to make a reply to respondents' argument on the subject of damages.

[6] The fourth proposition urged by appellant will not be considered by us, because of the failure to observe the provisions of rule VIII, section 3 (213 Cal. xlvii), which provides that, where instructions given to a jury are attacked as erroneous, all other instructions given, bearing upon that subject, must be printed in full in the appellant's brief; also that, if it be claimed that instructions requested were erroneously refused, the refused instructions must be printed in full in appellant's brief and all instructions given bearing upon the subject covered by the refused instructions must be printed in appellant's brief in full or the substance thereof clearly stated with citations to the line and page where such instructions may be found. Rule VIII, sec. 3, *supra*.

[7,8] The final proposition of appellant is untenable. The law is settled that

the jury's verdict will not be set aside on appeal upon the ground that the damages are excessive, unless the verdict is so outrageously excessive as to suggest at the first blush passion, prejudice, or corruption. *Corvin v. Hyatt*, 10 Cal.App.2d 107, 108, 51 P.2d 176. Neither the verdict of \$12,000 as damages for the death of Claude Ellison nor the verdict of \$10,000 as damages for the death of Nora Andrade fall within the provisions of the foregoing rule.

We have examined the other errors alleged to have been committed by the trial court in its rulings on the admission and rejection of evidence but find none which resulted in prejudice to appellant.

For the foregoing reasons (1) the motions to dismiss are denied, and (2) the judgments are and each is affirmed.

I concur: CRAIL, P. J.

WOOD, Justice (concurring).

I concur in the order of affirmance. In my opinion no error appears in the record which would justify an order of reversal.



24 Cal.App.2d 167

PEOPLE v. HOUSTON.

Cr. 350.

District Court of Appeal, Fourth District,
California.

Dec. 22, 1937.

1. Criminal law $\hookrightarrow$ 1023(8)

An order denying a motion for arrest of judgment is not appealable.

2. Criminal law $\hookrightarrow$ 720(1), 1159(2, 3, 4)

Arguments of inconsistencies in testimony and conflicts in evidence in criminal prosecution are proper before a jury but cannot be considered by Court of Appeal, since that court may not judge credibility of witness, determine weight of evidence, or settle conflicts in evidence except where evidence is so inherently improbable as to be unworthy of belief.

3. Indictment and information $\hookrightarrow$ 110(47)

An amended information charging motorist with crime of "hit and run" in language of statute and setting forth all necessary elements of crime in ordinary, concise, and understandable language, stated facts sufficient to constitute a public offense. *St.1935*, p. 170, § 480; *Pen.Code*, §§ 950-952.

4. Criminal law $\hookrightarrow$ 27

Sections of Vehicle Code providing that violations thereof shall be misdemeanors where not otherwise provided do not apply to section denouncing crime of "hit and run" and containing its own penalty, as against contention that "hit and run" is a misdemeanor and not a felony. *St.1935*, p. 170, § 480.

5. Criminal law $\hookrightarrow$ 636(3)

The trial judge's action in ordering a special venire in defendant's absence was not error where it did not appear whether any of the trial jurors were from special venire or whether jurors were all from regular panel, and defendant did not challenge panel or raise question in trial court, since there is no more necessity for defendant's presence when a special venire is ordered than when a regular term jury is drawn.

6. Automobiles $\hookrightarrow$ 355(8)

Evidence that defendant, who admitted being the driver of automobile at time of "hit and run" accident, had finely broken glass on his clothes when arrested a short time after accident, that defendant's shoes fitted into tracks leading from automobile, and that there were worn places on each heel of defendant's shoes and corresponding worn places in tracks, was sufficient to identify defendant as driver of automobile and sufficient to sustain conviction for violation of statute denouncing "hit and run." *St.1935*, p. 170, § 480.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Jesse Houston was convicted of violating the statute denouncing the crime known as "hit and run," and he appeals from orders denying his motions for arrest of judgment and for new trial and from the judgment.

Order denying motion for new trial and judgment affirmed, and attempted appeal from other orders and rulings dismissed.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and John O. Palistine, Deputy Atty. Gen., for the People.

MARKS, Justice.

[1] Defendant was charged with violation of the provisions of section 480 of the Vehicle Code, St.1935, p. 170, which denounces the crime popularly known as "hit and run." He was convicted and sentenced to confinement in the penitentiary. He made motions for arrest of judgment and for new trial, which were denied. He has appealed from those orders and from the judgment. He has also attempted to appeal from a multitude of rulings and orders of the trial judge, none of which is appealable. Section 1237, Pen. Code. The order denying a motion for arrest of judgment is not appealable. *People v. Williams*, 184 Cal. 590, 194 P. 1019.

[2] Defendant urges a great number of alleged errors, most of which are simply stated as errors, without any argument to support them and without citation of authority. A large portion of his brief is devoted to arguing inconsistencies in the testimony of witnesses and conflicts in the evidence. Such arguments are proper before a jury but under circumstances here presented have no appropriate place in a brief in an appellate court which cannot judge the credibility of the witness, determine the weight of the evidence, nor settle conflicts in it except in those extreme cases where evidence may be held to be so inherently improbable as to be unworthy of belief. We will only consider those specifications of error which may possibly deserve attention.

[3] Defendant urges that the amended information on which he was tried does not state facts sufficient to constitute a public offense. In charging the offense the pleading follows the statute and sets forth all the necessary elements of the crime in ordinary, concise, and understandable language as required by our law. Sections 950, 951, 952, Pen.Code.

[4] Defendant further urges that "hit and run" is a misdemeanor and not a felony. In support of this argument he cites various sections of the Vehicle Code which provide that violations of that Code shall be misde-

meanors where not otherwise provided. Section 480 of the Vehicle Code contains its own penalty, so the other sections are not applicable.

[5] Counsel assigns error arising from the fact that in the absence of the defendant the trial judge ordered a special venire for service at the trial. There is no more necessity for the defendant's presence when a special venire is ordered than there is when a regular term jury is drawn. Furthermore, there was no challenge to the panel nor was the question raised in the trial court. If we are not mistaken, defendant did not exhaust his peremptory challenges but secured a jury that was seemingly satisfactory to him. It does not appear in the record whether any of the trial jurors were from the special venire or whether the jurors were all from the regular panel.

Defendant complains of a number of the instructions given by the trial court and the refusal to give a number of instructions requested by him. We have read all of the instructions. There does not appear to be any error in them sufficiently prejudicial to require a reversal of the judgment under the facts of this case.

[6] Defendant urges that the evidence is insufficient to support the verdict and judgment. This argument is based on the sufficiency of the identification of defendant as the driver of the automobile involved in the accident. Defendant admitted being the driver of the car at the time of the accident. When arrested a short time after the accident his clothes had finely broken glass on them. The shoes of defendant exactly fitted into tracks which led from the automobile. There was a worn place on each heel of defendant's shoes. Corresponding worn places appeared in the tracks. Defendant was sufficiently identified as the driver of the automobile and consequently the evidence is sufficient to support the verdict and judgment.

The order denying the motion for new trial, and the judgment, are affirmed. The attempted appeal from the other orders and rulings is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

24 Cal.App.2d 170

PEOPLE v. HOUSTON.

Cr. 352.

District Court of Appeal, Fourth District,
California.

Dec. 22, 1937.

1. Criminal law ☞1023(8)

An order denying a motion in arrest of judgment is not appealable.

2. Criminal law ☞1186(6)

A conviction for being an habitual criminal and an order denying defendant's motion for new trial were reversed where Attorney General confessed error and admitted that filing of supplemental information by district attorney, charging defendant with two prior convictions after he had been found guilty in a criminal prosecution, was improper under statute requiring amendment of information to charge prior convictions, whenever it is discovered that an information does not charge such prior convictions. Pen.Code, § 969a, as amended by St.1931, p. 1060.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Jesse Houston was convicted of being an habitual criminal and he appeals from the judgment, and from orders denying his motion for new trial, and in arrest of judgment.

Judgment and order denying motion for new trial reversed, and appeal from order denying motion in arrest of judgment dismissed.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

MARKS, Justice.

This is a companion case to People v. Houston, 74 P.2d 515, the opinion in which has this day been filed. After defendant had been found guilty in that case the district attorney of Riverside county presented and filed a supplemental information charging him with two prior convictions. He was found guilty and sentenced as an habitual criminal who had suffered two prior convictions.

[1] Defendant has appealed from the judgment sentencing him as an habitual

criminal, and from the orders denying his motion for new trial, and in arrest of judgment. The latter order is not appealable.

[2] The Attorney General has confessed error and admits that since the amendment of section 969a of the Penal Code, St.1931, p. 1060, the procedure followed here cannot be supported.

The judgment adjudging defendant an habitual criminal and the order denying the motion for new trial are reversed. The appeal from the order denying the motion for arrest of judgment is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.



24 Cal.App.2d 210

JONES v. CLOVER et al.

Civ. 11287.

District Court of Appeal, Second District,
Division 1, California.

Dec. 23, 1937.

1. Judgment ☞305

The limits set by statute authorizing setting aside of judgment and entry of a different judgment, but not authorizing any attack upon findings, cannot be transgressed (Code Civ.Proc. §§ 663, 663a).

2. Judgment ☞305

Findings may be disturbed by trial court after they have been filed and judgment entered only by granting of new trial, except in respect to mere clerical error or mispronunciation.

3. Judgment ☞305

The trial court, in modifying judgment, was limited to substitution of judgment that should have been given upon findings of fact, and was not authorized to substitute new findings and judgment for findings previously filed and judgment entered thereon (Code Civ.Proc. §§ 663, 663a).

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by C. W. Jones against J. B. Clover and others. From an adverse judgment, plaintiff appeals.

Reversed and remanded, with directions.

Carl B. Sturzenacker, Arthur S. Guerin, and Hal Hughes, all of Los Angeles, for appellant.

George B. Bush, of Los Angeles, for respondent.

WHITE, Justice.

This is an action to recover upon certain promissory notes in favor of plaintiff. After trial, the court made and entered its judgment, for the plaintiff and against the defendant, in the sum of \$10,460, together with costs and attorney's fees. Thereafter, defendant Clover moved for a new trial, and at the same time moved for the entry of another and different judgment upon the same findings theretofore made. However, on February 23, 1933, the following order was made by the trial court: "The findings filed January 5, 1933, and the judgment entered January 6, 1933, are hereby vacated and set aside and new findings be filed and judgment be entered in favor of plaintiff in the sum of \$295.00." Thereafter, the court, sua sponte, entered the following and additional order: "In this entitled action the Order of February 23, 1933, as to the amount of judgment, namely \$295.00, is hereby vacated and set aside and in place substitute '\$400.00 and \$460.00 attorney fees'."

Following this the court made new findings of fact as well as new conclusions of law, which were entered on March 30, 1933, and under which judgment was awarded to the plaintiff in the principal sum of \$400, together with \$460 attorney's fees. This latter judgment, together with the findings and conclusions supporting it, was entered April 3, 1933. Thereafter, plaintiff moved for a new trial, which motion was denied by lapse of time without any action on the part of the trial court.

[1] Several grounds for reversal are urged by appellant, but we shall first give consideration to the claim that the court was without power to alter its findings under sections 663 and 663a of the Code of Civil Procedure. If appellant's contention in this respect be upheld, it is determinative of this appeal. The aforesaid sections of the Code of Civil Procedure authorize the setting aside of a judgment

by the court which rendered it and the entry of another and different judgment, when incorrect or erroneous conclusions of law, not consistent with nor supported by the findings of fact, are shown, in which case, after the judgment is set aside, the conclusions of law shall be amended as corrected. The limits set by these sections cannot be transgressed. They in no case authorize an attack upon the findings. In *Dahlberg v. Girsch*, 157 Cal. 324, 327, 107 P. 616, 619, our Supreme Court says: "Section 663, Code Civ.Proc. authorizes simply the substitution of the judgment that should have been given as a matter of law upon the findings of fact in a case where the judgment already given is an incorrect conclusion from such findings. The court cannot on such a motion in any way change any finding of fact. The sole remedy in the trial court of a party who is aggrieved by any finding of fact is a motion for a new trial."

[2] In *Stanton v. Superior Court*, 202 Cal. 478, 487, 261 P. 1001, it was held that the only method, under our system, by which findings may be disturbed by the trial court after they have been filed and judgment has been entered thereon, except perhaps in respect to a mere clerical error or misprision is by the granting of a new trial. See, also, *Hawxhurst v. Rathgeb*, 119 Cal. 531, 51 P. 846, 63 Am.St.Rep. 142; *Los Angeles County v. Lankershim*, 100 Cal. 525, 35 P. 153, 556; *Hole v. Takekawa*, 165 Cal. 372, 375, 376, 132 P. 445; *Pico v. Sepulveda*, 66 Cal. 336, 5 P. 515.

[3] The order of February 23, 1933, purporting to set aside the findings of fact and substitute new findings, was therefore ineffectual for any purpose, as the court was limited to the substitution of the judgment that should have been given as a matter of law upon the findings of fact, if the judgment already given was an incorrect conclusion from such findings.

The foregoing conclusion at which we have arrived makes it unnecessary to consider or decide other points raised.

The judgment from which this appeal is taken, and which was entered April 3, 1933, is reversed, and the cause remanded, with directions to the court below to reenter the original judgment entered by the court on January 6, 1933.

We concur: YORK, P. J.; DORAN, J.

PEOPLE v. JORDAN et al.**Cr. 351.**District Court of Appeal, Fourth District,
California.

Dec. 13, 1937.

Hearing Denied by Supreme Court
Jan. 10, 1938.**1. Sodomy** $\hookrightarrow$ 6

Testimony of accomplices, corroborated by testimony of police officers, *held* to authorize conviction for sex perversions (Pen. Code, § 288a).

2. Criminal law $\hookrightarrow$ 438

In prosecution for sodomy, admission in evidence of photographs of cupola built on cabin, through which police officers observed commission of offense, was not prejudicial error, notwithstanding alleged failure to lay proper foundation by showing when photographs were taken.

3. Criminal law $\hookrightarrow$ 511(1)

Evidence corroborating testimony of accomplices need not be sufficient to satisfy jurors of defendants' guilt beyond a reasonable doubt.

4. Sodomy $\hookrightarrow$ 6

Evidence merely furnishing natural grounds for suspicion in view of corroborating circumstances *held* not to authorize conviction of sodomy on particular counts (Pen. Code, § 288a).

5. Sodomy $\hookrightarrow$ 6

Evidence, including chemist's testimony concerning examination of handkerchief and clothing of defendants, *held* to authorize conviction for crime against nature (Pen. Code, § 286).

6. Conspiracy $\hookrightarrow$ 47

Circumstantial evidence and evidence that when police raided party participated in by sixteen defendants, one defendant told others to "stick together, don't say anything," *held* to authorize conviction of conspiracy to commit sex perversions (Pen. Code, § 288a).

7. Conspiracy $\hookrightarrow$ 47

Evidence sufficient to support conviction of conspiracy to commit sex perversions, and evidence that two of numerous defendants committed crime against nature, *held* not to authorize conviction of conspiracy to commit crime against nature (Pen. Code, §§ 286, 288a).

8. Criminal law $\hookrightarrow$ 673(4)

In prosecution of numerous defendants under joint indictment, admitting testimony of statements made by defendants who did not appeal was not prejudicial error as respects appealing defendants, where trial court told jury that such statements were to be considered only as against the persons making them.

9. Criminal law $\hookrightarrow$ 1186(4)**Witnesses** $\hookrightarrow$ 337(4)

In prosecution of numerous defendants for sodomy and conspiracy, admitting evidence that one defendant had been guilty of sex perversions on prior occasions, in rebuttal of such defendant's testimony to the contrary, was error but not reversible, where court instructed jury that evidence thereof should be considered only in connection with such defendant's guilt, and other evidence clearly authorized conviction (Pen. Code, §§ 286, 288a; Const. art. 6, § 4½).

10. Criminal law $\hookrightarrow$ 1186(4)**Witnesses** $\hookrightarrow$ 366

In prosecution of numerous defendants under joint indictment, refusing to permit impeachment of defendant who had pleaded guilty by asking him on cross-examination if he had not applied for probation was error, but not reversible where such defendant's testimony was fairly supported and not essential to the prosecution's case (Const. art. 6, § 4½).

11. Criminal law $\hookrightarrow$ 438, 1186(4)

In prosecution of numerous defendants for sodomy, admission in evidence of obscene pictures, found in locker of one defendant was error, but not prejudicial, where other evidence clearly supported conviction (Pen. Code, §§ 286, 288a; Const. art. 6, § 4½).

12. Conspiracy $\hookrightarrow$ 43(5)

An indictment charging conspiracy to violate Penal Code sections, each of which provides a penalty which renders violation thereof a felony, was not demurrable as failing to charge a felony as against the contention that one or more of the overt acts charged were misdemeanors only and that each count alleged itself to be a separate count "being an offense of the same class of crimes, committed at the same time and place" (Pen. Code, §§ 286, 288a).

13. Sodomy $\hookrightarrow$ 4

The statute prohibiting "participating in" sex perversion refers to persons actual-

ly performing acts of perversion, as against contention that "participating" refers only to third persons assisting principals (Pen.Code, § 288a).

[Ed. Note.—For other definitions of "Participate," see Words & Phrases.]

14. Criminal law ⇨823(1)

Instructions, parts of which allegedly conflicted when taken independently of their context, were not prejudicially erroneous where no conflict appeared when instructions were considered as a whole, and trial court instructed jury that they must consider and construe each instruction with all the others.

15. Criminal law ⇨822(1)

On appeal from conviction, reviewing court must consider all the instructions as a whole.

16. Criminal law ⇨774, 1172(1)

In prosecution for sodomy, instruction that drunkenness is no excuse for commission of a crime, which omitted statutory provision that jury may consider drunkenness where specific intent is a necessary element of a particular crime, was incomplete but not prejudicially erroneous, where omitted rule would be applicable only to two counts of indictment charging conspiracy and the only defendant shown to have been intoxicated pleaded guilty and did not appeal (Pen.Code, § 22).

17. Criminal law ⇨829(1)

In criminal prosecution, refusal of offered instructions was not error where substance thereof, in so far as they were correct statements of law, was adequately covered in instructions given.

18. Criminal law ⇨622(2)

In prosecution of seventeen defendants under joint indictment for sodomy and conspiracy to commit sodomy, that defendants represented various grades or strata of society did not render trial court's denial of motions for separate trial an abuse of discretion (Pen.Code, § 1098).

19. Criminal law ⇨1163(5)

Failure of record to show affirmatively that court admonished jury on some of numerous recesses and adjournments would not justify reversal in absence of showing of prejudice (Pen.Code, § 1122).

20. Criminal law ⇨863(2)

In prosecution for conspiracy, trial court's remarks to jury after submission of

case including reference to "statements alleged to have been made by certain defendants following completion of conspiracy," was not prejudicial error as telling jury that conspiracy had been completed, though it would have been better to refer to "alleged completion of alleged conspiracy," especially where no objection or exception was made or taken at the time.

21. Criminal law ⇨1129(1)

On appeal from conviction, alleged misconduct of district attorney in remarks included in argument to jury was not reviewable when not assigned as error.

22. Criminal law ⇨730(14)

District attorney's argument to jury in criminal prosecution that verdict other than guilty would insult intelligence and cast reflection on court's honor and dignity was not reversible error, where court, after defendant's objection, stated that jury had already been instructed as to statements of counsel.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Edward Jordan and others were convicted of violations of sections 286 and 288a of the Penal Code, and they appeal.

Affirmed in part and reversed in part.

Joseph Seymour, of Riverside, for appellants.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Earl Redwine, Dist. Atty., and Harry P. Amstutz and Wm. O. Mackey, Deputy Dist. Attys., all of Riverside, for the People.

BARNARD, Presiding Justice.

In this action seventeen defendants were charged, in an indictment containing fifteen counts, with a number of violations of sections 286 and 288a of the Penal Code, alleged to have been committed on or about March 13, 1937. Count I charged all of the defendants with a conspiracy to violate section 288a. Count II charged all of the defendants with a conspiracy to violate section 286. Counts III to XIV, inclusive, each charged some two of the defendants with a violation of section 288a, and count XV charged two of the defendants with a violation of section 286.

The defendant named in the indictment as Bill Doe was never apprehended, four defendants pleaded guilty to certain counts,

and the other twelve pleaded not guilty and were tried. A jury found all twelve guilty on the first two counts and found them all guilty as they were respectively charged in the other thirteen counts. A motion for a new trial was denied and ten of those convicted have appealed.

The appellants' briefs contain more than 1,000 pages, several hundred being single-spaced. Many points are raised with several hundred incidental claims of error which are not separately stated or treated. A large portion of these briefs is devoted to discrepancies and conflicts which go only to the weight of the evidence and it has been no small task to segregate the points which deserve consideration and the matters material thereto. It is obviously impossible to consider all of the claims of error made, but we shall attempt to pass upon all which by any possibility could affect the result. For obvious reasons, we shall omit the sordid details and comment on the evidence only in the most general terms.

The most important question is whether the evidence is sufficient to sustain the verdict and judgment upon the respective counts as affecting the various appellants. Certain general facts appearing in the evidence will first be set forth, followed by a reference to other evidence more particular in nature.

[1] A few weeks prior to March 13, 1937, the operator of a service station on a main highway about 5 miles easterly from Riverside delivered to the defendant Bill Doe a key to a cabin which is located in a secluded spot on a side road about a mile from the service station. A short distance to the rear of this cabin is a sort of ravine and at another point a drainage ditch. The cabin is about 23x17 feet in size and contains four rooms and a bathroom. Across the front, which is the long way of the cabin, is a living room and a small kitchen. To the rear of these is a bedroom about 10x8 feet in size, another bedroom about 8x8, and between them a small bathroom about 5 feet square with a small hall about 3 feet wide, which gives access from the living to both bedrooms and the bathroom. The partitions between the various rooms do not extend up to the roof and there was no ceiling over any of the rooms, except in one place which covered about one-third of the living room and extended for a distance of a foot over one of the bedrooms and over a small corner of the hallway. There was a switch near the front

door which turned on electric lights in all of the rooms, after which the light in any particular room could be turned off or on. There was some furniture in the cabin, including a day cot in the living room, a double bed in one of the bedrooms, and two single beds in the other.

The operator of the service station reported to the sheriff's office that he had noticed quite a few cars going in toward the cabin late at night. A deputy sheriff and an officer of the military police at March Field investigated and on the evening of March 4, observed an automobile go up the road and stop at this cabin. The lights in the cabin were turned on and the car remained for some forty-five minutes. The officers followed the car as it left the premises and it was driven to a place in Riverside where two of these defendants lived, and two men got out of the car and entered the house. On the afternoon of March 5, the officers obtained a duplicate key to the cabin, entered the same, made an examination of it, and punched out some knots in boards which were over the windows so that they might later observe what went on in the cabin. On the evening of March 6 four officers went to the premises and concealed themselves in the drainage ditch to the rear of the cabin. During that evening four cars drove up and twelve men entered the cabin, including nine of these defendants. The lights were turned on and a radio was taken into the cabin and hooked up. There followed what is referred to in the record as a party. There was some drinking and some dancing, and two of the men were dressed in women's clothes. At various times during the evening the officers observed certain of the persons present entering the various bedrooms, at times the light in a bedroom was turned out, at times the lights in the entire house were turned out, and at such times there was considerable screaming "like women screaming." Early in the evening two of the men came outside of the cabin and embraced each other and the officers heard one of them say to the other that this was a marvelous place, that "no one would ever think of coming up here," and that everything was perfectly safe. During the evening several of the men came outside and peeked in at various knot holes. On one occasion another man came out and told them to stop this as they would not like others peeking at them under similar circumstances. The officers heard

someone make an announcement that one of the defendants would give a hula hula dance and a little later the announcement was made that another person "will now give a demonstration" of how section 288a should be violated, which announcement was followed by general laughter and applause. Later on an announcement was made that all present were invited to return on the night of the 13th and that a party would then be put on which would make the present one seem like a "teaser."

During the next few days the officers made preparations to permit of a better observation of what might take place within the cabin on the night of the 13th and arranged for a raid at that time. A cupola was built on the rear slope of the roof of the cabin large enough for two or more persons to conceal themselves within it. This cupola was covered with roofing paper similar to that on the roof of the cabin, and an opening was left on its upper end nearest the ridgepole so that from the ground it would look like a part of the cabin. The cupola was built over four holes or openings which were made in the roof. One of these was a knot hole a couple of inches in diameter and the other three were slots made by widening cracks between boards in the roof, the slots being from 3 to 5 inches long. There is ample evidence that these slots or openings afforded a view of every room in the house and of nearly all parts of these rooms.

On the evening of March 13, four deputies from the sheriff's office and two officers of the military police at March Field went to this cabin and concealed themselves. Two occupied the cupola on the roof, two were in the drainage ditch to the rear and northerly from the cabin, and two were in some trees about 90 feet easterly from the cabin. About an hour later one car appeared, a little later two other cars, and eventually all seventeen of the defendants were in the cabin. What there occurred was observed by the two officers in the cupola and some portions were seen or heard by the officers concealed outside. Their evidence is also confirmed in many particulars by the testimony of two of the defendants who pleaded guilty. Shortly after the party started an obscene picture was tacked on the wall and obscene remarks were made concerning it. Liquor was served and there is ample evidence of these men kissing and caressing each other, of various ones dancing together in what may

be summarized as a highly improper manner, and of other acts which need not be referred to which are highly suggestive as to the nature of the party. About 1 o'clock a. m. the officers appeared openly and arrested all the participants except Bill Doe who had previously left.

The two officers who were stationed on the roof testified in detail as to what occurred on several distinct occasions during this evening, on each of which some two of the defendants went off by themselves in one or the other of the two bedrooms, and on one occasion the bathroom. The acts testified to by them as having been performed on these respective occasions fully and completely disclose, in each of these instances, a violation of section 288a. There can be no question that ample direct evidence appears in the record to support the conviction of the respective appellants charged with this offense in counts III to XI, inclusive.

[2] In this connection we may refer to certain contentions made by the appellants to the effect that some of the evidence just referred to is unworthy of belief and that some was improperly received. The appellants argue from one statement made by the men who built the cupola on the roof that it was inclosed on all sides, with no opening, that this conclusively proves that these officers could not have been concealed therein, and that the entire evidence as to what they saw must be disregarded. This argument is one for the jury at best, and it is easy to see why the jury refused to accept the suggestion that a cupola built for this express purpose would be so constructed that it could not be used. There is ample evidence that it was built with an opening at its upper end and that it was actually used on this occasion for the purpose for which it was intended. Three photographs were introduced in evidence showing a rear view of this cabin with the cupola upon the roof. One of these shows the box-like construction of the cupola without any roofing paper over it. In that picture appears a vine at the rear of the cabin, the top of which reaches the lower edge of the roof just below the cupola. In another, the cupola is shown covered with roofing paper and the vine appears to be bent over toward the ground so that its middle or highest part extends only about half way up to the eaves. In the third picture the cupola is also covered with roofing paper but no vine appears. It

is argued that this indicates that these pictures were taken at great intervals of time extending over what must have been the period necessary for this vine to grow up to the eaves, and demonstrates that this cupola was not constructed a few days before March 13, as testified to by several witnesses. No more than a conflict appears in any event, and it may be observed that the only conclusion reasonably to be drawn is that the vine extended to the eaves while the cupola was being constructed, that when the second picture was taken the vine had fallen or had been knocked half way down, and that when the third picture was taken it had been cut down. It is argued that no sufficient foundation was laid for the introduction of these pictures, and that it does not appear exactly when they were taken. While these pictures satisfy a natural curiosity as to what this cupola looked like, they serve no other purpose, they are in no way essential to the people's case, and whether or not a sufficient foundation for their admission was laid no possible prejudice is shown.

[3] It is further argued that if there were any holes or slots in this roof on this occasion, a person looking through them could only see directly downward, that his view would be obstructed by a small shelf in the hallway and by the portion of a ceiling which covered a part of the living room and extended about a foot over one of the bedrooms, and that it conclusively follows that these officers could not have seen what they said they saw. This argument is contradicted both by common experience and by the record in this case. A hole, some 2 inches wide and 3 to 5 inches long, between two boards on a roof a considerable distance above such partitions as these, would afford a vision over a considerable space and the same would not be confined to what was immediately below the aperture. Again, this argument was one for the jury and the view they took of it finds complete support in the record. Several other photographs depicting this cabin, its immediate surroundings, and portions of its interior were admitted in evidence and the appellants contend that no sufficient foundation for their admission was laid. While these pictures show the general situation in and around this cabin, they are not essential, and the only ones which have much or any value are those showing the interior of the cabin, which were taken that night following the raid

and for which a sufficient foundation was laid. Because it could not affect the result, we refrain from going into the matter as to whether the admission of any of these pictures was improper. It is further contended that the two defendants who pleaded guilty were accomplices, and that their testimony must be corroborated by other independent evidence which, in itself, is sufficient to satisfy the minds of the jurors beyond a reasonable doubt of the guilt of the accused. Not only is this statement of the law entirely erroneous (*People v. Negra*, 208 Cal. 64, 280 P. 354), but the testimony of these accomplices finds full corroboration in the testimony of the officers even under such a rule.

[4] We will now consider the sufficiency of the evidence relating to counts XII, XIII, and XIV. In count XII appellants Bailey and Kirkland were charged with a violation of section 288a, which is claimed to have taken place during this same evening in an automobile parked near this cabin. In counts XIII and XIV appellants Bailey and Mitchell are charged with two other violations of this section which it is claimed took place in this same automobile. With respect to count XII an officer testified that before the raid took place he saw Bailey and Kirkland leave the house and enter this automobile, and that at the time of the raid he instructed another officer to go to this car and get the two men who were in it. There is testimony that two of the officers then went to this car and found Bailey and Kirkland sitting in the front seat; that Bailey was leaning over against Kirkland with his arms around him; that one officer told Bailey to get out and when he refused pulled him out; that Kirkland got out on the other side of the car and after fastening his trousers started to walk away but stopped when told to do so; and that both men were then brought into the cabin where the other defendants were. With respect to counts XIII and XIV there is evidence that during the evening and before the raid, Mitchell and Bailey got into the back seat of this automobile, which was parked some 75 feet from where two of the officers were hidden. One of these officers testified that he could see the car, that they got into the back seat, and that they later got out of the car and went back into the cabin. The other officer testified that he saw these two men come out of the house and get into the car; that he could see their heads bob around occasionally; that

when some one opened the door of the cabin the light flashed out and he could see movements in the car, but that he "could not tell what was doing there"; and that he saw these men get out of the car, light cigarettes, hold a short conversation, and then go back into the cabin. While the actions of these three persons furnish a natural ground for suspicion in view of the nature of this party and of many other things which occurred in and around this cabin during this evening, the evidence is not sufficient, in our opinion, to sustain a conviction upon these three counts.

[5] Count XV charges two of the appellants with a violation of section 286 of the Penal Code, which is claimed to have taken place during this evening in an outhouse a short distance easterly from the cabin. Some of the evidence heretofore referred to has an application in connection with this count in disclosing the general situation. It appears from the testimony that the officers carefully examined this toilet just before this party began and again immediately after the raid. It also appears from the testimony of these officers that while this party was in progress these two appellants left the cabin and entered the toilet where they remained about fifteen minutes, after which they returned to the cabin. When the toilet was examined after the raid, it was found that it had not been used for the purpose for which it was intended and a handkerchief was found on the seat. This handkerchief and certain clothing worn by these two appellants at the time were examined by a chemist, whose testimony appears in the record. Without setting forth his testimony here we will say that, in our opinion, the evidence relating to this count fully sustains and justifies the conclusion reached by the jury.

[6] Count I charges all of the defendants with a conspiracy to violate section 288a of the Penal Code and alleges certain overt acts, some of which at least were established. In *People v. Lee*, Cal.App., 72 P.2d 572, 573, it is said: "In order to constitute conspiracy, it was not necessary that the defendants enter into an elaborate and detailed agreement prior to the commission of any overt act. It is only necessary that each has adopted a common design with the knowledge and consent of the other to constitute them conspirators." The law fixes no time at which a conspiracy must have been entered into, it is not necessary that there should be a formal agree-

ment or one expressed in words, and if at any time or in any manner the conspirators tacitly come to a mutual understanding to commit a crime, this is sufficient to constitute the conspiracy and it is not necessary for the prosecution to show that the criminal enterprise in its inception had in contemplation a particular crime as against a particular person or as between particular persons. *People v. Yeager*, 194 Cal. 452, 229 P. 40. In a conspiracy the acts of one are considered the acts of all. We have here the testimony of a number of witnesses as to conversation and acts of many of these defendants at this same cabin on the night of March 6, as to conversations of various defendants during the ensuing week, and as to many acts at the same cabin on the night of March 13. An invitation was extended to all present at the first party to come back on the 13th and bring their friends. At least two witnesses testified that they fully understood that they were to bring only people who were "queer" or "who knew the score," the meaning of which expressions clearly appears from the evidence. While the appellants argue that the party was given by the defendant Bill Doe, who was not apprehended, that he furnished the refreshments, and that, therefore, it was not a common undertaking, we think it sufficiently appears from the evidence as a whole that every one who was present on March 13th knew what kind of a party it was and came for a particular purpose. It cannot be reasonably inferred that any of those present would have remained longer than a few minutes if he had not understood or had been deceived in the nature of the enterprise. The congregating of these men in this isolated cabin and the lewd and lascivious acts, which followed immediately after their arrival there, indicate a previously conceived scheme or plan and justifies the inference which was apparently drawn by the jury that each and all of these parties were acting in accordance with a common design and purpose, which was known to and consented to by each of the others. A remark made by one of the appellants at the time of the raid is significant. Four of the officers entered the cabin first, leaving the others outside. When they entered this appellant said: "They haven't got anything on us—remember, fellows, there is only four of them and there is sixteen of us. Stick together, don't say anything." While the proof of a conspiracy in this instance must, as is usually the case, rest at least in part on circumstantial evi-

dence, we think the evidence is sufficient to justify the verdict as to this count and that such part of the evidence as is circumstantial is entirely inconsistent with the idea of innocence on the part of any of those participating in this party.

[7] A somewhat different situation appears with respect to count II which charges all of the defendants with entering into a conspiracy to violate section 286 of the Penal Code. The only evidence of a specific violation of this section on this occasion is that respecting the acts of two of the defendants relating to count XV. In that instance any such act was committed by these two who had temporarily left the rest of the party. Aside from these two, we find no evidence in the record which would support the conclusion or the inference that any of the defendants violated section 286, intended or planned to do so, knew that others were committing that crime or in any way aided or participated in the commission of that crime by others. In our opinion, the evidence is not sufficient to support the verdict and judgment in so far as the same is based upon count II of the indictment.

[8] Certain assignments of error in connection with the admission or rejection of other portions of the evidence will next be considered. Testimony was received of certain statements made a few days after the raid by two of the defendants who did not appeal. It is argued this was prejudicial to the appellants. No error appears as the court before permitting this evidence, and again in its final instructions, plainly told the jury that any such statements were to be considered only as against the persons making them.

[9] It is claimed that the court erred in permitting evidence to the effect that one of these appellants had been guilty of a violation of section 288a at times prior to those involved in this action. It is argued that evidence was thus received of other and distinct crimes, which constitutes reversible error under the rule laid down in such cases as *People v. Wyett*, 49 Cal.App. 289, 193 P. 153. It was held in that case that an error of this nature was sufficiently prejudicial to compel a reversal regardless of section 4½ of article 6 of the Constitution. The court pointed out, however, that the defendant was convicted upon the testimony of the prosecuting witness alone and that his evidence was in some respects quite

uncertain and must have been strongly supported in the minds of the jury by the evidence of other similar acts committed by the defendant. In the case before us it cannot be assumed that the admission of this testimony affected any of the appellants other than the one referred to in that evidence, as the court instructed the jury that if they consider the evidence at all they must consider it only in connection with his guilt. This evidence was offered in rebuttal for the purpose of impeaching a general statement to the contrary made by this appellant. In a way, counsel for the appellants opened the door for this evidence although it may be said that the impeachment was upon a matter which was largely immaterial in this action. Although we think the court should not have admitted this evidence, in view of the amount and nature of the other evidence which here appears, it cannot be assumed that the same could have carried such weight with the jury as to influence their verdict. While the admission of such evidence may be sufficiently prejudicial to justify a reversal in a close case, it would be contrary to both the letter and spirit of section 4½ of article 6 of the Constitution to give it that effect in such a case as this, particularly where appellants' counsel is not free from blame.

[10] One of the defendants, who pleaded guilty and who testified in this case, was asked on cross-examination if he had not applied for probation. An objection to the question was sustained. It is argued that this was a proper impeaching question which went to the state of mind or possible bias of the witness, and that it could be shown, outside the record, that this witness applied for probation, that the hearing thereon was continued several times, and that his case was transferred to the juvenile court after the appellants were convicted. The court should have permitted the full facts in this regard to be given the jury under the rule laid down in *People v. Pantages*, 212 Cal. 237, 297 P. 890, but we cannot here consider this error sufficiently prejudicial to justify a reversal. While the rejected evidence was such as might well affect the credibility of this witness, it is hardly reasonable to say that the jury might have refused to believe him when his testimony was so thoroughly supported by that of the two officers who were in a position to see what occurred. In any event, his testimony was not essential to the prose-

cution's case and if it be assumed that the jury might otherwise have regarded him as unworthy of belief, it cannot be assumed that this would have had any great bearing on the result.

[11] Error is assigned in the admission of another block of evidence, which is referred to in the briefs as exhibits 23 to 87, inclusive. These are pictures and cards found in the locker of one of the appellants at March Field on the day after the raid. A large number of these exhibits are cards and papers which are entirely immaterial. Among these exhibits are five small pamphlets, each consisting of some half dozen pages, and each pamphlet constituting a series of obscene pictures. There are several duplicate copies of each of these pamphlets and several loose leaves which are duplicates of some of the pages from the various pamphlets. We can see no theory under which these exhibits were admissible and, in our opinion, their admission was plainly erroneous. Assuming that such error would be prejudicial in a close case depending upon unsatisfactory evidence, a somewhat different situation here prevails. This trial lasted many days and not only was the evidence of guilt, with the exception of certain counts as above pointed out, satisfactory and strong, but the direct evidence was of such a nature that it is impossible to believe that the jurors could have been influenced by these pictures to do something they would not otherwise have done. Regardless of the fact that several errors in the admission and rejection of evidence thus appear, it cannot be said under these circumstances that they are sufficient to justify a reversal, and we are far from convinced that any or all of them have led to a miscarriage of justice.

[12, 13] Some contention is made that the court erred in overruling a demurrer to the indictment. It is argued that counts I and II, the conspiracy counts, are insufficient since one or more of the overt acts alleged were nothing more than misdemeanors, that therefore these counts do not charge the defendants with the commission of felonies, and that none of the other counts charges a felony because each alleges that it is a separate count "being an offense of the same class of crimes committed at the same time and place." We must confess our inability to follow the argument made. Counts I and II charge a conspiracy to violate sections 286 and 288a, respectively. Each of those sections

provides for a punishment which brings the crime into the felony class. Counts III to XV, inclusive, charge respective violations of these sections of the Penal Code substantially in the language of the code with a definite and certain statement as to the parties involved, and the time, place, mode, and manner of the commission of the offense. One argument in this connection is at least novel. It is argued that section 288a of the Penal Code, properly construed, does not make any act claimed to have been committed by any of these defendants a crime. It is said that this section provides that any person "participating" in the act referred to in the section is punishable by imprisonment, that the plain meaning of the word "participating" is "assisting," and that it follows that the statute does not make it a crime for two persons to perform the act mentioned in the section, but only makes it a crime for a third person to assist them. Aside from its novelty, this argument has no merit and the mere statement thereof should be a sufficient answer. The demurrer was properly overruled.

[14-16] The appellants attack a large number of the instructions given. It would prolong this opinion to an unreasonable extent and serve no useful purpose to set forth and consider the respective claims of error made in this connection. In many instances the statement is made that some portion of an instruction is erroneous without any attempt to support the claim by argument or authority. It most of these attacks some clause or sentence from an instruction is taken independently and a meaning given thereto which could not possibly be attributed to it when considered with the context and in connection with the rest of the instructions. In the same way it is argued that several conflicts appear between various instructions, although a different result obtains if these instructions are considered as a whole. We have carefully gone over all of these instructions and find no prejudicial error. Not only must a reviewing court consider all of the instructions as a whole, but in this case the jury was specifically told that the court had not intended to give them all of the law in any one instruction, that they were not to single out any one instruction and base their verdict thereon, but that they must consider and construe each instruction with all of the others. Only one assignment of error in connection with the instructions

given requires consideration. The court gave an instruction to the effect that drunkenness is no excuse for the commission of a crime. Appellants point out that this instruction omits that part of section 22 of the Penal Code which provides that where a specific intent is a necessary element of a particular crime the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the intent with which he committed the act. *People v. Siegel*, 2 Cal.App. 2d 620, 38 P.2d 450, is cited and it is argued under that authority that the instruction here in question failed to advise the jury that if it believed that any particular defendant was in such a degree of intoxication as not to be able to give his consent at the time any of these acts were performed, a verdict of not guilty should be returned as to him. Conceding that the instruction in question is incomplete in this respect, it may be first observed that the omitted rule could have applied only with respect to the first two counts of the indictment. Not only is there no evidence of intoxication on the part of any of the defendants up to the time that any crimes which were committed were completed, but the only evidence of intoxication on the part of any one of them at any time is that at the time of the raid, somewhere around 1 o'clock a. m., the defendant Gee was found asleep in a bed and in such a state of intoxication that he had to be assisted to a car. Not only is there no evidence as to when he reached such a degree of intoxication as not to have been able to give his consent to any particular act, but he pleaded guilty and is not involved in this appeal.

[17] Complaint is also made of the refusal of the trial court to give some forty-seven instructions offered by the appellants. Not only do many of these, as admitted by appellants, contain erroneous matter, but in so far as they are correct statements of the law, the substance thereof was adequately covered in the instructions given.

[18] Error is assigned in the refusal of the court to grant two motions for a separate trial, it having been requested at one time that one trial be had as to the first two counts, another trial as to counts III to XIV, and a third trial as to count XV, and at another time that there be one trial as to counts I and II and another trial as to the remaining counts. The only argument advanced is that the seventeen defendants represented various grades or strata of

society, that on this account it is probable that "all of the appealing defendants were dragged down the stream of repulsiveness and engulfed in the whirlpool of guilt," and that it was unfair to try them together. The reason given furnishes no legal grounds for a severance. The offenses charged in counts III to XV took place on the same evening, at the same place, within a short period of time, and by members of one group. Counts I and II, while involving also things which took place shortly before the evening just mentioned, were largely concerned and intimately connected with the events involved in the other counts. All of the offenses were of the same general class and involved largely the same evidence, and it could well be said that it was in the interest of justice that all of the charges be tried together. The matter was one within the discretion of the court and nothing appears to show that this discretion was abused. Section 1098, Pen.Code; *People v. Dowell*, 204 Cal. 109, 266 P. 807; *People v. Perry*, 195 Cal. 623, 234 P. 890.

[19] It is contended that the court erred in failing to admonish the jury, as required by section 1122 of the Penal Code, at some of the recesses and adjournments. This trial lasted many days and there were fifty-nine recesses or adjournments. While the record does not show a failure to admonish the jury on any of these occasions, it fails to affirmatively show that the jury was so admonished on the twenty-first adjournment, which was for a noon recess, and on the twenty-seventh which was for a short recess during the day. In all other cases the record shows affirmatively that the jury was admonished although in some of these cases the transcript merely states that the jury was duly admonished by the court. We cannot presume error and there is no attempt to show any prejudice resulting from the instances in which the record is silent. If it be assumed that there was any irregularity in this respect, it is not sufficient to justify a reversal. *People v. Olds*, 86 Cal.App. 130, 260 P. 321; *People v. Leavitt*, 100 Cal.App. 93, 279 P. 1056.

[20] A few words from some remarks made by the trial court to the jury after the case had been submitted are assigned as error, which is stated to be "one of the most important alleged errors committed by the trial court." In answering a question asked by the foreman of the jury, the court used the words, "and also as to certain

statements alleged to have been made by certain defendants *following the completion of the conspiracy.*" (Italics ours.) It is argued that the last six of the quoted words told the jury that a conspiracy had been completed, and that the court thereby invaded the province of the jury. While it would have been better to have referred to the *alleged* completion of the *alleged* conspiracy, it is not reasonable to think that the jury could have misconstrued the language used and taken it to be an expression of opinion on the part of the court that it had been established, as a fact, that a conspiracy existed. The court had instructed the jury that they were the exclusive judges of the weight of the evidence and the credibility of the witnesses, that the court did not intend to express or intimate any opinion as to what facts were or were not established, and that if any expression of the court seemed to indicate any such opinion the same was to be disregarded. A further consideration is that no objection or exception was made or taken at the time, when the matter could easily have been corrected.

[21, 22] The last point which will be considered is that the district attorney was guilty of prejudicial misconduct in certain remarks made during his argument to the jury. Five instances are set forth in which some one of the defendants was referred to as a "pervert." Aside from any other consideration, the appellants admit that they did not assign the use of this word in these instances as error, and the matter need not be further discussed. During a portion of his argument the district attorney stated, "I think any other verdict other than guilty upon all of the counts in this indictment would be an insult to your intelligence and to mine and would cast reflection upon the honor and dignity of this court." Thereupon, counsel for appellants stated, "I wish to assign the remark of the district attorney that a verdict of not guilty would be an insult to the dignity of this court as error prejudicial to the substantial rights of the defendants, and I ask the court at this time to specifically instruct the jury to ignore the same, and instruct them upon that." Thereupon the court said: "The jury have already been instructed as to statements of counsel in the course of a criminal trial." The appellants cited *People v. Pantages*, supra, as authority for the proposition that the making of the remark in question constitutes reversible er-

ror. We think the case referred to is, in itself, sufficient authority for a contrary holding.

While minor errors appear in this record, the appellants had a fair trial, and, except as noted with respect to certain counts, the evidence amply supports the verdict and judgment, any errors which appear are not sufficiently prejudicial to warrant a reversal, and no miscarriage of justice is disclosed by the record.

That portion of the judgment which is based upon counts II, XII, XIII and XIV of the indictment is reversed. In all other respects and as based upon all other counts the judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.



24 Cal.App.2d 124

PELTON v. ANDREWS.

Civ. 11567.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1937.

Hearing Denied by Supreme Court
Feb. 17, 1938.

1. Attorney and client ⇨129(2)

In action against attorney for breach of contract to render services in connection with patent applications, evidence that one application had been rejected in February, subject to amendment required to be filed on or before August 15, that applicant did not notify attorney of rejection until July, when he wrote to attorney asking him to prepare necessary amendments and have them ready for filing within three weeks, and that attorney was on vacation in Europe at that time, supported finding that applicant's request was not made upon reasonable notice.

2. Attorney and client ⇨129(2)

In action against attorney for breach of contract to render services in connection with patent applications, evidence was sufficient to sustain finding that attorney performed services required in accordance with contract, and that they were of great value to applicant.

3. Witnesses ⇨133

In action for breach of contract, continued against defendant's executor after defendant's death and after executor rejected claim filed by plaintiff in probate proceedings, the trial court properly refused to permit plaintiff to testify concerning matters of fact occurring before defendant's death, since action constituted a "claim or demand" against the defendant's estate.

[Ed. Note.—For other definitions of "Claim" and "Demand," see Words & Phrases.]

4. Abatement and revival ⇨77

In action for breach of contract, continued against defendant's executor after defendant's death and after executor rejected claim filed by plaintiff in probate proceedings, the trial court did not err in refusing to permit plaintiff to amend his complaint to show negligence on defendant's part in rendering services under contract, where action was based on alleged failure of defendant to perform and not on allegations that he was negligent or unskillful.

5. Executors and administrators ⇨449

In action on a rejected claim against executor of a decedent's will, plaintiff can recover only on claim presented and rejected, and may not recover for any other cause of action.

6. Appeal and error ⇨766

Where record on plaintiff's appeal from judgment for defendant showed that plaintiff also appealed from part of order taxing costs, but no reference was made to that appeal in briefs, order was affirmed.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers and Robert W. Kenny, Judges.

Action by George E. Pelton against A. V. Andrews. Defendant having died, Lewis M. Andrews, as executor of the last will of A. V. Andrews, deceased, was substituted as a party defendant. From a judgment for defendant and from part of the order taxing costs, plaintiff appeals.

Judgment and order affirmed.

Warren E. Libby, of Los Angeles, for appellant.

Chandler, Wright & Ward, of Los Angeles, for respondent.

WOOD, Justice.

This action was filed June 2, 1934. Thereafter, the defendant, A. V. Andrews, died and probate proceedings were commenced. The executor of his will rejected a claim filed in the probate proceedings. Substitution of the executor was made as a party defendant in the present action and a trial was conducted resulting in judgment for the defendant, from which plaintiff prosecutes this appeal. Hereinafter, A. V. Andrews will be referred to as the defendant.

Plaintiff is an inventor, and defendant was during the time of the transactions which are the subject of the litigation, a lawyer practicing in Los Angeles. He had had experience in patent matters, but was not a registered patent solicitor. Under date of May 7, 1928, plaintiff wrote to defendant a letter which was accepted by defendant and became a contract between them. The part of the letter which is important in the present litigation follows: "Referring to the services which you have rendered to me heretofore in connection with the preparation, development and application of patent upon my invention of coated ribbons for typewriters and other machines, and also to my invention for the application of cellulose coating material to various base materials, fibres and cloths and to paper for various and sundry uses, and referring to one or more set-ups or combinations of machinery and appliances for use in the production of products under said respective inventions—I propose that, in addition to the services you have already rendered in connection with the inking ribbons and the like, you shall render from time to time such service as may be required in working out and preparing applications for patent and amendments thereto with reference to the inventions above briefly outlined, and shall render such further advisory service as may be found necessary or desirable from time to time in connection with the respective patent applications on the above subjects and also such suggestions as may occur to you concerning features which should receive further consideration or experiment in connection with the fuller development of said inventions, processes and/or appliances—it being understood that you are not required to make personal appearances before the Patent Office or handle the technical or clerical matters involved at Washington. * * *" For the services to be performed under the contract plaintiff agreed to pay

defendant the total sum of \$10,000. The sum of \$1,000 was actually paid. In his complaint plaintiff alleged that defendant breached the contract on or about the month of June, 1929, and thereafter "failed, neglected and refused to perform or do any of the things required by him under and by virtue of the terms of said contract," and that the services performed by defendant were of no value to plaintiff. Plaintiff further alleged that he had been required to employ other attorneys to perform the work which defendant had agreed to perform, and that he was thereby damaged in the sum of \$4,608.70. The trial court found that defendant performed the services required of him in accordance with the terms of the contract, and that they were of great value to plaintiff. The court further found that plaintiff himself abandoned the contract on or about July 10, 1929, and that the action is barred by subsection 1 of section 337 of the Code of Civil Procedure, as amended by St.1933, p. 2116. These findings are now attacked by plaintiff.

[1,2] At the request of plaintiff, defendant prepared an application for a patent covering typewriter ribbons which was filed in the United States Patent Office at Washington on April 3, 1928, by plaintiff's patent solicitor. The Examiner in the Patent Office required numerous amendments to the specifications and claims. The matter was again referred to defendant, who worked out a number of proposed changes and mailed them to plaintiff on May 14, 1929. Considerable correspondence passed between defendant and plaintiff, who was then living in the Eastern part of the United States. The patent was finally issued on October 15, 1929. An application for a different patent had been filed by plaintiff on May 5, 1927. Defendant had had nothing to do with the preparation of this patent application. On February 15, 1929, this application was rejected, subject to amendment which was required to be filed on or before August 15, 1929. Defendant knew nothing of the rejection of this patent. On July 7, 1929, plaintiff wrote from Buffalo a letter to defendant, in which plaintiff referred to that part of the contract in which defendant agreed to render services on "the two pending applications" and asked defendant to prepare the necessary amendments and have them ready for filing within three weeks. This letter arrived at defendant's office on July 11, 1929. At that time defendant was on vacation in Europe

and was not expected back in time to be able to prepare the amendment. No request was made of defendant to render services after the letter dated July 7, 1929. During the time of defendant's employment and up to July, 1929, plaintiff frequently changed patent solicitors and during this period employed four different attorneys in various cities in the East to work on his patent applications. Defendant was not obligated by his contract to perform the work of a patent solicitor at Washington. Plaintiff's solicitors obtained extensions of time for the application filed May 5, 1927, and after a number of amendments were filed, a patent was finally issued on April 18, 1933. A detailed statement of all the evidence bearing upon the efforts of the parties to secure the patents would be inappropriate. Since plaintiff withheld information from defendant concerning the application of May 5, 1927, and of its rejection on February 27, 1929, until the month of July, 1929, a time in which an attorney might be expected to be on vacation, the trial court properly held that the request of plaintiff to complete the preparation of the amendment within three weeks was not made upon reasonable notice. We are satisfied that the record discloses sufficient evidence to sustain the finding of performance on the part of defendant. The conclusion we have reached on this point makes it unnecessary to consider the attacks upon the other two findings.

[3] Plaintiff complains of the ruling of the trial court refusing to permit plaintiff to testify as a witness concerning matters of fact occurring before the death of Mr. Andrews. The ruling of the court was correct. In *George v. McManus*, 27 Cal. App. 414, 150 P. 73, the plaintiff and the defendant were owners of automobiles which collided and plaintiff commenced an action charging negligence and seeking to recover damages. Pending suit the defendant died and his personal representatives were substituted as defendants. The reviewing court held that the action constituted "a claim or demand" against the estate of McManus and that it was prejudicial error to permit the plaintiff to testify as to the occurrences and facts upon which he based his claim.

[4,5] Plaintiff also complains of the ruling of the trial court in refusing to permit him to amend his complaint to show negligence on the part of defendant in rendering services. The court did not err in refusing to permit the amendment. The

action is based upon the alleged failure of defendant to perform and not upon allegations that he was negligent or unskillful. In an action upon a rejected claim against the executor of the will of a deceased person the plaintiff can only recover upon the claim presented and rejected. He is not entitled to recover for any other cause of action. *Lichtenberg v. McGlynn*, 105 Cal. 45, 38 P. 541; *Estate of Dutard*, 147 Cal. 253, 81 P. 519; *Mix v. Yoakum*, 200 Cal. 681, 254 P. 557; *Bechtel v. Chase*, 156 Cal. 707, 106 P. 81.

Plaintiff complains of various rulings of the trial court concerning the admission of evidence. We find no action of the trial court which has resulted in prejudice to plaintiff.

[6] The record discloses that plaintiff has also appealed from a part of the order taxing costs, but no reference is made to that appeal in the briefs.

The judgment and order are affirmed.

We concur: CRAIL, P. J.; McCOMB, J.



24 Cal.App.2d 224

WALSH v. PARKER.

Civ. 11370.

District Court of Appeal, Second District,
Division 1, California.

Dec. 24, 1937.

Rehearing Denied Jan. 21, 1938.

Hearing Denied by Supreme Court
Feb. 21, 1938.

1. Executors and administrators ⇨221(9)

In action against administrator on rejected claim based on an instrument executed by deceased, finding of court that deceased was in a state of mental weakness and subject to delusions, but that she had mental capacity to understand instrument, was sustained by the evidence.

2. Account stated ⇨1

In action against administrator on rejected claim based on instrument executed by deceased, exclusion of evidence to show that plaintiff had performed only minor services, on theory that instrument was an "account stated," was error, where instrument, though acknowledging value of services rendered by plaintiff and providing for their payment after deceased's death, had been executed by an

elderly woman with mental weakness, and no antecedent debts or disputed claims or compromise or adjustment thereof, were shown to have existed, since instrument was a "promise to pay for past services after death of deceased" rather than an "account stated."

[Ed. Note.—For other definitions of "Account Stated," see Words & Phrases.]

3. Account stated ⇨1

For existence of an "account stated," it must appear that at time of accounting certain claims existed concerning which an account was stated, that a balance was then struck and agreed on, and that defendant expressly admitted that certain sum was then due from him as a debt.

4. Account stated ⇨1

An "account stated" is a document which exhibits a state of account between parties and balance owing from one to the other.

5. Account stated ⇨1

For existence of an "account stated," there need not be mutual or cross-accounts or demands between the parties.

6. Account stated ⇨3

The acknowledgment of a debt, though it consists of but a single item, may form the basis of an "account stated."

7. Account stated ⇨1

The writing constituting an "account stated" need not aver or contain grounds and reasons for conclusion and declaration expressed, but is a complete "account stated" if it contains a signed and written acknowledgment of a present, unqualified indebtedness or liability, with a promise to pay a named sum.

8. Account stated ⇨8

Only when account stated is clear and complete and execution thereof is admitted is restriction that it can be avoided only by averment and proof of fraud, mistake, etc., applicable.

9. Account stated ⇨19(2)

Where account sued on is a defective memorandum of account, without dates, or any balance struck or stated, and answer denies that any account was stated, court should allow great latitude in introducing evidence to disprove it.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by James H. Walsh against Harvey M. Parker, administrator with the will annexed of the estate of Mary Ann Tarbell, deceased (substituted in place and stead of Charles J. Ramsey, executor of the estate of Mary Ann Tarbell, deceased). From an adverse judgment, the defendant appeals.

Judgment reversed.

Merriam, Rinehart & Merriam, of Pasadena, for appellant.

Ticknor & Maxwell and Roland Maxwell, all of Pasadena, for respondent.

PER CURIAM.

This is an appeal by the administrator of the estate of Mary Ann Tarbell from a judgment rendered against him in an action upon a rejected claim against the estate.

It was alleged in the complaint that for a period of six years prior to September 8, 1933, and for over a year thereafter, the plaintiff rendered services to the decedent, "staying with her at nights, attending to her wants, driving her and otherwise assisting and caring for her," for which services decedent promised to pay plaintiff \$2,000 per year, plus interest at 5 per cent.; that about September 8, 1933, decedent executed a "memorandum of said agreement," which is as follows:

"Sep 8, 1933

"James Walsh has worked for me for the past six years staying in with nights and attending to me. Driving me evenings where I wanted to go. Also most every Sunday. I agreed to pay him \$2000 Two Thousand a year plus intrist at the rate of 5%. This to be paid from my estate after my death.

"This I fully understand and order that James H. Walsh be paid \$2000 a year for his services for the past six years and at the same rate as long as he shall continue in my service.

"this is my wishes

"Mary A. Tarbell."

At the trial of the action, plaintiff made prima facie proof of the execution of the document (it appearing that the body of the instrument was in the handwriting of the plaintiff and that the words "this is my wishes Mary A. Tarbell" were in the handwriting of the decedent), and also offered some slight evidence of "services" rendered decedent by him subsequent to September 8, 1933, which evidence consisted of the

testimony of witnesses to the effect that the plaintiff lived in the home of Mrs. Tarbell; that he was seen, "occasionally," or "frequently," driving her in her automobile; that he worked as a gardener, not for Mrs. Tarbell. A motion for nonsuit was denied.

[1] From the evidence of the defendant, it appeared that the plaintiff, a man about 40 years of age, had lived at the home of Mrs. Tarbell since about 1927, but paid nothing for his room or board during this period. Mrs. Tarbell was 84 years old and subject to the infirmities of age. She suffered from a complication of ailments, arteriosclerosis, senile dementia, gall bladder, and stomach trouble. In April, 1933, she made a holographic will leaving her entire estate to the plaintiff. This will was found in plaintiff's possession. A month later she made another will, omitting mention of plaintiff. There were produced as exhibits blank sheets of paper bearing her signature. She habitually left such papers lying about the house. Her attitude toward the plaintiff would vary from anger and abuse to fond affection. She would chase him from the house, board up the windows and hide his bedclothes; but in a day or two she would readmit him. She frequently threatened him with a hammer which she kept under her pillow. At other times she seriously considered marrying him. After her death a number of promissory notes, payable to her and signed by the plaintiff, were found among her effects. The trial court found, among other things, that on September 8, 1933, Mrs. Tarbell "was in a state of mental weakness and was subject to delusions or hallucinations, and although on said date the mental faculties of the said Mary Ann Tarbell were somewhat impaired; nevertheless said agreement was not signed by reason of any weakness of mind or lack of mental capacity upon the part of the said Mary Ann Tarbell, and the said Mary Ann Tarbell was able to and did understand the nature, purpose and effect of said agreement at the time of the execution thereof by her." This finding represents the choice of the trial court between the conflicting inferences which might be drawn from the foregoing evidence and other evidence to the effect that the decedent was well able to manage her own affairs. In such circumstances, it may not be disturbed by this court.

The judgment must be reversed, however, upon another point made by appellant. The position which was taken by the plaintiff on the trial, adopted by the trial judge,

and urged by respondent in this court, is that the instrument in question constituted an account stated, and that, as was said in *Gardner v. Watson*, 170 Cal. 570, 150 P. 994, 996, all "evidence going to total or partial lack of consideration is forever debarred by the convention and agreement of the parties, for this is of the very essence of an account stated." Upon this theory, the trial court refused to admit evidence offered by defendant as to the nature of the services rendered by plaintiff during the period prior to the execution of the document, and rejected defendant's offer to prove by such evidence a total failure of consideration. Despite this ruling, however, as the trial progressed, evidence was offered by defendant and received to the effect that the "services" rendered by plaintiff to Mary Ann Tarbell prior to the execution of the document amounted to no more than reading to her a few evenings each week, occasionally taking her on automobile rides on Sundays or evenings, in her car; and sometimes performing some minor household task or errand; that prior to his death the son of decedent did all these things; that after her son's death decedent's half-brother called daily at the house, drove her in her car, and assisted in the management of her estate. This evidence was admitted solely as bearing on the issues of want of capacity of decedent and undue influence by plaintiff. Appellant contends that this and other rejected evidence of similar import should have been received and considered on the defense of want of consideration, and also, since the execution of the document was denied in the answer, as bearing on the probability of decedent's having signed it.

[2] While the offers of proof were not as clear or definite as they might have been, the evidence admitted, as well as that offered (which it would unduly prolong this opinion to set out in further detail than as hereinbefore stated), presents a situation where, far from being her creditor, the plaintiff appeared to be considerably indebted to decedent, not only for board and room, but for money lent; and the "services" appeared to be so trifling as to constitute no consideration at all, aside from their being of the nature which ordinarily, between such good friends as plaintiff and decedent, are rendered with no thought of compensation. This, indeed, was the view taken of the alleged services by the trial court, for it denied recovery for services claimed to have been rendered after the ex-

ecution of the instrument (the proof thereof being very slight) and observed that plaintiff apparently rendered no more "services" to decedent before the execution of the document than he did afterward. It is apparent, therefore, that in arriving at a decision in favor of plaintiff as to services rendered prior to the signing of the agreement, the trial court rigidly excluded as a factor in its determination, the amount, nature, or value of such services. In this, we think, the court erred.

[3-7] The plaintiff did not plead or prove, nor does the writing on its face purport to be, an account stated. Plaintiff alleged in his complaint the making of an oral agreement of employment and the subsequent execution of a written memorandum thereof. In presenting his case, he proved only the execution of the writing. No antecedent debts or disputed claims, or the compromise or adjustment thereof, were shown to have existed. In *Gardner v. Watson*, 170 Cal. 570, at page 574, 150 P. 994, 995, it is said: "Over what in law constitutes an account there was never any question in this state, and very little uncertainty exists in other states. 'It must appear' (says this court in *Baird v. Crank*, 98 Cal. 293, 297, 33 P. 63) 'that at the time of the accounting certain claims existed, of and concerning which an account was stated, that a balance was then struck and agreed upon, and that defendant expressly admitted that a certain sum was then due from him as a debt.' To like effect is *Coffee v. Williams*, 103 Cal. 550, 556, 37 P. 504, where it is said: 'An account stated is a document—a writing—which exhibits the state of account between parties and the balance owing from one to the other; and when assented to, either expressly or impliedly, it becomes a new contract. An action upon it is not founded upon the original items, but upon the balance agreed to by the parties.' * * * It is not at all necessary that there should be mutual or cross-accounts or demands between the parties. The acknowledgment of a debt, though it consists of but a single item, may form the basis of such a stated account. * * * Moreover, the writing constituting an account stated need not aver, or at all contain, the grounds and reasons for the conclusion and declaration expressed. It is a complete account stated if it contains a signed and written acknowledgment of a present, unqualified indebtedness or liability with a promise to pay a named sum."

[8,9] Applying most liberally the foregoing language to the instrument here presented, we cannot see that it constitutes an account stated. The writing merely confirms the alleged previous agreement. It takes no cognizance of the outstanding indebtedness of plaintiff to decedent, represented by a series of promissory notes. It is merely evidence of an agreement. Only when the account stated is clear and complete and the execution thereof is admitted, is the restriction contended for by respondent applicable. "And the general rule is that when the stated account *is admitted*, it can be avoided only by averment and proof of fraud, mistake, etc." *Gardner v. Watson*, supra; *Coffee v. Williams*, 103 Cal. 550, 556, 37 P. 504. "Where the account sued upon is a defective memorandum of account, without dates, or any balance struck or stated, *and the answer denies that any account was stated*, the court should allow great latitude in introducing evidence to disprove it." *Coffee v. Williams*, supra. (Italics added.)

The document here presented is not an "acknowledgment of a present, unqualified indebtedness or liability with a promise to pay a named sum" (*Gardner v. Watson*, supra); but ought to be classed with the type of instrument considered in *Herbert v. Lankershim*, Cal.Sup., 71 P.2d 220, 224, where a claimant presented a promissory note for \$500,000, payable "one month after my death, from my estate or my trust fund, for her loving kindness and protection to me." Of this instrument the Supreme Court said: "If the note was intended as a gift payable after death, then, of course, it did not create an enforceable legal obligation. * * * The note can be upheld, if at all, only as a contract. This is conceded. As a contract, to be enforceable, it must, of course, be supported by a valid consideration. This consideration must be either past or present."

In the case before us there was no evidence offered by plaintiff of an antecedent agreement except the recital in the instrument, "I agreed to pay him," etc. And from the evidence a conclusion that there had been no such antecedent oral agreement would have been well founded. The evidence which defendant sought to introduce as to the character of the services was pertinent and germane to the issue of whether there was or was not an antecedent agreement and might well have been the deciding factor had it been admitted. As has been said the court held that plaintiff had failed

to prove the rendition of services of any value subsequent to the execution of the agreement. The language of the Supreme Court in *Herbert v. Lankershim*, supra, is again applicable:

"As part of her case respondent offered evidence tending to prove various services intermittently rendered by her, and the length of time over which the services were rendered. According to the evidence produced by her, all of the services were rendered and completed prior to the date of the execution of the note. There is not one word of evidence that services of any kind were rendered after that date. If the note was intended as compensation for the services already rendered, then the provisions of section 1606 of the Civil Code are applicable, and this is so whether the obligation to pay for these past services was either a moral or a legal obligation. That section provides: 'An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, *to an extent corresponding with the extent of the obligation, but no further or otherwise.*' (Italics supplied.)

"It must be admitted that, under this theory, at the time the note was executed the 'extent of the obligation' existing against Colonel Lankershim, legally or morally, was to pay for the reasonable value of the services rendered. If this analysis is correct then the only consideration that can support the document sued upon was this prior obligation and it can support the document only to the 'extent of the obligation, but no further or otherwise.' The appellants sought to introduce evidence as to the reasonable value of the services, but this evidence was excluded. The jury was specifically instructed that the respondent, if entitled to recover at all, was entitled to recover the full \$500,000. The defendants offered several instructions to the effect that if the jury should find the consideration for the note was past consideration, then the plaintiff was limited in her recovery to the reasonable value of her services. These instructions were refused. This was error of a prejudicial nature. Certainly from the evidence introduced, the jury, if it found services were in fact rendered, could have found that the services already rendered when the note was executed were the sole consideration for the note. The jury should have been instructed that, in the event it so found, recovery was

limited to the extent of the existing obligation as defined in section 1606 of the Civil Code. *Lagomarsino v. Giannini*, 146 Cal. 545, 80 P. 698; *In re Estate of McConnell*, 6 Cal.2d 493, 58 P.2d 639; *Moore & Co. v. O'Grady*, 9 Cal.App.2d 695, 50 P.2d 847."

This reasoning is applicable to the instant situation. While an account stated might well arise out of an understanding as to the value of services rendered, the situation here disclosed by the evidence, despite the trial judge's finding that the instrument was not obtained through undue influence, calls for a more rigid scrutiny than would be the case between parties dealing at arm's length. Considering the informal nature of the document and the circumstances under which it was prepared and executed, a court should not stultify itself by adhering to a construction thereof which has been applied to instruments drawn with reference to ordinary commercial transactions, and to which it bears only a superficial resemblance, for such construction may compel, as we think it did here, an unjust result. The instrument here, in substance, and viewed in the light of the circumstances surrounding its execution, is a promise to pay for past services after the death of the decedent; and the true value of such services may therefore be shown.

For the reason that the trial court erred in rejecting evidence of the true value of plaintiff's services rendered before the execution of the document sued upon, not only as affecting the probability of decedent's having executed the same, but also as affecting the amount which plaintiff was entitled to recover, the judgment is reversed.



23 Cal.App.2d 570

**GALLICHOTTE v. CALIFORNIA MUT.
BUILDING & LOAN ASS'N et al.**

Civ. 10377.

District Court of Appeal, First District,
Division 1, California.

Dec. 23, 1937.

Evidence 529

In insured's action on behalf of insurer to recover for burning of insured property through alleged negligence of defendants in

burning grass on adjoining land, opinion of assistant fire chief, formed from his observations on arriving at scene of fire while it was in progress, that fire on insured's land was started by grass fire, was admissible.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 74 P.2d 73.

Long & Levit and George H. Hauerken, all of San Francisco, for Gallichotte.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, for Howard and Pilgram and California Mut. Building & Loan Ass'n.

PER CURIAM.

In response to the question raised by the petition for rehearing and the answer thereto, and in view of the fact that the judgment of affirmance herein calls for a third trial of the action, it may be stated by way of clarification that our decision holding that there was a material difference between the evidence introduced at the two trials is founded necessarily upon the premise that the testimony given at the first trial by the assistant fire chief as to the origin of the fire in question was on the former appeal deemed admissible for the purpose for which it was offered; otherwise the court in its decision therein would not have emphasized such testimony as one of the important factors upon which it based its conclusion that the evidence at that trial as a matter of law established the origin of the fire. On the other hand, without so construing the decision on the former appeal, there doubtless would be no basis for sustaining as we have the contention of the defendants that the absence of such testimony at the second trial was legally sufficient to take the case out of the scope and effect of the decision rendered on the former appeal. Furthermore, it may be stated that in our opinion the ruling in the case of *St. Paul Fire & Marine Ins. Co. v. Southern Pacific Co.*, 30 Cal.App. 140, 157 P. 247, cited and relied on by the defendants, cannot be said to be controlling here for the reason that there the witness was called to testify purely as an expert, and the opinion he gave as to the origin of the fire in question there was based solely on a hypothetical case, that is, upon a state of circumstances established by the testi-

mony of others; whereas here, as pointed out by the decision on the former appeal, the witness arrived at the scene of the fire while it was in full progress, and his opinion as to the origin of the fire was based entirely upon his own observation of the conditions existing upon his arrival.

The petition for rehearing is denied.



24 Cal.App.2d 92

RAYMOND v. CHRISTIAN et al.

Civ. 5906.

District Court of Appeal, Third District,
California.

Dec. 16, 1937.

Rehearing Denied Jan. 15, 1938.

1. Appeal and error ⇐110

An appeal does not lie from an order denying a new trial.

2. States ⇐63

Under the statute requiring the appointing power to fix the compensation of employees in accordance with the classification and salary schedule of the civil service commission, where the commission readjusted the salary range for a position so that the minimum salary exceeded that which an employee was receiving an allowance of the minimum salary was not an increase in salary which, under the rules of the commission, required a recommendation of the appointing power, and the employee was entitled to such minimum salary without any action by the appointing officer. St.1927, p. 1314, § 5; Pol.Code, § 2153a.

3. States ⇐63

One appointed to a position in the classified civil service of the state, by signing the report of appointment in which he accepted the compensation of the position, did not waive his right to an increase in compensation provided for by subsequent readjustment of salaries by the civil service commission.

4. States ⇐61

The board of managers of a state hospital, under its statutory power to establish by-laws, rules, and regulations, may require employees to live on the grounds, or at the institution, and make a reasonable

charge for the maintenance of such employees other than those entitled by statute to receive their maintenance without charge. Pol.Code §§ 350, 2150, subd. 2, 2154, 2156.

5. States ⇐61

A charge against a state hospital employee living at the institution of \$11 per month for a room and \$8 per month for each meal is reasonable. Pol.Code §§ 350, 2150, subd. 2, 2154, 2156.

6. States ⇐61

An employee of a state hospital who upon his marriage is granted permission to live off the grounds but has the privilege of eating all his meals at the institution is properly charged with such meals, though he actually eats only one meal a day at the institution.

7. States ⇐63

The statute providing that when any state department, board, commission, etc., fixes the salary or compensation of an employee, the salary shall be subject to the approval of the state department of finance, did not apply to the readjustment of the salary range of a position by the civil service commission prior to the effective date of such statute. Pol.Code, § 675b.

8. States ⇐59

The statute providing that when a department, board, commission, etc., fixed the salary or compensation of an employee or officer, the salary should be subject to the approval of the department of finance, did not require the classification, grading, etc., of positions by the division of personnel and organization under the direction of the civil service commission, which itself is a division of the department of finance, to be approved by the director or some other division of that department. Pol.Code, §§ 675b, 686; St.1931, p. 2021, § 2; Const. art. 24, § 2, adopted in 1934.

9. States ⇐59

The civil service commission, in classifying positions and grading the same and establishing maximum and minimum limits for salaries within the grades established, does not fix the salary or compensation of any employee or officer within the meaning of the statute providing that when a department, board, commission, etc., fixes salary or compensation, it shall be subject to the approval of the department of finance. St.1927, p. 1314, § 5; Pol.Code, § 675b.

10. States ⇐130

Under the statutes, there must exist some valid specific appropriation made for the purpose for which a warrant is sought, although the fund itself may have been exhausted. Pol.Code, § 433, subd. 17; § 441, as added by St.1933, p. 1547; § 4076; Const. art. 4, § 22.

11. Mandamus ⇐102(2)

A state hospital employee seeking by mandamus to obtain a warrant for unpaid salary must show an appropriation sufficient to cover his claim for the particular biennium involved.

12. States ⇐133

Under the provisions in general appropriation bills for an emergency fund, the questions whether an emergency exists, and, if so, how much money should be transferred and to what department, is to be determined by the department of finance in its discretion. St.1931, p. 319, § 5; St.1933, p. 840, § 5; St.1935, p. 1199, § 5.

13. States ⇐131

The setting aside of the emergency fund provided for in the general appropriation bills constitutes an "appropriation" within the contemplation of the Constitution and statutes. St.1931, p. 319, § 5; St.1933, p. 840, § 5; St.1935, p. 1199, § 5.

[Ed. Note.—For other definitions of "Appropriate; Appropriation," see Words & Phrases.]

14. Mandamus ⇐101, 102(1)

Where it is the plain duty of the Board of Control or the comptroller to audit and allow a claim or issue a warrant thereon, the duty may be enforced.

15. States ⇐133, 169

When a claim against the state has been passed on by the Legislature and an appropriation has been made by it, it is not necessary to present the claim to the Board of Control, even though the fund or appropriation has been exhausted, but where an appropriation has been made to a department in a general appropriation bill and the sum so appropriated has been exhausted, the claim can only be paid by securing a transfer from the emergency fund or by presenting a claim to the Legislature in accordance with the statute. Pol.Code, § 433, subd. 17; § 441, as added by St.1933, p. 1547; § 686; Const. art. 4, § 22.

16. Limitation of actions ⇐61

An application for a writ of mandamus is a special proceeding of a civil nature within the rules which govern the statutes of limitation.

17. Limitation of actions ⇐34(2)

A claim for salary by a state hospital employee is subject to the 3-year limitation applying to a "liability created by statute." Pol.Code, § 2153a; Code Civ.Proc. § 338, subd. 1, as amended by St.1935, p. 1673.

A "liability created by statute" is a liability imposed by some written law, either constitutional or statutory; a liability imposed by the sovereignty in contradistinction to a liability growing out of tort or contract, or a liability which would not exist but for the statute.

[Ed. Note.—For other definitions of "Liability Created by Law," see Words & Phrases.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action for a writ of mandamus by Vincent P. Raymond against E. H. Christian and others, as members of the State Personnel Board of the State of California and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal.

Appeal from order denying new trial dismissed, and judgment affirmed.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for appellants.

Thomas C. Ryan, of San Francisco, for respondent.

PER CURIAM.

The petitioner had judgment against certain of the defendants above named for the sum of \$420, found by the trial court to be due him on account of unpaid salary or wages as an institutional storekeeper, grade 2, at Napa State Hospital. From the judgment and order denying a new trial, the defendants against whom judgment was entered have appealed. As no appeal lies from an order denying a new trial, that portion of the appeal may stand dismissed.

[1] The action was instituted by the plaintiff filing a petition for a writ of mandamus to secure a writ directing the payment of the additional sum claimed to

be due for his services during certain years by reason of a reclassification of the employees and of the employment in which the plaintiff was engaged, and which classification entitled the plaintiff to wages or salary in addition to that which he had formerly received. The reclassification appears to have been made during the year 1931, but the plaintiff's compensation was not readjusted to conform to such reclassification until some years later.

The consideration of this cause has required extensive investigation as to the different sections of the Political Code having to do with the government of state institutions, and also a consideration of complicated facts and figures. These facts and figures and the several provisions of the Political Code, as just mentioned, have been so learnedly considered and set forth by the Honorable Malcolm C. Glenn, the judge of the superior court before whom said action was tried, in an opinion filed by him, that we take the privilege of adopting the same as the opinion of this court, as follows:

"Holding the position of grade 2, institutional storekeeper at Napa State Hospital, and in order to accomplish this result, petitioner seeks a writ of mandamus directing the members of the state personnel board to approve and certify a pay roll in his favor in the sum of \$1,296, together with interest thereon from the various dates he claims the items making up said sum became due, and requiring the state controller to draw his warrant therefor, and the state treasurer to pay the same; and also, to require the state personnel board to grade his salary so that it will correspond with the amount theretofore set by said board.

"On January 8, 1931, petitioner was appointed as institutional storekeeper, grade 2, and at all times has been a civil service employee. Prior to July 9, 1931, institutional storekeeper was graded into two ranks; rank 'A' and rank 'B.' 'B' was the higher rank. The salary range for rank 'B' was from \$140 to \$160 per month. When petitioner was appointed his salary was fixed at \$100 per month and maintenance, valued at \$35. He was receiving less than his grading called for.

"The state civil service commission, some time prior to July 9, 1931, readjusted the salary range for the position of institutional storekeeper, grade 2, so that commencing on July 9, 1931, the salary

range was from a minimum of \$150 to \$180 per month.

"Notwithstanding the establishment of the minimum salary at \$150 per month for said position, on said July 9, 1931, plaintiff continued to receive but \$100 in money and his maintenance at the institution valued at \$35 per month.

"Petitioner was married June 4, 1933, and secured permission to live off the grounds. From that time on he received \$100 for salary, \$11 for room allowance, in lieu of occupying a room at the institution, and partook of his noonday meal at the hospital, valued at \$8 per month, making a total of \$119. This situation continued until November 1, 1935. From November 1, 1933, to date, he has been paid \$115 per month salary, an allowance of \$11 for room, in lieu of rooming at the institution, and his noonday meal, valued at \$8. From July 9, 1931, up to the time he was married and moved off the grounds, there was owing to him \$15 per month. From August 1, 1933, to November 1, 1935, there was owing him \$31 per month. From November 1, 1935, to date, there would be owing him \$16 per month.

"In explanation of the above it is claimed by respondents that petitioner's salary was fixed originally at \$100 per month, plus his maintenance, which was valued at \$35. As the salary range was fixed by the state civil service commission from \$140 to \$160, that he was well within that range, and hence received all he was entitled to. Of course this is true, up to July 9, 1931, when the state civil service commission changed the salary range for the position of institutional storekeeper, grade 2, so that from that date it was \$150 to \$180. Respondents claim that the fact that the minimum salary was raised from \$140 to \$150 by the state civil service commission had no effect upon petitioner's salary until and unless some action was taken by the appointing power to bring him within that range. In accordance with this theory we find that whatever allowances were made him, in addition to his salary of \$100 per month, were based upon a maximum salary of that amount, and allowances for maintenance based upon the value thereof; \$35 per month. Thus, as pointed out above, after petitioner had married and moved off the grounds, he was allowed \$100 salary, \$11 for room (because of the fact that he was given permission to move off the grounds, and

that sum was the value of his room had he continued to occupy one at the institution), and his noonday meal, which was eaten at the institution, valued at \$8, making a total of \$119; \$16 less than \$135. The \$16 was charged against him, being the value of two meals each day, although not eaten by petitioner, for the reason that such are the rules of the institution.

"It will be observed also from the foregoing that from November 1, 1935, to date, he had been paid a salary of \$115, given an allowance of \$11 for room in lieu of rooming at the institution, and his noonday meal valued at \$8 making a total of \$134, which, adding the \$16 value of two meals a day which he did not receive, makes a total of \$150. Thus it will be seen that under respondent's theory his salary has been placed within the range of \$150 to \$180 since November 1, 1935.

"Taking effect from and after July 9, 1931, the state civil service commission regraded the position of institutional storekeeper, grade 2, so far as the salary was concerned, establishing a minimum of \$150 per month, and a maximum of \$180 per month. Petitioner was given the benefit of this regrading of his position, or the readjustment of the salary range, until August 1, 1935. We are confronted with the query as to whether or not, in view of the raising of the minimum salary to \$150, he should have been paid at least that amount in salary and maintenance from and after July 9, 1931.

[2] "Respondent takes the position that to raise petitioner from a salary of \$100 per month and maintenance, valued at \$35 per month, to a minimum of \$150 (which also would include maintenance valued at \$35 per month) would be an increase in his salary, and hence falls within the provisions of rule 12 of the state civil service commission; that under said rule a request therefor must first be made by the appointing power, and cannot be made retroactive; and such request and the procedure therefor were never made.

"The witness Louis J. Kroeger, principal personnel technician of the state personnel board, testified, that to secure an increase of salary the procedure is that the requisition for adjustment is initiated by the appointing power, is forwarded to the personnel board, and is there reviewed to see if the proposal is within the salary range, and then goes to the director of finance for approval; and after his ap-

proval, is approved by the personnel board, and becomes final. He also testified:

"Q. Am I correct in stating that the minute the new rules went in on July 9, 1931, creating that grade 2 institutional storekeeper, Mr. Raymond was on the records of the personnel board considered grade 2? A. That is correct, yes.

"Q. With the pay scale of \$150 to \$180? A. Yes."

"Section 5 of the State Civil Service Act, St.1913, p. 1036, § 5, as amended by St.1927, p. 1314, provides that the commission shall 'classify positions to be held under state authority in accordance with the provisions of this act, and in accordance with the duties attached to such positions. The commission shall grade all positions within each class with respect to salaries, to the end that like salaries shall be paid for like duties, and shall establish minimum and maximum salary limits for each grade in its classification of positions, and shall provide by rule of advancement of salary within each grade on the basis of efficiency and length of service. Such classes and grades may from time to time be amended, added to, consolidated, or abolished by the commission, but persons holding positions under the original classification or grade shall not be effected thereby. Any appointing power authorized by law to fix the compensation of an employee or employees, subject to the provisions of this act, must so fix said compensation in accordance with the classification and salary schedule herein provided, and subject to the approval of the commission.'

"Under the provisions of section 2153a, Political Code, the medical superintendent of the state hospitals makes the appointment of the various employees. The law is specific that the appointing power must fix the salary or compensation 'in accordance with the classification and salary schedule' provided by the state civil service commission (now the state personnel board).

"The state civil service commission had nothing to do with the fixing of individual salaries. Its duty was as specified in said section 5, to classify positions and grade the same within each class with respect to salaries, and 'establish minimum and maximum salary limits for each grade in its classification of positions.' The appointing power, when given the authority to fix the salary of an employee, must do so within

the minimum salary range for each graded position. Whatever salary is fixed must be within the range provided by the commission; neither below the minimum nor above the maximum. This is mandatory. Language could hardly be made clearer than that found in said section 5, 'Any appointing power authorized by law to fix the compensation of any employee or employees subject to the provisions of this act, must so fix said compensation in accordance with the classification and salary schedule herein provided, and subject to the approval of the commission.'

"When petitioner was first appointed his salary was \$100 and maintenance, equaling \$135 per month. When the state civil service commission regraded the position of institutional storekeeper, grade 2, it raised the minimum and also the maximum. Respondent claims that this was a raise in petitioner's salary, and hence the appointing power must request that petitioner be placed within the range; otherwise, he would continue to draw the same salary as before action taken by the commission. In one sense it is true that to allow petitioner the minimum salary of \$150 would constitute a raise in his salary, but this is not the raise in salary contemplated by rule 12 of the commission, and for convenience all of rule 12 is quoted herewith:

"Salary Increases. Section 1. To conform to classification. Advancement of salary within each sub-class or grade shall be based upon efficiency and length of service, and the rate of advancement or the amount of salary increase shall be in accordance with the salary schedule established for each sub-class or grade in the classification of positions as adopted and made a part of these rules.

"Section 2. Increases not Oftener than Once a Year. Advancement of salary based upon efficiency and length of service shall be made only upon recommendation of the appointing power and not oftener than once a year, preferably on July 1st of each year, except in emergency cases presented to and approved by the executive member of the civil service commission.

"Section 3. Requests for Increases. All original requests for increases in salaries shall be filed with the civil service commission.

"Section 4. Increases not Retroactive. In no case shall advancement of salaries be retroactive.'

"An increase in a salary is fixing a higher amount than formerly received within the range provided; not giving an employee the minimum salary. If the appointing power could, by either refusing or neglecting to place an employee's name on the pay roll at the minimum salary fixed by the commission for his position, where the minimum had been raised by the commission, then the effect would be that any new appointee to a similar position would have to be placed within the new range of salary as provided by law, while the old and faithful employee would continue his old salary at the will and pleasure of the appointing power. The object of the law is to award merit, efficiency, and faithfulness. The language of rule 12 is that, 'Advancement of salary within each sub-class or grade, shall be based upon efficiency and length of service,' certainly this language is not susceptible of the construction that allowing an employee the minimum salary is an advancement of the salary within a grade, and such also is the language found in section 5 of the State Civil Service Act likewise. To give the construction to rule 12 contended for by respondent would directly contravene section 5 of said act, that the grading of all positions within each class with respect to salary shall be made 'to the end that like salaries shall be paid for like duties.' If we follow respondent's theory to its logical conclusion, we well might suppose a condition where length of service could result in a serious handicap to an employee, and where many different amounts would be paid to employees holding the same positions. Employees are entitled to the benefits conferred by the act.

[3] "Respondent asserts that petitioner signed the 'Report of Appointment,' in which he accepted the compensation, and hence, falls within the rule stated in *Myers v. City of Calipatria*, 140 Cal.App. 295, 35 P.2d 377. In that case the court stated: 'The appointing board has no power by minute order to reduce the salary of a statutory officer when fixed by ordinance. Where the officer actually agrees to the acceptance of the reduced salary before his appointment, and, after the salary has been earned, does so accept it, the officer will be held bound by his agreement and contract the same as in any other case. (*De Boest v. Gambell*, 35 Or. 368, 58 P. 72, 353.)'

"As heretofore stated, when petitioner was appointed there were two grades, rank

'A,' with a salary range of \$100 to \$130, and rank 'B,' with a salary range of from \$140 to \$160. Petitioner's compensation was actually between these two, as he received \$100 plus maintenance, valued at \$35. But we are not concerned with the amount of his compensation until after July 9, 1931, when the range of salary was established with a minimum of \$150 per month. The case cited has no bearing on the situation presented here. True, petitioner signed Exhibit 'A,' but even if we treat this as an agreement, it must be construed in accordance with the circumstances existing. The fact that an employee of the state, under civil service, agreed to work for the compensation then provided by law, does not have the effect of thereafter precluding him from receiving an increase provided for the position he holds. When an employee of the state, under civil service, accepts a position, he does so with knowledge of the fact that his salary, and, indeed, his conduct, are both subject to the law governing such matters, as set forth in the statute and the rules and regulations of the commission. The petitioner signed nothing more than was required of him, and as required of every employee in the classified service of the state. In doing this he certainly did not waive his rights to any future advantages that might be his under the Civil Service Act.

"Taking the conclusion reached above that petitioner should have been placed on the minimum range of salary basis of \$150 per month, then the amount the state is short in the payment of his back salary depends upon questions presented with reference to his maintenance allowances.

"Prior to living away from the institution, he was charged \$35 for his maintenance. It is not understood that he makes any objection to this, although he does claim, of course, that from July 9, 1931, up to the time he was permitted to live away from the institution, in June, 1933, he should have received an additional \$15 to make up his salary of \$150 per month.

"After he removed from the institution, and up to November 1, 1935, the state continued to pay him \$100 for salary, \$11 for room, and he ate his noonday meal, valued at \$8. The respondents, proceeding on the theory that petitioner's salary to November 1, 1935, was \$135, thus deducted \$16 for two meals, which were not eaten at the institution by him.

"From November 1, 1935, to date, while there have been added \$15 to his payments, giving him \$115 salary, \$11 for room, and noonday meal valued at \$8, he is charged \$16 for the two meals not eaten by him at the institution.

"On this phase of the case the question presented revolves itself into the right of the respondents to deduct \$16 per month for two meals which have never been consumed by petitioner.

"There is nothing in the rules or regulations of the State Civil Service Act, nor in the rules and regulations of the commission, or personnel board with reference to an allowance for maintenance being made for institutional storekeeper. In regard to this, Mr. Kroeger testified: 'Mr. Ryan: Q. Is it a fact that the salary grade for that position that Mr. Raymond holds has been \$150 to \$180 without mention as to how that should be divided as to maintenance or cash salary? A. There is no specific mention in connection with that particular classification as to that division, that is correct.'

[4, 5] "Certain employees are required by Code provision to reside on the premises, but not petitioner. Section 2156, Pol. Code. And receive their maintenance. Section 2154, Pol. Code.

"Section 350, Pol. Code, provides: '* * * So far as consistent with law, the head of each department may adopt such rules and regulations as may be necessary to govern the activities of the department, and may assign to each of the officers and employees thereof, such duties and labors as he may see fit.'

"With regard to state hospitals, the board of managers, subject to approval of the lunacy commission, is given power 'to establish such bylaws, rules and regulations, subject to the approval of the commission, as it may deem necessary and expedient for regulating the duties of officers and employees of the hospital, and for the internal government, discipline and management of the same.' Section 2150, subd. 2, Pol. Code.

"By virtue of the provisions of section 2150, subd. 2, Pol. Code, the management of the institution has authority to make all necessary rules and regulations concerning the management of the institution and the employees, and hence, the only question which is presented is whether the rules are reasonable and necessary. That it is necessary for certain employees to live on the

grounds has been decided by the Legislature itself. Section 2156, Pol.Code. Although the occupant of the position held by petitioner is not mentioned in the statute, that fact would not preclude the making of a rule or regulation to the effect that he must do so.

"Where institutions such as the state hospitals for the insane have been following a line of practice for a number of years, and such practice has been acquiesced in and recognized not only by those immediately affected thereby, but by other departments of the state, these facts speak rather forcefully as to the reasonableness of the rules upon which the practice is founded.

"The hospital authorities would have no justification for attempting to force any employee to accept less than the amount of his salary as established by law; but, as pointed out above, they do have the right to designate what employees must live on the grounds or at the institution. Concede this to be true, then it must follow that they have the right to fix a reasonable charge for maintenance. Certainly there is nothing in the statute that officers or employees, other than those mentioned in section 2154, Pol.Code, are entitled to receive maintenance without charge. There has been no claim made that the value fixed for room rental charge or for the meals is not reasonable. \$11 per month for a room, and \$8 per month for each meal is reasonable. From the foregoing analysis it follows that petitioner, as well as other employees, if required by the rules of the institution, must live there; and, being required to do so, petitioner must pay a reasonable amount for maintenance.

[6] "The question might arise as to whether it is reasonable to charge petitioner for meals which he did not consume. In the first place the testimony shows that the superintendent of the hospital construed rules quite liberally in favor of petitioner in granting permission for him to live off the grounds. There is no showing that, having granted petitioner the right to live off the grounds, he could not have availed himself of the privilege of eating all his meals at the institution. The privilege was his, to be exercised as he desired. The evidence shows that he partook of his noonday meal at the institution, but did not have either his breakfast or dinner there, although charged for both. The superintendent was not required to give peti-

tioner permission to room away from the institution because he desired to be married; but he did, nevertheless, grant that permission, and the sum of \$11 was added to his salary.

"Respondent claims that the department of finance never approved the salary range for institutional storekeeper, grade 2, from \$150 to \$180 per month, as adopted, and to take effect on and after July 9, 1931, and hence, petitioner never came within that range of salary until November 1, 1935, at which date he was placed therein. (As noted above, even after that date, and to the present time, he is being charged with two meals at the institution, which he does not receive, valued at \$16, and hence, since that time is being paid in salary and maintenance only the sum of \$134.)

[7] "The respondents base their claim that the department of finance must first approve the adoption of a salary range before it becomes effective, which is based on section 675b of the Political Code as it stood from its effective date in August, 1931. Section 675b did not take effect until August, 1931. The action of the state civil service commission in adopting the salary range for institutional storekeeper, grade 2, acted prior to July 9, 1931. Hence, whatever may be said as to the constitutionality of said section, it could have had no effect upon the action of the said civil service commission, because it was not a law at that time.

[8] "In 1929, section 686 of the Political Code was adopted, which created in the department of finance, established in 1927, see article 18, § 654 et seq., Pol. Code, as added by St.1927, p. 449, a division of personnel and organization, which division includes the state civil service commission. " * * * The duties, powers, purposes, responsibilities, and jurisdiction now, or which may hereafter be imposed upon the said civil service commission by law, are hereby transferred to said department of finance, which duties, powers, purposes, responsibilities and jurisdictions, and such additional duties as may be designated to it by the director of finance, shall be administered by and through the division of personnel and organization, under the direction of the state civil service commission. There is hereby created the position of "chief of the division of personnel and organization," who shall have civil service status and be selected by the state civil service commission

under the terms of the Civil Service Act and its rules and regulations, with the approval of the director of finance. The chief of the division of personnel and organization shall perform the duties imposed upon the executive-member of the commission, as provided in the Civil Service Act. * * * Section 686, Pol.Code.

"The duties of the 'executive-member,' section 2 of the State Civil Service Act, St.1913, p. 1035, § 2, as amended by St. 1931, p. 2021, were prescribed in the following provision of said section: 'One of said commissioners shall be designated by the governor, to act as president and executive-member of the commission. The names "commission" and "commissioner," as used in the Civil Service Act, shall be construed to mean and apply to the executive-member, in whom, in all respects, the duties, powers and functions now conferred upon the civil service commission, commission or commissioners are vested and conferred, except that the enactment of the rules and regulations of the commission, the creation and adjustment of classifications and grades, exemptions of positions from under the Civil Service Act, as permitted by law, and dismissals, demotions or other punitive actions placed in the control of the commission, shall be the duty of, and be controlled by the members of the commission, and the votes of two commissioners shall be required to make any action of the commission effective.'

"It will be seen that the division of personnel and organization, which division includes the state civil service commission, was created within the department of finance, and the duties, powers, etc., of the civil service commission were transferred to the department of finance, but they are to be administered by and through the division of personnel and organization under the direction of the state civil service commission. The chief of the division took over the duties and powers of the executive member of the state civil service commission, but neither he nor the executive member had the powers enumerated within the excepted provision as above set forth.

"Section 675b, Political Code, provided, prior to its repeal in 1935, St.1935, p. 404, § 2, as follows: 'Whenever any state department, board, commission, court or officer fixed the salary or compensation of an employee or officer, which salary is payable out of the state funds, the salary shall be subject to the approval of the state depart-

ment of finance before it becomes effective and payable.'

"The state civil service commission, as pointed out above, is a division of the 'department of finance.' Not only is this true, but the 'division of personnel and organization' includes the 'state civil service commission.' Section 686, Pol.Code. And the duties, powers, etc., imposed upon the civil service commission were transferred to the department of finance, but 'shall be administered by and through the division of personnel and organization under the direction of the state civil service commission.' Thus, the matter of classification, grading, etc., of positions was still to be administered by and through the division of personnel and organization, under the direction of the state civil service commission (except the duties of the division who has not the power to classify or to make rules or regulations, etc.). The commission is a division of the department of finance. And when the civil service commission acted in establishing a salary range of from \$150 to \$180, to take effect on July 9, 1931, it had authority so to do, and, even if it might be said that section 675b, supra, subsequently became effective, its act was not counter to that section, for it was a part of the department of finance, and the particular division thereof having to do with that specific matter. As a matter of fact the section has relation to the fixing of salaries by officers and commissions, other than by the department of finance, acting through the state civil service commission. To give it a construction as contended for by respondent would be tantamount to a holding that the department of finance, acting through one of its divisions having the specific duty of establishing classifications and grading positions with relation to salaries, would have to be approved by itself, or that its acts did not meet with the approval of its own department.

"In 1934, article 24 of the State Constitution was adopted, which relates to state civil service. Thereby a new state personnel board was created. It also provides for the appointment of an executive officer who shall be a member of the state civil service, but not a member of the board. We find in this amendment, substantially the same language which has theretofore been pointed out with relation to the powers of the executive officer, and the powers reserved in the board itself; we quote therefrom as follows: 'Said executive officer

shall perform and discharge all of the powers, duties, purposes, functions and jurisdiction hereunder or which hereafter, by law, may be vested in the board, except that the adoption of rules and regulations, the creation and adjustment of classifications and grades, and dismissals, demotions, suspensions and other punitive action, for or in the state civil service, shall be and remain the duty of the board, and a vote of a majority of the members of said board shall be required to make any action with respect thereto effective.' Section 2.

"Respondent introduced a certified copy of the order of the state civil service commission which established the salary range to be effective on and after July 9, 1931, for institutional storekeeper, grade 2, at from \$150 minimum to \$180 maximum, per month. (Exhibit 'E.') Therein we find the following: 'Pay scales are for classes of positions in the California state service, 1931 edition; proposed rate of pay for classified positions in the California state service. As recommended to the civil service commission and the director of finance by the classification and pay staff, on July 9th, and adopted by the civil service commission subject to review and approval by the director of finance. Institutional storekeeper, grade 2, 150, 160, 170, 180. Pay scale in the California state service, edition of October, 1934: institutional storekeeper, grade 2, 150 (10) 180. Pay scale in the California state service, edition of January, 1936: institutional storekeeper, grade 2, 150, (10) 180.'

"Why the commission, prior to the effective date of section 675b of the Political Code, should have inserted italicized portion in the order made prior to July 9, 1931, is not clear. Said section not being then in force, the provision referred to might well be treated as surplusage; but, as already indicated, it would seem that the action of the board, which is a division of the department of finance, needed no approval of any other division of the department.

[9] "And finally, on this phase of the case, section 675b, supra, only deals with cases where the department, board, commission, court or officer 'fixes the salary or compensation of an employee or officer.' As pointed out elsewhere in this opinion, the civil service commission does not fix the salary or compensation of any officer or employee. It does, in accordance with the mandate of the Civil Service Act, classify positions and grade the same and es-

tablish maximum and minimum limits for salaries within the grades established, and 'any appointing power authorized by law to fix compensation of any employee or employees, subject to the provisions of this act, must so fix said compensation in accordance with the classification and salary schedule herein provided, and subject to the approval of the commission.' Civil Service Act, § 5. Nothing could be plainer than this quotation to show the meaning of section 675b, supra.

☞ "According to petitioner's contention, and on his theory of the case, as previously stated, there remains unpaid to him: (a) \$15 per month from July 9, 1931, to August 1, 1933; (b) \$31 from August 1, 1933, to November 1, 1935; (c) \$16 per month from November 1, 1935, to date.

"Respondent asserts that under Act 8083, Deering's General Laws, all balances remaining unexpended from the appropriations made by the Legislature revert to and become a part of the unappropriated moneys in the general fund four years after said appropriations become available. The appropriation, petitioner states, for the biennium July 1, 1931, to June 30, 1933, would revert to the general fund on July 1, 1933; that for the fiscal year, July 1, 1933, to June 30, 1934, there was a balance of \$107.36 left in the appropriation for Napa State Hospital; that for the fiscal year, July 1, 1934, to June 30, 1935, there is a balance of \$6,711.51 left in the appropriation for said hospital; and for the fiscal year, July 1, 1935, to June 30, 1936, there is a balance of \$1,952.38 left in the appropriation for said hospital. Commenting on this statement he says:

" 'Thus, if respondent's contention in this regard is correct, petitioner would be unable to receive any money from the state treasury for the years July 9, 1931, to June 30, 1933, and for the years July 1, 1933, to June 30, 1934, he would only be able to receive \$107.36, whereas, for the year July 1, 1934, to June 30, 1935, he would be able to receive the entire amount due him, which would also be true for the period July 1, 1935, to June 30, 1937.

" 'There are some exceptions in said act, by virtue of which moneys appropriated for certain purposes do not revert to the general fund, but it is not necessary to determine whether this is true in this case, for the only funds shown to be remaining and unexpended in the various appropriations made for said hospital are those commencing

ing with the biennium 1933-1935, and as the complaint herein was filed in February, 1936, the four-year period had not expired as to those or subsequent appropriations.

"Petitioner contends that he is entitled to a writ of mandate against the controller to compel him to issue his warrant, even though there is no money in the state treasury to pay the same. He cites a number of cases from this jurisdiction, as well as from others, in support of his claim. The first case cited will illustrate that whether the writ shall issue depends entirely upon the statutory provisions governing the situation presented. In that case (*Babcock v. Goodrich*, 47 Cal. 488), the court ordered a warrant issued, although there were no funds in the county treasury at the time, for the reason that section 4076, Pol.Code, dealing with the subject under consideration at that time, provided for so doing.' * * * If the fund is insufficient to pay any warrant, it must be registered, and thereafter paid in the order of its registration.

"Turning to section 433 of the Political Code, designating the duties of the state controller, that section and subdivision 17 thereof provides: 'It is the duty of the controller: * * * 17. To draw warrants on the treasurer for the payment of moneys *directed by law to be paid out of the treasury*; but no warrant must be drawn unless authorized by law, and upon an *unexhausted specific appropriation* provided by law to meet the same. Every warrant must be drawn upon the fund out of which it is payable, and specify the specific appropriation applicable to the payment thereof.' And the Supreme Court has held that this section means exactly what it says. In *Marshall v. Dunn*, State Controller, 69 Cal. 223, 10 P. 399, the court quotes the provision above set out, italicizing the words underscored above, and citing in support thereof, *Stratton v. Green*, 45 Cal. 149, 151, and then states: 'Here the fund specifically appropriated for the traveling expenses of the plaintiff during the thirty-fifth fiscal year had already been exhausted when the demand was made on the controller for a warrant, and when this proceeding was commenced.' It was held that the controller was not authorized to draw a warrant therefor. See, also, *Baggett v. Dunn*, State Controller, 69 Cal. 75, 10 P. 125, and *Butler v. Bates*, 7 Cal. 136, which are to the same effect.

"In 1933, the Legislature adopted a new section, numbered 441, Political Code, chapter 44, section 441, Pol.Code, for the is-

ter 605, p. 1547, Stats.1933, amended in 1935, Stats.1935, p. 863. So far as material here, the amendment of 1935, added nothing. The act as originally passed was under consideration by the Supreme Court in the case of *Riley v. Johnson*, 219 Cal. 513, 27 P.2d 760, 92 A.L.R. 1292. Therein, the court states: 'This bill was passed by the legislature in contemplation of the fact that the general fund would be exhausted before the end of the present biennium, and that it would, therefore, become necessary to register warrants. This contingency has now occurred.' It was also contended that the provisions of the act did not constitute an appropriation, as such moneys are received subject to the priorities mentioned therein. It will be observed from the provisions of said section 441 that it, impliedly at least, authorized the state controller to draw his warrant upon the state treasurer even when it represents an amount in excess of the unapplied moneys therein; and it will be recalled that in the instant case the testimony of one of the witnesses was to the effect that the general fund was some thirty or forty million dollars 'in the red.' In answer to the contention last stated, the court stated: 'There can be no doubt that the provisions of the act requiring such warrants, with interest, to be paid from the unapplied moneys in the general fund, subject to the priorities therein provided, as such moneys are received into such fund, constitutes a legal appropriation of so much money as will be necessary to make such payment.' (Citing several early cases.)

"Another point raised was that the act was void for uncertainty because the exact amount appropriated could not be ascertained. In holding this argument not tenable, it stated: 'The amount appropriated from the unapplied moneys in the general fund by the act in question is limited by the extent of the principal of the warrants, which, in turn, is limited by the various appropriations made by the legislature. The amount of interest on the warrants is limited by the amount of principal of the warrants, and can be ascertained by applying a simple mathematical formula to the amount of the principal. This renders the appropriation sufficiently certain.'

[10] "We cite the above case and quote therefrom as above set forth for the purpose of pointing out the authority which exists, notwithstanding the provisions of section 433, subd. 17, Pol.Code, for the is-

suance of warrants even in excess of the unapplied moneys in the general fund. But there is an important matter to be kept in mind so far as petitioner's claim is concerned. It will be observed from the quotation made from the case last referred to, there must be in every case a valid appropriation made by the Legislature to meet a claim before a warrant can be drawn therefor. This is the mandate of the Constitution itself. Section 22, art. 4.

"The effect, therefore, of section 441, Political Code, as originally passed in 1933, and as amended in 1935, upon subdivision 17 of section 433 of the said Code, is merely this: There must exist some valid specific appropriation made for the purpose for which the warrant is sought, although the fund itself may have been exhausted.

[11] "Petitioner has been unable to show any appropriation for the support of Napa state institution sufficient to cover his claim of the amount he asserts to be due him covering the various years during which he says it arose, other than, or in addition to, the various balances remaining in the general fund and to the credit of the Napa State Hospital. His right, if any he has, to a warrant, must be confined to said amounts during the particular biennium involved.

[12] "The general appropriation bills for 1931, 1933, and 1935, make this plain. Section 5 of each of said acts provides, in part, as follows: 'The officers of the various departments, boards, commissions and institutions, for whose benefit and support appropriations are made in this act are expressly forbidden to make any expenditure in excess of such appropriations except the consent of the state department of finance be first obtained, and a certificate in writing duly signed by the director of said department, of the unavoidable necessity of such expenditure, and any indebtedness attempted to be created against the state in violation of the provisions of this section shall be null and void, and shall not be allowed by the state controller, nor paid out of any state appropriation. * * *', Stats.1935, p. 1199; Stats.1933, p. 840; Stats. 1931, p. 319.

"If the funds designated in the appropriation bill are insufficient, an emergency fund has been provided in the general appropriation bill, the administration of which is committed to the discretion of the department of finance, but petitioner can se-

cure no comfort from the emergency fund created in the general appropriation bills during the past sessions of the Legislature, for the discretion of determining whether an emergency exists, and, if so, how much money should be transferred, and to what departments, is to be determined by the department of finance. *Vandergrift v. Riley*, 220 Cal. 340, 30 P.2d 516. On that phase of the case the court states: 'We therefore conclude that the department of finance, through its executive officer, has the power to determine, in the exercise of a sound discretion, whether an emergency exists as contemplated by item 201 of the budget enactment, and as herein construed, and to order the transfer of money from the emergency fund for a necessary and proper state purpose when no specific appropriation has been made therefor, or when a specific appropriation has been made to a state department, office or purpose, and the same has been found to be insufficient.'

[13] "The setting aside of the emergency fund constitutes an appropriation. On page 349 of 220 Cal., 30 P.2d 516, the court states: 'That the amount set aside "for emergency fund" during the successive sessions of the legislature is an appropriation within the contemplation of the budget amendment to the Constitution and statutes enacted pursuant thereto, cannot be doubted. When so appropriated it becomes part of the funds set aside for the proper functioning of the state government and its several departments, offices and purposes.'

"In the *Vandergrift Case*, *supra*, the director of finance was endeavoring to meet a situation somewhat akin to that petitioner finds himself in, and of course recognized the fact that before he could secure a warrant from the controller he would have to first have a transfer made from the emergency fund to the particular department to be benefited, so that there would be an appropriation for that purpose. Appropriations had been made for items 3, 4, 5, and 6, as mentioned in the decision, but the appropriation for each was insufficient; if the transfer from the emergency fund had not been authorized and made, there would have been no appropriation for the amount to be transferred from said fund for the specific purpose, and hence, no warrant could have been issued. 'Funds' and 'appropriation' are not the same. 'A fund may exist without provision being made for any appropriation therefrom.' 23 Cal.Jur. p. 555.

"Respondent calls the court's attention to sections 664, 666, and 667, Pol.Code, and asserts that it is clear from said sections that where the fund or appropriation is exhausted, the claimant's only relief is to secure the approval of the Board of Control to his claim, and thereafter secure an appropriation for the payment of his claim from the Legislature. In answer to this, petitioner states that he is not filing a claim against the state, but is seeking the assistance of the court to compel respondent to perform certain acts enjoined by law; to pay him the salary set by the state personnel board, and which has already been earned by him; that the sections of the Political Code mentioned by respondent's counsel apply to cases where a person has a claim against the state, the amount of which must be fixed or ascertained by the Board of Control before payment is made; and it does not apply to definite amounts of money due employees of the state as salary, and already earned by them; that, in other words, a state employee whose salary is fixed by law does not have to go before the Board of Control in order to ascertain the amount he is entitled to, because the personnel board has already determined that amount.

[14] "The rule of course is that, 'where it is the plain duty of the board (of control), or the controller, to audit and allow a claim, or issue a warrant thereon, the duty may be enforced.' 23 Cal.Jur. p. 538, citing *Dufton v. Daniels*, 190 Cal. 577, 213 P. 949.

[15] "Respondent does not claim that it is necessary for a claimant to present his claim in every instance, but only where the fund or appropriation is exhausted. Under section 441, supra, as construed by the court in *Riley v. Johnson*, supra, it is not necessary, where an appropriation has been made by the Legislature and the claim has been passed on by the Legislature, and an appropriation has been made by it, to go through the formality of presenting the claim to the Board of Control, even though the fund or appropriation has been exhausted; but where an appropriation has been made to a department in general appropriation bill, if the funds so appropriated have been exhausted, then there are only two ways of having the claim paid; one, by securing a transfer from the emergency fund; and the other, by presenting a claim to the Legislature in accordance with section 666 of the Political Code. Thus, we find

that while section 433, subd. 17, supra, specifying the duties of the state controller, is qualified by the provisions of section 441, supra, the latter section is limited by section 22, article 4 of the State Constitution, and the various boards, departments, etc., are expressly forbidden to expend any moneys in excess of the respective appropriations made therefor.

"Respondent claims the action is barred in part by the provisions of subdivision 1 of section 338 of the Code of Civil Procedure, as amended by St.1935, p. 1673, although he also pleads other sections as a bar.

[16] "An application for a writ of mandamus is a special proceeding of a civil nature, within the rules which govern the statute of limitations. 16 Cal.Jur. p. 775. 'As is the rule generally in regard to the time of demand in determining whether an action is barred, it is held that a party may not escape the bar of the statute by failure to make a demand within his power at any time.' 16 Cal.Jur. p. 776. In the case of *Curtin v. Board of Police Commissioners*, 74 Cal.App. 77, 239 P. 355, the petitioner had been dismissed as a member of the police department of San Francisco. He waited almost three years before applying for reinstatement, and after that was denied, he filed a petition seeking a writ of mandate to compel his restoration as a member of the said department. Respondents claimed, and the trial court decided, that the proceeding was barred by subdivision 1 of section 338 of the Code of Civil Procedure, and also by laches, and such was respondents' contention on appeal. The appellate court accepted this view and stated: 'We are of the opinion that the contentions made by respondents and the conclusions reached by the trial court must be sustained. * * * This dismissal occurred at a definitely fixed time, and was an unequivocal denial of his right to longer hold the position of captain of police, or any other position in the department. If his contention as to the illegality of such dismissal is well founded, he could immediately upon his dismissal have perfected his right to the remedy by mandate, by making his demand for reinstatement or assignment to duty as such captain of police. These considerations bring the case within the rule followed and recognized in many cases, that where a right has fully accrued, except for some demand to be made as a condition precedent to legal relief, which the claim-

ant can at any time make if he so chooses, the cause of action has accrued for the purpose of setting the statute of limitations running.' (Citing many cases.)

[17] "The statute, section 2153a, Pol. Code, provides for the appointment of employees of state hospitals. Their compensations (within the schedules provided by the civil service commission, now the state personnel board) is provided by law. While it is true that petitioner is not an official, and he draws no official salary, he does occupy a position by appointment under statutory authority, and one classified under the State Civil Service Act. The state civil service board, acting under the Civil Service Act, classified the various positions; graded them with respect to salaries. Examinations are held and eligible lists provided. As vacancies exist from time to time, and as new positions are created, the appointing power fills the same from the eligible list supplied. His appointment is provided for by statute, and his compensation under authority of statute.

"In *Santa Cruz County v. McKnight*, 20 Ariz. 103, 177 P. 256, the case involved the right of a sheriff to collect his salary, and the statute of limitations was pleaded. It was suggested that because the salary had been fixed by order of the board of supervisors under constitutional authority, it was not a liability created by statute. The court held that it was, and stated further: 'It was intended to cover liability imposed by some written law, either constitutional or statutory, except as limited by other provisions of paragraphs 709 to 718, inclusive, Civil Code of 1913. It meant a liability imposed by the sovereignty in contradistinction to liability growing out of tort or contract.' A number of cases are cited where it has been held that an official salary, compensation, or fee is a liability created by statute. Such a liability has been described as 'one which would not exist but for the statute.' *Hawkins v. Furnace Co.*, 40 Ohio St. 507, 515, cited with approval in *Hocking Valley R. Co. v. New York Coal Co.*, 6 Cir., 217 F. 727.

"In 16 California Jurisprudence, pages 473, 474, it is stated: 'When a duty exists only by virtue of a statute, or an obligation to pay is fixed in the act itself, the obligation is one created by statute. Thus, an action to recover from a public officer for breach of official duty, fixed by statute, an action by a school teacher, or police officer

for reinstatement, or an action by a public officer to recover compensation provided for by a special act, must be commenced within three years.'

"While it is true that petitioner is not an official, and no official salary is provided by statute, nevertheless, he occupied a position provided for by statute, as above noted. He has always been paid monthly, or on a monthly basis. When the salary range was raised to \$150 minimum per month, taking effect from and after July 9, 1931, he had the right to demand that his salary of that amount be paid monthly in accordance with such minimum schedule. This he failed to do, and in fact took no action to enforce his right until the filing of the petition herein on February 20, 1936. Subdivision 1, § 338, of the Code of Civil Procedure is applicable to petitioner's claim in so far as it antedates said three-year period mentioned therein.

"From the foregoing, we conclude as follows:

"A. The three-year period of the statute of limitations applies to petitioner's claim; provided, that moneys were appropriated during said years for its payment; if not appropriated, then a claim would have to be presented, approved, and allowed in due form, and presented to the Legislature. The action was commenced on February 20, 1936. Three years prior to that time would give us the date of February 20, 1933. From July 9, 1931, to the time petitioner was married, the state was \$15 short in payment of petitioner's compensation.

"B. August 1, 1933, to November 1, 1935, he received in salary, room allowance, and noonday meal, \$119. But he had the privilege of eating the other two meals at a valuation of \$16, making a total of \$135. The state was therefore short \$15 per month during that period. The 1933 budget for the Napa State Hospital shows a balance for the fiscal year 1933-34 of \$107.36, and for the fiscal year 1934-35 a balance of \$6,711.51. Hence, there are funds to meet this part of said claim.

"C. From November 1, 1935, to date, petitioner has received all that he was entitled to, based on a compensation of \$150 per month."

Having reached the same conclusion as the judge of the trial court, set forth in the foregoing opinion, it follows that the judgment should be, and the same is hereby, affirmed.

24 Cal.App.2d 128

In re PARRINO.

ALAMEDA PARK CO. v. PARRINO et al.

Civ. 10590.

District Court of Appeal, First District,
Division 2, California.

Dec. 21, 1937.

Hearing Denied by Supreme Court
Feb. 17, 1938.

Parent and child ⇨7

A father who has not deserted or abandoned his minor child has right, to exclusion of mother, to compromise disputed claim of child against third person, notwithstanding mother has been awarded custody of child in divorce action, Probate Code, § 1431.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Proceeding in the matter of the application of Anita Parrino for leave to compromise a claim of Louise Parrino, a minor. From an order setting aside an order approving a compromise of the claim of the minor, the Alameda Park Company appeals, Frank Parrino and Anita Parrino being respondents.

Affirmed.

Decoto & St. Sure, of Oakland, for appellant.

George R. Andersen, of San Francisco, for respondents.

SPENCE, Justice.

This is an appeal from an order setting aside an order approving a compromise of a claim of the minor.

It is stated by appellant that the issue on this appeal involves a single question of statutory construction. The statute is section 1431 of the Probate Code and the question is whether under the provisions of said section, a father, who has not deserted or abandoned his minor child, has the right to compromise a disputed claim of such child even though the mother has been awarded the custody of such child in a divorce action. The trial court determined that the father had such right under the circumstances and in our opinion, the order of the trial court must be affirmed.

Said Code section reads, "When a minor has a disputed claim for money against a third person, his father, or if his father is dead or has deserted or abandoned him

then his mother, shall have the right to compromise such claim." The right of either the father or mother to compromise such a claim is purely statutory and the Legislature saw fit to confer it upon the mother only in cases where the father is dead or has deserted or abandoned the child. Such is not the case here. The Code section is clear and unambiguous and leaves no room for the courts to construe the word "father" to mean "head of household" as contended by appellant.

The order is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



23 Cal.App.2d 739

DAUGHERTY, Commissioner of Corporations, v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 10695.

District Court of Appeal, First District,
Division 1, California.

Dec. 9, 1937.

Rehearing Denied Jan. 8, 1938.

1. Licenses ⇨38

Brokers who accepted license certificate from Commissioner of Corporations thereby submitted to commissioner's statutory jurisdiction to examine their business to determine violations of Corporate Securities Act, in proceedings for revocation of license, and such commissioner's jurisdiction continued, notwithstanding brokers' surrender of certificate (St.1917, p. 673, as amended; St.1917, p. 684, as amended by St.1933, p. 2317, § 23).

2. Licenses ⇨38

One who accepts a license impliedly agrees to submit to tribunals which state has created for determining his fitness to continue in enjoyment of the privilege granted.

3. Estoppel ⇨62(2)

The Commissioner of Corporations was not estopped from continuing hearing to determine whether brokers had violated Corporate Securities Act and to revoke their license, by accepting brokers' surrender of possession of certificate (St.1917, p. 673, as

amended; St.1917, p. 684, as amended by St.1933, p. 2317, § 23).

4. Injunction ☞85(1)

A proceeding instituted by Commissioner of Corporations to determine whether brokers had violated Corporate Securities Act and to revoke their license was a proceeding "in execution of a public statute for the public benefit" within statute prohibiting injunctions, and hence court had no jurisdiction to issue injunction (St.1917, p. 673, as amended; St.1917, p. 684, as amended by St. 1933, p. 2317, § 23; Civ.Code, § 3423; Code Civ.Proc. § 526).

5. Prohibition ☞5(3)

Prohibition will lie to prevent further prosecution of action seeking, contrary to statute, to enjoin "execution of a valid public statute for the public benefit" by Commissioner of Corporations (St.1917, p. 673, as amended; St.1917, p. 684, as amended by St. 1933, p. 2317, § 23; Civ.Code, § 3423; Code Civ.Proc. § 526).

Petition for writ of prohibition by Edwin M. Daugherty, as Commissioner of Corporations of the State of California, against the Superior Court of the State of California in and for the City and County of San Francisco.

Writ issued as prayed.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for petitioner.

Ellis & Steindorf and Richard M. Lyman, Jr., all of San Francisco, for respondent.

Thomas Whelan, Dist. Atty. of San Diego County, of San Diego, Lowell L. Sparks, Dist. Atty. of Placer County, of Auburn, Earl Warren, Dist. Atty. of Alameda County, of Oakland, Anthony Brazil, Dist. Atty. of Monterey County, of Salinas, Clair Engle, Dist. Atty. of Tehama County, of Red Bluff, Buron Fitts, Dist. Atty. of Los Angeles County, of Los Angeles, Walter C. Haight, Dist. Atty. of Tulare County, of Visalia, Elmer W. Heald, Dist. Atty. of Imperial County, of El Centro, Percy C. Heckendorf, Dist. Atty. of Santa Barbara County, of Santa Barbara, Toland C. McGettigan, Dist. Atty. of Sonoma County, of Santa Rosa, Fred L. Thomas, Dist. Atty. of Santa Clara County, of San Jose, Henry S. Lyon, Dist. Atty. of El Dorado County, of Placerville, Roger R. Walch, Dist. Atty. of

Kings County, of Hanford, and Ralph E. Hoyt, Chief Asst. Dist. Atty. of Alameda County, and R. H. Chamberlain, Asst. Dist. Atty. of Alameda County, both of Oakland, amici curiae.

PER CURIAM.

A petition for a writ of prohibition, requiring respondent court to refrain from taking further proceedings in an action brought by E. M. Lewis & Co., Inc., and E. M. Lewis as plaintiffs, against petitioner, to restrain the latter from proceeding with a hearing to determine whether cause existed for the revocation or suspension of a broker's certificate issued to said plaintiffs.

The certificate was issued on January 5, 1937. On September 10, 1937, petitioner served notice upon plaintiffs of the time and place of a hearing to determine whether they had committed certain specified violations of the Corporate Securities Act, St.1917, p. 673, as amended, and requiring them to show cause why their certificate should not be revoked. Following this notice plaintiffs surrendered possession of the certificate to petitioner, and on the same day brought the action mentioned to restrain the hearing so noticed. A restraining order issued, and an order to show cause why a temporary injunction should not be granted was made. Petitioner appeared therein, and his general demurrer to plaintiffs' complaint was sustained without leave to amend. The restraining order was dissolved and the order to show cause discharged. Following this respondent court made its order, which recited that plaintiffs were about to appeal from the judgment to be entered on the order first mentioned, and that pending such appeal the restraining order theretofore made and dissolved be reinstated and the whole thereof be in full force and effect.

It is undisputed that the physical possession of the certificate in question was surrendered, and that following the filing of the complaint in the injunction suit petitioner obtained from respondent court an order authorizing the temporary suspension of the certificate, and that thereafter he did suspend the same. Plaintiffs contend that by reason of these facts petitioner lost jurisdiction, and that consequently he may properly be enjoined from proceeding with the hearing.

Section 23 of the Corporate Securities Act, St.1917, p. 684, as amended by St. 1933, p. 2317, provides that: "The com-

missioner shall at all times have the power to administer oaths and make an examination or investigation of the business and the books, records, accounts and other papers pertaining thereto, of any company, broker, investment counsel or agent theretofore permitted or authorized by him to sell securities, or to act as an investment counsel, * * * or of any company, broker, agent or investment counsel, or any other person who the commissioner has reason to believe has violated or is about to violate any of the provisions of this act. * * * Such power shall not be terminated by the suspension or revocation of any permit, order or certificate theretofore issued by him."

[1,2] The statute plainly gives the commissioner the power to act in the premises, and by accepting the certificate the plaintiffs submitted to the jurisdiction of the commissioner and to the provisions and conditions of the act. As was said in *Marrs v. Matthews* (Tex.Civ.App.) 270 S. W. 586, 589, "One who accepts a license impliedly agrees to submit to the tribunals which the state has created for determining his fitness to continue in the enjoyment of the privilege granted. This is not a situation where the law attacked is thrust upon the complainant, nor is it one where an inherent right has been invaded, but is one in which the complainant has voluntarily sought and secured a statutory privilege, to be enjoyed subject to statutory conditions."

In *Motor Finance & Guaranty Corporation v. Georgia Securities Commission*, 158 Ga. 75, 122 S.E. 782, which closely resembles in its facts the case at bar, it was held that the mere return of a license did not oust jurisdiction to conduct an examination into the affairs of the licensee.

[3-5] Plaintiffs rely on *Jones v. Securities & Exchange Commission*, 298 U.S. 1, 56 S.Ct. 654, 80 L.Ed. 1015; but there an application for a license was withdrawn before hearing thereon; and it was held that this withdrawal was a matter of right; that the applicant never having submitted to the provisions of the act authorizing the granting of the license, the power of the commissioner to proceed with the hearing was at an end. These facts distinguish the case cited, and, contrary to plaintiffs' contention, the facts of the present case present no elements of estoppel as against the commissioner. The proceeding instituted by him was clearly one in

execution of a valid public statute for the public benefit. Civ.Code, § 3423; Code Civ.Proc. § 526. The only relief sought in the pending action was injunctive relief. Such being the case, respondent court exceeded its jurisdiction as limited by the Code sections above cited, and prohibition will lie to prevent the further prosecution of the action. *Reclamation District v. Superior Court*, 171 Cal. 672, 154 P. 845.

It is ordered that a writ of prohibition issue as prayed.



24 Cal.App.2d 70

LOWELL et al. v. HARRIS et al. (two cases).

Civ. 10443.

District Court of Appeal, First District,
Division 2, California.

Dec. 16, 1937.

Hearing Denied by Supreme Court
Feb. 11, 1938.

1. Master and servant ⇨301(4)

Where an employee is subject wholly to the direction or control of a special employer to whom his employer has lent or hired him for some special service, the special employer is liable for injuries caused by negligent or wrongful acts of the employee while engaged in the performance of duties pertaining to such special service.

2. Master and servant ⇨330(1)

When a master hires out the services of an employee for the operation of an instrumentality owned by the master, together with the use of the instrumentality without relinquishing the power to discharge such servant, to go where and perform such work as the hirer directs, it is presumed that the servant remains, in the absence of an agreement to the contrary, the servant of the general employer so far as the method and manner of operating the instrumentality is concerned, and that negligence of the servant is that of the owner of the instrumentality.

3. Master and servant ⇨301(4)

A general employer cannot escape liability for negligence of a servant whose services have been lent or hired to another, unless he resigns full control of the servant for the time being.

4. Master and servant ⇨301(4)

The existence of the right of control over an employee is the critical test of liability for his acts rather than the mere fact of its exercise.

5. Master and servant ⇨301(4)

A special employer has no control if he has no voice in the selection or retention of an employee, as respects liability for employee's negligence.

6. Master and servant ⇨301(4)

The person who is responsible for a servant's selection and retention is the one who is liable for the servant's acts.

7. Automobiles ⇨242(6)

Clear proof is required before a truck owner who has hired out the truck with a driver of his own choice will be presumed to have surrendered full control to the hirer, as respects liability for the driver's negligence.

8. Master and servant ⇨301(4)

Where a general employer rents a machine and a servant to operate it, a continuance of the general employment is indicated, particularly if the instrumentality is of considerable value, as respects liability for employee's negligence.

9. Master and servant ⇨301(4)

If a servant is expected to give only the results called for by a temporary employer and to use the instrumentality belonging to his general employer as his general employer would desire, the original service continues, as respects liability for employee's negligence.

10. Master and servant ⇨330(2)

The fact that a general employer is in the business of renting machines and men is relevant in determining liability for employee's acts, since in such case there is more likely to be intent to retain control over the instrumentality.

11. Automobiles ⇨193(5)

A truck owner who hired out truck and driver to another for the purpose of hauling road materials at a specified rate per ton, but retained responsibility for maintaining the trucks in operative condition, was liable for injuries sustained by pedestrian who was struck by truck at crosswalk while truck was engaged in hauling for such other.

12. Automobiles ⇨193(5)

The drivers of truck owner who agreed to supply another with trucks and drivers

selected by owner for use in hauling road materials at a specified rate per ton remained drivers of the owner, for whose negligence the owner and not such other was chargeable, in absence of relinquishment by owner of complete control over the drivers.

13. Master and servant ⇨301(4)

While an employee is furthering the business of his general employer by the service rendered to another, there is no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division, as respects liability for employee's negligence.

14. Automobiles ⇨193(5)

Contractor who hired truck with its driver from owner who retained right to discharge driver was not liable for death of pedestrian who was struck at crosswalk by truck while truck was engaged in hauling materials for contractor, notwithstanding contractor gave driver directions about loading and unloading and occasionally gave directions as to route to be taken.

15. Contracts ⇨176(1)

Generally, the trial court must construe a contract in litigation, and first determine whether any uncertainty or ambiguity exists.

16. Customs and usages ⇨17

Evidence of usage is not admissible to vary the terms of a clear and unambiguous contract.

17. Master and servant ⇨301(4)

One who hires the servants of another cannot be said to have control over them so as to be responsible for their acts unless he has the right to discharge them and employ others in their places in case of misconduct or incapacity.

18. Master and servant ⇨301(4)

One who is vested for the time with exclusive control of the right to discharge servants and to employ others is alone responsible for their defaults.

19. Master and servant ⇨301(4)

Where a person hires personal property of another, who supplies under the contract a servant charged with the general management and control of the property, although the hirer acquires to a limited degree a dominion over the servant with a right to superintend and direct his conduct, the owner continues responsible for the servant's

negligence, though it occurs in the performance of work in which the hirer alone is interested.

20. Appeal and error ⇨1056(1)

In action for death of pedestrian who was struck at crosswalk by truck which was hauling materials for contractor who had hired truck and driver from owner who retained exclusive right to hire and discharge drivers, rejection of testimony with respect to a local custom under which the man to whom a truck was furnished controlled the direction thereof was not prejudicial to truck owner, in absence of a surrender of complete control over truck or driver.

21. Automobiles ⇨246(42)

In action for death of pedestrian who was struck by truck at crosswalk, instruction that driver was the employee of the owner and that driver's negligence, if any, was imputable to the owner was not error under the evidence, although truck was being operated at the time in hauling road materials for another to whom owner had hired the truck and driver.

22. Automobiles ⇨160(4)

Under statute, pedestrian crossing street at marked crosswalk had right of way over automobiles (St.1935, p. 188, § 560(a).

23. Automobiles ⇨206

Pedestrian crossing street at marked crosswalk was justified in assuming, while proceeding with ordinary care and in the absence of reasonable warning of danger, that his right of way over automobiles would be respected (St.1935, p. 188, § 560(a).

24. Automobiles ⇨217(5)

Pedestrian crossing street at marked crosswalk was not required in the exercise of his right of way to keep looking continuously to the left until reaching center line of street (St.1935, p. 188, § 560(a).

25. Automobiles ⇨242(8)

Pedestrian presumptively used reasonable care and vigilance for his own safety in crossing street at marked crosswalk, in absence of evidence as to the precautions taken by him in his course other than that before stepping from curb he looked to the left for automobiles and as he approached center line of street looked to the right (St. 1935, p. 188, § 560(a).

26. Automobiles ⇨217(6)

A pedestrian who sees a truck approaching from a distance but deems himself se-

cure in the protection of his right of way while crossing street at a marked crosswalk, or miscalculates the distance or speed of the truck, is not necessarily charged with contributory negligence (St.1935, p. 188, § 560(a).

27. Automobiles ⇨245(72)

Whether a pedestrian who fails to look at all, or looks straight ahead without glancing to either side, or who is in a position where he cannot see and takes no precaution for his safety, is contributorily negligent with respect to injuries sustained when struck by an automobile is for the court.

28. Automobiles ⇨245(72)

Whether a pedestrian who looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some reason assumes he could avoid injury to himself, is contributorily negligent with respect to injuries sustained when struck by an automobile is for the jury.

29. Automobiles ⇨245(72)

In action for death of pedestrian who was struck by truck while crossing street at marked crosswalk, whether pedestrian who looked to the left before stepping from curb but turned to look to the right before reaching center line of street was contributorily negligent was for the jury.

30. Death ⇨99(4)

\$10,000 awarded to widow, and married daughter, for death of 68 year old husband and father, who had been in good health and had a life expectancy of 9.7 years, and whose earnings for some time prior to his death had been about \$100 a month, was not excessive.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action by Lily W. Lowell and another against J. Henry Harris, Will D. Wilson, and W. H. Talbott. Judgment for plaintiffs against the first two named defendants but in favor of the last-named defendant, and the plaintiffs and the first two named defendants appeal.

Affirmed.

Jesse E. Nichols and Elwood Murphey, both of Oakland, for Lowell and Young.

Owen M. Gentry and Hamilton Wright, both of Oakland, for Harris and Wilson.

Weinmann, Quayle & Berry, of Oakland, for Talbott.

JOHNSON, Justice pro tem.

This is an action in which the plaintiffs, who are respectively the widow and the married daughter of George P. Lowell, deceased, brought suit for damages by reason of the death of said decedent, which, the plaintiffs alleged, was caused by negligence of the defendants in the operation of an automobile truck driven by the defendant Wilson.

The defendant Harris was the owner of the truck, and had rented it with his employee, Wilson, as driver, to the defendant Talbott for use in certain business of the latter. At the trial a nonsuit was granted in favor of the defendant Talbott; and pursuant to a verdict of \$15,000 against the other defendants, judgment against them in that sum was entered in favor of plaintiffs. Upon motion of those defendants for a new trial, the amount of the judgment was, with the acquiescence of the plaintiffs, reduced to \$10,000. From a judgment so modified the defendant Harris and Wilson appealed; and from the judgment in favor of the defendant Talbott entered upon his motion for nonsuit, the plaintiffs have appealed. The appellants other than Wilson, respectively, invoke the principles affecting liability of general and special employers.

The defendant Harris, who was an excavating contractor, owned several trucks which were operated, as occasion required, by men in his employ, of whom Wilson was one. The defendant Talbott had a contract to haul and spread road materials for use by a subcontractor in furtherance of construction of the so-called "Broadway Low Level Tunnel," designed to facilitate travel between Alameda and Contra Costa counties, and having its westerly portal on or near upper Broadway in Oakland.

In the latter part of September, 1935, Talbott and Harris had a telephone conversation whereby, upon a proposal made by Talbott, it was agreed that Harris would rent to Talbott some of the former's trucks, when not needed by Harris himself, and which might be wanted from time to time by Talbott in performance of his hauling contract. With trucks so to be hired by Talbott, it was agreed that Harris should furnish drivers at his expense; and in accordance with the usual practice Harris supplied the requisite gasoline and oil, and maintained the trucks in operative condition. In the beginning the hauling was be-

ing done from Hutchinson's quarry at El Cerrito, and the price was fixed at the rate of 40 cents a ton. There were working days, however, when no hauling at all was done by Harris's trucks; and on October 22, a change to Blake Brothers' quarry in Richmond being made, the rate per ton was increased because of a longer haul. At the conclusion of service for either a full or a fractional day, the trucks were returned by the drivers to Harris's yard, where they remained at night; and each morning the drivers reported there to ascertain whether there was work for them to do, either on a job of Harris himself or that of Talbott or of some one else.

One of the trucks used, as needed, in Talbott's work was a Chevrolet dump truck of which the defendant Wilson was the driver. Wilson had worked intermittently for Harris in fairly regular employment during a period of seven to nine years.

On the morning of October 22, 1935, when the change was made to Blake Brothers' quarry, Wilson had made one trip with his truck from that quarry to the tunnel, and was on his way back to the quarry in Richmond for another load. It was on that return trip to the quarry that the accident in question occurred, shortly after 10 o'clock in the morning, at the intersection of San Pablo avenue and Bancroft way in the city of Berkeley.

Wilson was driving in a northerly direction along San Pablo avenue; and at its intersection with Bancroft way, Mr. Lowell was walking across the avenue from east to west in the northerly crosswalk plainly marked for pedestrians. The day was clear and the street dry. The easterly half of the avenue had a "passing lane" marked off, adjacent to the center line, for northerly vehicular travel; and Wilson was operating his truck in that inner lane at a speed, as he said, of 20 to 25 miles an hour. According to his testimony, there was a car to his right somewhat ahead of him as he neared Bancroft way. During his approach toward the intersection, he was looking straight along his lane; and not until Wilson himself was within 10 to 12 feet of the southerly edge of the crosswalk, did he see Mr. Lowell, who was then a little to the east of Wilson's lane. Thereupon, realizing the danger, Wilson veered to the left, but not quickly enough to avoid the accident. Mr. Lowell was first brought into contact with the right front fender; and, according to Wilson, was then thrown against the body of the truck, hitting his head against the

knob of the door. The impact caused a basal fracture of the skull, and Mr. Lowell died on the following day.

Under subdivision (a) of section 560 of the Vehicle Code of 1935, (St.1935, p. 188), it was made the duty of the driver of a vehicle to yield the right of way to a pedestrian crossing the roadway within a marked crosswalk; and there was introduced in evidence an ordinance of the city of Berkeley, giving a right of way to a pedestrian crossing within a marked crosswalk, subject to the proviso that such right of way was to be yielded by the operator of a vehicle to those pedestrians who had entered the half of the roadway being traversed by such vehicle prior to the time that it entered the crosswalk. According to the testimony of Officer Schmidt, who witnessed the accident, Mr. Lowell was close to the easterly line of Wilson's lane of travel before Wilson had entered the intersection. There is evidence that as Mr. Lowell neared that easterly line, he had his face turned somewhat northward, as if to take note of traffic moving southward along the westerly half of the avenue. There is also other evidence that before stepping from the curb into the crosswalk, Mr. Lowell had looked to the south. It is urged on behalf of the defendants, Harris and Wilson, that Mr. Lowell was guilty of contributory negligence as a matter of law in failing to keep looking to the south as he drew near the passing lane. We will recur to that point later, but it should be borne in mind that under the evidence there was a duty on Wilson's part to yield the right of way to Mr. Lowell. In the arguments made on behalf of the defendants Harris and Wilson, there is a tacit concession of negligence on the part of Wilson in his operation of the truck. The only grounds of appeal relied upon in his behalf are contributory negligence of the deceased, excessiveness of the modified judgment, and refusal of the court to grant a new trial.

In behalf of the defendant Harris, it is insisted primarily that Wilson was in the special employ of Talbott and under his full control; and that in consequence Harris was relieved of all liability for negligence of Wilson in the operation of the truck for Talbott's uses.

In like manner, in the appeal of the plaintiffs from the judgment in favor of Talbott, it is contended that there was sufficient evidence of a measure of control on the part of Talbott, as a special employer of Wilson,

to require denial of Talbott's motion for a nonsuit and a submission of the issue to the jury.

The status of Wilson in his dual relationship is really the nodal point in the case.

[1,2] There is nothing equivocal in the rules affecting general and special employers, as enunciated in a catena of cases in this jurisdiction. An employee may be in the general service of one person, and may be lent or hired to another for some special service; and if in that service he is subject wholly to the direction or control of that other person, the latter, and not the general employer, is the master pro hac vice, and is liable for injuries caused by negligent or wrongful acts of the employee, while engaged in the performance of duties pertaining to such special service. 16 Cal.Juris. 1108-1109. But as stated in *Billig v. Southern Pacific Co.*, 189 Cal. 477, 485, 209 P. 241, 244, "when a master hires out, under a rental agreement, the services of an employee for the operation of an instrumentality owned by the master, together with the use of the instrumentality, without relinquishing to the hirer the power to discharge such servant, to go where and perform such work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality, and the negligence of the servant must be held to be that of the owner, and not that of the hirer, of the instrumentality."

[3] Hence, to escape liability for negligence of a servant whose services have been lent or hired to another, the general employer must resign full control of the servant for the time being. A few of the cases which may be cited in addition in support of the rule stated are *Stewart v. California Improvement Company*, 131 Cal. 125, 129-131, 63 P. 177, 724, 52 L.R.A. 205; *Moss v. Chronicle Publishing Co.*, 201 Cal. 610, 616, 258 P. 88, 91, 55 A.L.R. 1258; *Umsted v. Scofield Eng. Const. Co.*, 203 Cal. 224, 227, 263 P. 799; *Peters v. United Studios, Inc.*, 98 Cal.App. 373, 379, 277 P. 156; *Valdick v. LeClair*, 106 Cal.App. 489, 496, 289 P. 673; *Scrimsher v. Reliance Rock Co.*, 116 Cal.App. 500, 504, 505, 2 P. 2d 862; *Carlson v. Sun-Maid Raisin Grow-*

ers' Ass'n, 121 Cal.App. 719, 726, 727, 9 P. 2d 546.

[4, 5] The existence of the right of control over the employee is the critical test of liability for his acts. It is the right to exercise control rather than the mere fact of its exercise which is decisive. *Peters v. United Studios, Inc.*, supra. In the *Billig Case*, supra, it is said that the power of control does not exist in a special employer in a situation where he has no voice in the selection or retention of the negligent employee. And in reference to the general employer, the court in the *Moss Case*, supra, quoted from 39 C.J., page 1275, the following passage: "To escape liability, the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person; and it is necessary to distinguish between authoritative direction and control and mere suggestions as to details or the necessary co-operation where the work furnished is part of a larger operation."

[6, 7] In the present case there was no express agreement that Harris should relinquish to Talbott complete control over either Wilson or the truck; nor has attention been directed to any circumstances indicating that, as the work progressed, there was any release of authoritative control by Harris. Wilson was paid by Harris; the truck was returned after each day of use to Harris's yard; and Harris might at any time have exercised his discretion in substituting some other driver in place of Wilson. In the absence of any express agreement, the law puts the liability for the acts of a servant upon the person responsible for the servant's selection and retention. The operation of a motor truck through city streets is a matter of so much concern to the owner that, when he has manned the truck with a servant of his own choice as a safeguard of his own interests, clear proof must be required before he will be presumed to have surrendered full management and control to the hirer.

There has been no change in the fundamental legal principle since the "horse-and-buggy days" when a team was rented with its driver. In reference to liability under such circumstances, it is said in 39 C.J. page 1277: " * * * One who furnishes a driver and team to another for the latter's use for a trip or for a specified time or for a particular purpose is nevertheless liable for injuries resulting from the acts of the

servant while performing such services for the third person, provided exclusive control of the driver is not vested in the hirer. The test of liability turns on the question whether the employer or the hirer controls the movement of the driver. Liability of the general employer for the acts of the driver furnished with the team is not affected by the fact that directions are given the driver as to when and where to go, that directions are given as to what shall be carried, or that directions are given to the driver to hurry or to take his time, or that the driver also assisted in the work that the hirer was doing for which the team was used."

[8-11] In like manner in 1 Restatement of the Law of Agency, page 502, the rule announced is accompanied by this comment: "A continuance of the general employment is also indicated in the operation of a machine where the general employer rents the machine and a servant to operate it, particularly if the instrumentality is of considerable value. Normally, the general employer expects the employee to protect his interests in the use of the instrumentality and these may be divergent from the interests of the temporary employer. If the servant is expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire, the original service continues. Upon this question, the fact that the general employer is in the business of renting machines and men is relevant, since in such case there is more likely to be intent to retain control over the instrumentality." A review of the voluminous transcript before us convinces us that it may not be said that Talbott became vested exclusively with authoritative control over Wilson as the driver of the truck.

[12] We turn now to the appeal of plaintiffs from the judgment of nonsuit in favor of the defendant Talbott. In plaintiffs' brief, testimony is quoted showing that Talbott gave the drivers of the hired trucks directions about loading and unloading, about taking precautions so that rock would not be spilled in the streets; gave at times directions concerning the route to be taken; and admonished drivers to stay within the speed limit. Because of something in connection with spreading the rock on delivery at the tunnel, Talbott on one occasion made a suggestion "to have prongs that were sticking back of the truck cut off," saying that, "if they did not have,

it fixed," he could not use the truck on the job. In all matters of that sort such directions or suggestions relate merely to details incident to the use for which the hiring is had. The business of Harris was not that of doing Talbott's work, and Harris had no control over the details of its performance. In his relations with Talbott, Harris's business was that of furnishing trucks with drivers of his own selection; and though he supplied trucks and drivers for use in Talbott's special business, yet in the absence of relinquishment by Harris of complete control over his drivers, they remained, in operating the trucks, servants of his business, for whose negligence Harris, and not Talbott, would be chargeable.

[13] One of the important elements in such cases is the right of discharge; and assuredly Harris had not conferred upon Talbott the right to discharge any of the drivers furnished. Talbott, if dissatisfied with a particular driver, might have asked Harris to provide another, or might have sent the driver and his truck back to Harris. But there was no power in Talbott to dismiss Wilson, and put the truck under operative control of a man of his own. Upon this point in *Densby v. Bartlett*, 318 Ill. 616, 149 N.E. 591, 596, 42 A.L.R. 1406, the court said: "The driver, while performing a special service for appellant, was performing work of his employer, Saracino, within the scope of his employment, viz., driving cars for persons who hired them from his employer. Many of the cases above cited expressly hold that the right of the hirer to direct the driver when and where to go, whom to haul, and the route to travel, does not place the driver under the control of the hirer as to the manner of driving the car. In that regard he is doing the work of the general employer and is not subject to the control of the hirer. In this case appellant was not authorized to discharge a reckless driver and replace him with another driver. At most he could dismiss the car and driver. In the absence of an agreement to do so, it cannot be inferred that the owner of cars of considerable value and requiring competent and skilled persons to drive them, and who employed as drivers men he was willing to trust, would authorize one to whom he hired them to discharge the drivers for any reason."

And in *Driscoll v. Towle*, 181 Mass. 416, 63 N.E. 922, in reference to the renting of a team with the driver, Judge Holmes,

as Chief Justice of the court, spoke as follows:

"But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant. More than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign,—as the master sometimes was called in the old books."

"In cases like the present, there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take his or that burden, to hurry or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street."

We take the following excerpts also from the decision of Judge Cardozo in *Charles v. Barrett*, 233 N.Y. 127, 135 N.E. 199: "We think that truck and driver were in the service of the general employer. * * * Where to go and when might be determined for the driver by the commands of the defendant. The duty of going carefully, for the safety of the van as well as for that of wayfarers, remained a duty to the master at whose hands he had received possession. Neither the contract nor its performance shows a change of control so radical as to disturb that duty or its incidence. * * * The rule now is that, as long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division."

In respect of the right of the hirer to designate the route of travel as an incident of his right of use, reference may be had also to *Thatcher v. Pierce*, 281 Pa. 16, 20, 125 A. 302; and *Meyers v. Tri-State Automobile Co.*, 121 Minn. 68, 140 N.W. 184, 44 L.R.A., N.S., 113.

[14] In so far as use of San Pablo avenue was concerned, Wilson himself said that it was the straightest, widest street, and the nearest route that could be taken to the job; also that it was an arterial way, protected from cross-traffic and open to trucking.

Upon the evidence before the court at the time when Talbott's motion for a nonsuit was granted, it is quite clear, in our opinion, that there was nothing which showed that Talbott had authoritative control of the conduct of the driver Wilson in his management and operation of the truck while in transit. The case was therefore brought plainly within the principles laid down in *Billig v. Southern Pacific Co.*, 189 Cal. 477, 209 P. 241, as well as in the quotations from the texts and the cases from other states gathered in our own research.

We are, therefore, of the opinion that Talbott's motion for a nonsuit was properly granted. It is contended, however, by the defendant Harris (but not with concurrence of plaintiffs on their appeal), that the trial court erred in sustaining objections to certain questions put to Harris, and in striking out certain of his testimony, when he was under examination as a witness called by plaintiffs during the presentation of their case. After Harris had testified to the agreement in terms made by telephone conversation between Talbott and himself, and to some other matters, and after he had been cross-examined by Talbott's attorney, he was taken in hand by his own counsel. A large part of the questioning then addressed to him was to discover whether there might be circumstances which would serve to shift liability from Harris to Talbott. The questions so propounded were framed with a view to drawing forth testimony as to whether there existed any local custom or usage under which a driver, furnished by his employer in renting a truck to another, was to follow the instructions of the hirer in regard to management, operation, and control of the truck, while engaged in doing the things pertaining to the special work undertaken by the hirer. We have read not only the portions of the record printed in the brief of the defendant Harris, but have carefully considered all that appears in the transcript on the subject. Many of the questions ruled out were objectionable in form. It appears, however, that Harris testified that there was a local custom in respect of operation, management, and control of trucks rented with drivers; and then when asked what "the rule" was, he said, "The man to whom the truck is furnished controls the direction." Complaint is made because that answer and others like it were stricken out. Harris said also that the drivers "took orders from the men who hired the trucks." This represents what we conceive to be the

substance of Harris's statements on the point. He admitted, however, that nothing was said between him and Talbott as to who should have supervision over Wilson from the time the latter arrived on the job, or as to who should direct Wilson after he left his general employer's yard.

[15,16] The answers of Harris which were stricken out did no more than import what the law implies as to the right of the hirer to give directions as to details incident to the accomplishment of his particular work. Nothing that Harris said indicates, to our minds, that there was any general usage or custom in the renting of trucks with drivers for such hauling purposes, whereby physical control of the owner's drivers was surrendered to the hirer as a sovereign master, or any right of complete control of the mechanical operation, management, and care of the trucks in traveling to and fro between the points of loading and delivery.

Such undoubtedly was the view of the trial court in making the rulings criticised. For in sustaining objection to one of the questions, the judge said that the contract was not uncertain or ambiguous; and upon the question of management and control of the truck he referred to the cases of *Billig v. Southern Pacific Company* and *Stewart v. California Improvement Company*, hereinbefore cited. As is said in *May v. American Trust Co.*, 135 Cal.App. 385, 391, 27 P.2d 101, it is generally the province of the trial court to construe the contract in question, and first determine whether any uncertainty or ambiguity exists; and evidence of usage is not admissible to vary the terms of a clear and unambiguous contract.

[17-19] In *Shearman & Redfield on Negligence*, 6th Ed. § 162, page 392, regarding the right of control, the rule is stated in these words: "The hirer can not properly be said to have control of the servants, unless he has the right to discharge them and employ others in their places in case of their misconduct or incapacity; that being the only practicable means by which free servants can be controlled. If, therefore, the hirer has no such power, he is not responsible to any one for the faults of the servants. If the hirer is vested for the time with exclusive control with the right to discharge the servants and to employ others, he alone is responsible for their defaults. Where a person hires the personal property of another, who supplies, under the

contract, a servant charged with the general management and control of the property, although the hirer acquires, to a limited degree, a dominion over the servant, with a right to superintend and direct his conduct, the owner continues responsible for the servant's negligence, though it occurs in the performance of work in which the hirer alone is interested."

[20] We conclude that no prejudice was suffered by the appellants in the rulings made.

[21] Error is charged also in an instruction given on the court's own motion in this form: "You are hereby instructed the defendant Will D. Wilson, driver of the automobile truck on the occasion in controversy here, was the employee, agent and servant of the defendant J. Henry Harris, and negligence, if any, on the part of defendant Will D. Wilson is imputed to said defendant J. Henry Harris."

This instruction left to the jury the question whether Wilson was negligent in the operation of the truck, and added that if the fact should be so found, such negligence would be imputable to his employer, Harris. Other instructions dealt with the element of proximate cause, and with the subject of contributory negligence charged against Mr. Lowell. In view of what has been said, we find no error in the instruction so given; nor in the refusal to give a formula instruction proposed on behalf of Harris, relative to the responsibilities of general and special employers; the refusal being placed by the judge upon the ground that said instruction was not applicable to the case.

[22-25] It remains to consider briefly the contentions that the deceased was chargeable with contributory negligence as a matter of law, and that the amount of the judgment, even as modified, is excessive.

Under the law Mr. Lowell in his use of the crosswalk had the right of way; and while proceeding with ordinary care, he was justified in assuming, in the absence of reasonable warning of danger, that his right of way would be respected. There is evidence that before he stepped from the curb into the crosswalk, Mr. Lowell looked to the south. He then proceeded along the crosswalk almost to the easterly edge of the passing lane, which was approximately ten feet from the center line of the avenue, the width of which was 74 feet. Just what observation he made, while so

proceeding, concerning traffic approaching from the south is not known. He was not required in the exercise of his right of way to keep looking continuously to the south; and as he drew close to the passing lane, he looked, not unnaturally, northward to apprise himself of traffic from that direction before crossing into the westerly half of the roadway. There being no definite evidence as to the precautions otherwise taken by him in his course, the presumption is that during his progress he used reasonable care and vigilance for his own safety. *DeLannoy v. Grammatikos*, 126 Cal.App. 79, 85, 14 P.2d 542; *Lam Ong v. Pacific Motor T. Corp.*, 16 Cal.App.2d 274, 277, 60 P.2d 480. To ignore that presumption "would be in effect to presume negligence on the part of one in excuse of negligence on the part of another." *Gay v. Winter*, 34 Cal. 153, 164; *Hollowell v. Cameron*, 186 Cal. 530, 533, 199 P. 803; *Jones v. Hedges*, 123 Cal.App. 742, 753, 12 P.2d 111.

[26-29] If, though he saw Wilson approaching from a distance, Mr. Lowell, as a result of his observation, deemed himself secure in the protection of his right of way, or miscalculated the distance or the speed of the truck, he would not necessarily be chargeable with contributory negligence as a matter of law. In dealing with the subject, the court, in *White v. Davis*, 103 Cal.App. 531, 542, 284 P. 1086, 1091, spoke thus: "There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he can not see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury." In the present instance we have no doubt that the determination of the issue was properly left to the jury.

[30] Nor do we think that the modified judgment should now be further reduced. At the time of his death Mr. Lowell was 68 years of age, possessed of good health and vigor, and had an expectation of life

of 9.7 years. He and his family had a happy and congenial home life, and his wife especially has been deprived of the society, comfort, and protection of her husband. While the decedent's earnings had been lessened during the depression years, there was evidence that he had earned for some time prior to his death about \$100 a month. After careful consideration of the matter on the motion for a new trial, the trial judge cut down by one-third the amount of the jury's award; and this court may safely rely on his fairness of mind supported by years of judicial experience.

The judgment against Harris and Wilson having been modified, there was no abuse of discretion in denial of their motion for a new trial.

The judgments subjected to appeal are hereby affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.



CITY OF LOS ANGELES v. FORD et al.*
Civ. 11605.

District Court of Appeal, Second District,
Division 2, California.

Dec. 14, 1937.

Hearing Granted by Supreme Court
Feb. 10, 1938.

Taxation Ⓒ514

City acquiring by purchase portion of larger parcel taxed as a unit to seller and previously sold to state for taxes, was entitled to cancellation of such taxes against portion acquired by city, notwithstanding possibility of reversion under Constitution exempting property of municipalities from taxation and provision of Political Code authorizing cancellation of uncollected tax or portion thereof on property acquired and owned by municipality after tax became a lien thereon (Pol.Code § 3804a; Const. art. 13, § 1).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by the City of Los Angeles against John Anson Ford and others as

members and constituting the Board of Supervisors of the County of Los Angeles, State of California, for a writ of mandate. From an adverse judgment, the petitioner appeals.

Reversed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

WOOD, Justice.

The city of Los Angeles filed a petition in the superior court for a writ of mandate directing respondents, members of the board of supervisors of Los Angeles county, to cancel certain taxes and assessments against parcels of real estate under the ownership of petitioner. The cause was submitted upon the pleadings and a stipulated statement of facts, and judgment went for respondents, from which petitioner appeals.

Petitioner acquired the land designated on the map appearing in the transcript as parcel B, between Alameda street and Santa Fé avenue, for the purpose of continuing Washington boulevard easterly from Alameda street at the same width as parcel B. The grade of this land is far below that of Alameda street, Santa Fé avenue, and Washington boulevard at its intersection with Alameda street, and it is impracticable to construct this continuation of Washington boulevard without raising the grade a considerable distance above the present grade of parcel B, and also of the land designated as parcels A and C. At the time the land was acquired by the city, it was the city's intention to construct the street on a bridge or viaduct, but the city was forced to abandon this original plan because of its excessive cost. In order to carry out the proposed continuation of Washington boulevard without the necessity of constructing a bridge or viaduct a fill is intended to be made and in order to do so it was necessary to acquire property on either side of parcel B in order to support the fill, and the land designated as parcels A and C was acquired by the city for that purpose. In order to afford a route for public travel between Alameda street and Santa Fé avenue until such time as Washington boulevard may be improved to the

*For subsequent opinion see 84 P.2d 1042.

desired grade and opened for public travel between Alameda street and Santa Fé avenue and slope rights for the fill are no longer needed, the land designated as parcel D was acquired by the city. The title to parcels A, C, and D, was acquired by the petitioner by a deed which contained a provision that title should revert to the grantors when the parcels of land designated as A, C, and D should be uniformly filled and the total area brought to the established grade of Washington boulevard, and, further, that parcel D should revert when parcel B was improved for use as a highway and actually opened for travel. The city acquired the three parcels mentioned in the deed on April 12, 1935, at which time the taxes for the years 1931-1932, 1932-1933, 1933-1934, and 1934-1935 were unpaid and the land sold to the state for said taxes; the property being only a portion of the real estate assessed as a unit for the taxes mentioned. Application was made to the board of supervisors for the cancellation of the taxes in so far as levied upon parcels A, C, and D and the application was denied on April 27, 1936.

It is provided in section 1, article 13, of the Constitution of California that: "Property * * * as may belong to * * * any * * * municipal corporation within this State shall be exempt from taxation." In *Smith v. City of Santa Monica*, 162 Cal. 221, 121 P. 920, 921, the plaintiff sought to quiet title to certain lands in the city of Santa Monica for which he held tax deeds from the state. The assessments under which the land was sold were for the years 1894 and 1895. The tax collector's deeds were made on June 10, 1908. The city of Santa Monica had brought an action to condemn the real estate for public purposes as a city park and judgment in its favor was entered on December 20, 1897. In upholding a judgment in favor of the defendant city, the Supreme Court said: "It may safely be said that when a municipal corporation acquires property under such circumstances the title which the state takes by the tax collector's deed is merged into the larger title which the municipality holds under the trusts, both for the public, as distinguished from the state, and also for the state, as the supreme sovereign." In *State ex rel. Hoover v. Minidoka County*, 50 Idaho 419, 298 P. 366, 370, the Supreme Court of Idaho had under consideration an action brought by the state to quiet title to lands

purchased by the state in foreclosing a school fund mortgage and to require the county commissioner to cancel and discharge certain tax liens. Basing its decision upon a section of the Constitution of Idaho, article 7, § 4, which exempts "the property of * * * the state * * * from taxation," the court said: "When the state obtains complete unconditional title to lands pursuant to the foreclosure of school fund mortgages, the title is freed, by article 7, section 4 of the Constitution, from all past taxes and liens therefor, and all such liens on the tax records become nil and should be canceled."

In 1925 the Legislature, St.1925, p. 431, amended section 3804a of the Political Code by providing that: "Any uncollected tax, or assessment, or portions thereof, * * * upon an assessment of property which after the time said tax or assessment became a lien was acquired and owned * * * by any * * * municipal corporation * * * and which, because of such public ownership, is not subject to sale for delinquent taxes, may, upon satisfactory proof thereof, be canceled by the officer having custody of the record thereof upon the order of the board of supervisors." The method thus provided for the cancellation of the assessment or uncollected tax was applied in *People v. Board of Supervisors*, 126 Cal.App. 670, 15 P.2d 209, where a writ of mandate was issued commanding the members of the board of supervisors to cancel an assessment of taxes against land owned by the city and acquired by it for park purposes. It was there stated that the case of *Santa Monica v. Los Angeles County*, 15 Cal.App. 710, 115 P. 945, relied upon therein and also in the present litigation, does not pass upon the question then before the court. The court pointed out that section 3804a was not in existence at the time of the decision in *Santa Monica v. Los Angeles County*. The constitutionality of section 3804a was upheld. An application for a hearing was denied by the Supreme Court.

Respondents point out that the land acquired by the city is a portion of a larger parcel taxed as a unit and contend that the language of section 3804a should be construed as meaning that the word portion refers to an installment of the tax due. We cannot accept this view. The word portion is related to the word assessment as well as to the word tax. It would be doing violence to the language used by the Legislature to place upon it the con-

struction suggested. By the enactment of section 3804a the Legislature provided effective means for the cancellation of assessments upon property acquired by the municipality. The Legislature did not enlarge or restrict the right of the municipality to exemption from taxes assessed against lands in its ownership. Indeed, it was not within its power to do so. The Political Code provides for payment of taxes by installments, a word which is used in various sections of the Code. If the Legislature had intended to provide for the cancellation of unpaid installments appropriate language to that effect doubtless would have been used. By using the word portion rather than the word installment, it must be considered that the Legislature intended to provide for a situation where a municipality or other state agency acquires a portion of a lot or trust.

The fact that the property involved might possibly revert to private ownership is not of consequence in the present discussion. The property is in the ownership of the city of Los Angeles. The taxes were upon an assessment of the property and not upon a reversionary or other lesser interest. An assessment upon a lesser interest would not have been possible since it has not come into existence.

The judgment is reversed.

We concur: CRAIN, P. J.; McCOMB, J.



24 Cal.App.2d 176

HARRUP v. BAKER.

Civ. 2062.

District Court of Appeal, Fourth District,
California.

Dec. 22, 1937.

Appeal and error ☞787

A motion to dismiss an appeal will be granted where appellant gave the county clerk a notice requesting the preparation of a transcript but failed to guarantee expenses as required by statute, did not file a record on appeal or points and authorities before the time permitted had expired, offered no excuse for failure and failed to oppose motion to dismiss or appear at its hear-

ing. Code Civ.Proc. § 953a, as amended by St.1935, p. 1960; § 953b.

Action by Edna Harrup against John B. Baker, justice of the peace of judicial township No. 3, county of Imperial. Judgment for defendant, and petitioner appeals. On defendant's motion to dismiss the appeal.

Dismissed.

Hugh S. MacKinnon, of Calexico, for appellant.

R. I. French, Asst. Dist. Atty., of El Centro, Imperial County, for respondent.

JENNINGS, Justice.

This motion by respondent to dismiss the appeal herein for failure of appellant to file a transcript on appeal within the time required by law is supported by the certificate of the county clerk of the county wherein the action was tried and by an affidavit of counsel for respondent. From these documents it appears that a judgment was entered in respondent's favor on April 2, 1937, and that on April 10, 1937, notice of appeal was given by appellant who, on the same date, filed with the county clerk a notice requesting the preparation of a transcript on appeal in accordance with the provisions of section 953a of the Code of Civil Procedure, as amended by St.1935, p. 1960. It further appears that on April 13, 1937, the county clerk advised appellant that the estimated expense of preparing a clerk's transcript amounted to \$12, but that said sum has never been paid, for which reason the clerk's transcript to be used on the appeal has not been prepared.

No appearance was made by appellant at the time appointed for hearing this motion and no opposition to the granting of the motion has been offered. Section 953b of the Code of Civil Procedure required appellant, at the time she gave notice requesting preparation of a transcript, to file an undertaking whereby payment of the expense to be incurred in the preparation of such transcript would be guaranteed. This was not done and apparently no effort was made to comply with the provisions of the last-mentioned section of the Code after receipt by appellant of the clerk's statement of the estimated cost of preparing the clerk's transcript. The time for filing a record on appeal and appellant's points and authorities, including any ex-

tensions that were within the power of the trial court to grant on any possible motion for a new trial has expired and no excuse, reasonable or otherwise, for appellant's failure to have perfected her appeal has been shown. Respondent's motion is therefore in order and must be granted. *Hussong v. Byers*, 104 Cal.App. 326, 285 P. 888.

The motion is granted and the appeal taken from the judgment herein is dismissed.

We concur: BARNARD, P. J.; MARKS, J.



24 Cal.App.2d 86

In re BOUCHE'S ESTATE.

BOUCH v. BOUCHE.

Clv. 58.

District Court of Appeal, Second District,
Division 1, California.

Dec. 16, 1937.

1. Executors and administrators ⇨509(2)

A decree of distribution of testator's estate entered January 23, 1933, had become final, with respect to court's jurisdiction to reopen the estate, by August 16, 1935, when petition to reopen probate was filed.

2. Executors and administrators ⇨509(2)

Courts have power to reopen probate of an estate in proper cases, but should ordinarily proceed with considerable caution. Probate Code, § 1067.

3. Executors and administrators ⇨315(5)

A decree of distribution providing that "any other property belonging to said estate, whether described herein or not," and "all the rest, residue, and remainder of said estate," should be distributed to trustees, vested in trustees testator's interest as vendor in realty purchase contract, which was not mentioned in estate proceedings.

4. Trusts ⇨166(1)

Where assets of a trust are in jeopardy because of trustee's inability or unwillingness to act, or adverse interests, the law provides for voluntary resignation or, in proper cases, removal of trustee, and appointment of successor.

5. Executors and administrators ⇨315(4)

Where decree of distribution in estate provided that residue of estate, whether described or not, should be distributed to trustees, reopening estate after decree had become final, for purpose of administering as "newly discovered asset" testator's interest as vendor in realty purchase contract, in which one trustee was purchaser, was improper in absence of procedure to remove such trustee. Probate Code, § 1067.

6. Trusts ⇨246

Testamentary trustees to whom residue of estate had been distributed by decree of distribution were vested with authority to maintain necessary and proper action for recovery of any assets of the estate.

7. Executors and administrators ⇨510(8)

On appeal from orders settling testamentary trustee's account and reopening estate for purpose of administering, as newly discovered asset, testator's interest as vendor in realty purchase contract, court could not determine legal effect of such contract as creating interest in nature of assets to which estate was entitled.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Separate proceedings in the matter of the estate of Louis Franklin Bouche, also known as Louis F. Bouche, deceased, wherein Victor Louis Bouch, a cotrustee of the estate of Louis F. Bouche, filed separate account and report, objected to by Marie Bouche, a cotrustee of the estate of Louis F. Bouche, and Marie Bouche filed petition to reopen the probate of the estate at the expiration of letters testamentary. From orders settling the report and account and reopening the estate, both cotrustees appeal, and Marie Bouche also appeals from order denying her motion for a new trial.

Reversed, with direction to dismiss the proceedings.

Goudge, Robinson & Hughes, of Los Angeles, David L. Bastedo, of Huntington Park, and Charles M. Fueller, of Los Angeles, for appellant Victor Louis Bouch.

Gladys Towles Root, and W. Frank Shelley, both of Los Angeles, for respondent Marie Bouche.

DORAN, Justice.

By stipulation the two appeals herein are presented on the judgment roll. The facts are as follows:

Prior to June, 1917, one Victor Louis Bouch (hereinafter referred to as Victor Bouch) was the owner of certain real property located in the city of Winnipeg, Canada, described as: "Lot 175 in D.B.S. 84 St. James, plan 681, registered in the Winnipeg Land and Title Office as Certificate No. 273750." On June 22, 1917, said Victor Bouch delivered a deed of land conveying to Louis Franklin Bouche, his brother (hereinafter referred to as Louis Bouche), an undivided one-half interest in and to said property. The deed so made was neither recorded nor registered in the Winnipeg land and title office.

Some time thereafter, namely, on or about November 1, 1928, said Victor Bouch made, executed, and delivered to Louis Bouche an agreement which read as follows:

"Whereas, you are the owner of a half interest in the whole of Lot 175 in D.B.S. 84 St. James, plan 681, registered in the Winnipeg Land Titles Office as Certificate No. 273750 in the name of Victor L. Bouch, together with all buildings and appurtenances thereto, better known as 276-278 Spence Street, Winnipeg, Manitoba, Canada. All free of encumbrances.

"And whereas, it is my desire to facilitate your coming into possession of this interest in cash at the earliest opportunity, I, for that purpose, beg to submit to you for your approval, the following proposition:

"(1) That we set on the property, a value of \$15,000.00, your interest therein being \$7,500.00 (Seventy five Hundred Dollars) as at this date, the 1st of November, 1928.

"(2) That, I pay you as conditions permit, various sums of money in reduction of the said sum of \$7500.00 until this principal amount has been reduced to a point where we can obtain and place on the property, a first mortgage loan at Six per cent interest, the proceeds of which to be paid over to you in termination of your interest thereof, with the following proviso:

"(3) That, in the event of a sale of the property taking place, either before or after the consummation of the terms of Art. 2, and the selling price being in ex-

cess of the sum of \$15,000.00 hereinbefore set out as a valuation, you are to participate to the extent of one-half, in the difference between the \$15,000.00 and the net proceeds of the sale; your share thereof to be paid you first, out of the proceeds of said sale.

"(4) That, I pay you interest from this date, (Nov. 1st, 1928) at the rate of Six per cent per annum, the first payment of which, to be made on January 1st, 1929, and thereafter in quarterly consecutive annual payments, on the balance of principal remaining unpaid.

"Should this meet with your approval, you may cash in the hereto attached initial cheque of \$250.00 in accordance with the terms of Art. 2. Another cheque of like amount to follow on or before January 1st, 1929.

"I agree to the above. [Signed] Victor L. Bouch."

Up until the time of the death of Louis Bouche, a total of \$1,450 on account of principal, together with all interest due, had been paid to him by Victor Bouch, and the interest of Louis Bouche in said Canadian property had not been terminated, but, in fact, remained an undivided one-half interest in and to the property.

Said Louis Bouche died testate in the county of Los Angeles, state of California, on April 6, 1932; thereafter, on May 5, 1932, proceedings were had in the superior court of Los Angeles county to probate the last will and testament of deceased, and to administer his estate situate in the State of California. Letters testamentary were granted to Marie Bouche (widow of decedent) and Victor Bouch; thereafter, on or about January 23, 1933, the court heard, allowed, and settled their final account and entered the decree of distribution. Said decree of distribution, in addition to property specifically described, provided as follows: "* * * and any other property belonging to said estate, whether described herein or not, be distributed as follows. * * * All the rest, residue, and remainder of said estate to Marie Bouche and Victor Louis Bouch, as trustees, upon the following terms and conditions." Said Victor Bouch made no mention of the agreement above quoted relative to the Canadian property, in the proceedings in said estate, and no mention of said agreement was made in the final account. Marie Bouche had no actual knowledge of the agreement until some

time after distribution of the California estate.

The issues of fact presented by the controversy which ensued between Marie Bouche and Victor Bouch, concerning the obligation of the latter to the decedent on account of the agreement, were tried in two separate proceedings in the estate matter. In one proceeding, Victor Bouch filed his first separate account and report as cotrustee of the California testamentary trust, including in the report, in addition to his account, a statement of the adverse claim made by Marie Bouche. The latter filed her objections to the report. The court found, in part, "that on the 23rd day of January, 1933, the entire residue of the above estate, whether known or unknown, was distributed to Marie Bouche and Victor Louis Bouch, as trustees, upon the trust in said decree of distribution provided and that said Marie Bouche and Victor Louis Bouch ever since said date have been and are now acting as trustees for the said property, whether known or unknown"; furthermore, "that Victor Louis Bouch and Marie Bouche were not fraudulent in their acts as Executor and Executrix, and the failure to mention said agreement was not due to mistake, but on the contrary, Victor Louis Bouch, in good faith, believed he was not obligated thereby to the estate," and the court concluded that the agreement was "an agreement of purchase and sale of the real estate, in said agreement described, and that as and when a good and sufficient conveyance of the interest of Louis Franklin Bouche, deceased, in and to said real estate is tendered to Victor Louis Bouch, Victor Louis Bouch will be obligated to pay the sum of \$6,050.00, together with interest * * * from April 6, 1932, to the legal successor or successors of Louis Franklin Bouche, deceased." From the order settling said report and account, Victor Bouch, petitioner, and Marie Bouche, objector, have each appealed.

In the other proceeding, Marie Bouche filed her petition to reopen the probate of the estate, and for issuance of letters testamentary, claiming that Victor Bouch was obligated to the estate on account of the agreement relative to the Canadian property. Victor Bouch filed objections to said petition. The court concluded that the facts found justified the reopening of the estate for the purpose of administering newly discovered assets, and ordered that

letters of administration de bonis non be issued to Germaine Bouche McCormack, daughter of the decedent. From the order made on said petition, Marie Bouche and Victor Bouch have each appealed.

Marie Bouche also appeals from the order denying her motion for a new trial

Appellant Victor Bouch contends, in substance, that the court sitting in probate acted in excess of its jurisdiction in reopening the settlement previously made; that the order made settling his account as testamentary trustee is uncertain, indefinite, and unenforceable; that the order made directing the issuance of new letters in the estate matter is not supported by the findings of the trial court that all the property of the estate had been previously distributed; that there are no findings made which show a necessity for the issuance of new letters; and that the court erred in decreeing that the memorandum in question constituted an agreement of purchase and sale.

[1,2] As above noted, the decree of distribution was entered January 23, 1933, and obviously had become final at the time the petition to reopen the probate of the estate and for letters testamentary was filed, to wit, on August 16, 1935. That the court has power to reopen the probate of an estate in proper cases there can be no question. Section 1067 of the Probate Code provides that final settlement of an estate shall not prevent a subsequent issue of letters testamentary "if other property of the estate is discovered, or if it becomes necessary or proper for any cause that letters should be again issued." However, with respect to this provision of the Probate Code, the Supreme Court in connection with a similar question there pending made the observation that, "*the court should ordinarily proceed with considerable caution before declaring the necessity of reopening that which has apparently been completed and closed.*" (Italics added.) In re Estate of Den, 3 Cal.2d 638, 641, 45 P.2d 963, 964.

[3-6] In the case at bar the decree of distribution adequately provided, as hereinbefore noted, for the distribution of "any other property belonging to said estate, *whether described herein or not,*" as well as for the distribution of "all the rest, residue, and remainder of said estate." (Italics added.) This provision of the decree vested in the trustees whatever estate

the contract in question created. *Humphry v. Protestant, etc., Church*, 154 Cal. 170, 97 P. 187; *Victoria Hospital Ass'n v. All Persons*, 169 Cal. 455, 147 P. 124. When the assets of a trust are in jeopardy by reason of the inability or unwillingness of the trustee to act, or by reason of the adverse interest of the trustee, the law provides for the voluntary resignation, or, in proper cases, for the removal of such trustee or trustees by appropriate action, as well as for the appointment of others as trustees to fill vacancies thus created. No such procedure was attempted in the case at bar, notwithstanding the possible or likely complications which may follow an order to reopen an estate for further probate. Instead, the court found that the trustees, having "signified their intention of resigning as trustees of said trust estate, that Germaine Bouche McCormack, daughter of Louis Franklin Bouche, deceased, is a fit and proper person to act as Administratrix De Bonis Non of the newly discovered property and as trustee of the estate heretofore administered," and, after concluding that the facts found justified the reopening of probate, ordered that letters of administration be issued to said Germaine Bouche McCormack. It was neither necessary nor proper, within the meaning of section 1067 of the Probate Code, for the court to reopen the probate proceeding in the matter of the estate, "for the purpose of administering newly discovered assets of said estate." The trustees by virtue of the general authority incident to such position and office were already vested with authority to commence and maintain the necessary and proper action for the recovery of any assets of the estate. *Wood v. American Nat. Bank*, 125 Cal.App. 248, 256, 14 P.2d 110; *Gilbert v. Penfield*, 124 Cal. 234, 238, 56 P. 1107; *Kipp v. O'Melveny*, 2 Cal.App. 142, 144, 83 P. 264.

[7] It is unnecessary for the purpose of this appeal to determine whether the legal effect of the contract in question creates any property right or interest in the nature of an asset to which the estate is entitled; such question must be determined in another action or proceeding. Nor is it necessary to give consideration to the contention that vital issues, which appear inevitable in any action on said contract, were by the findings left undecided.

For the reasons hereinbefore stated all of the orders appealed from are reversed,

with direction to the superior court to dismiss the proceedings relating to such orders.

We concur: YORK, P. J.; WHITE, J.



29 Cal.App.2d Supp. 747
SMITH v. HUME et al.

Civ. A. 90224.

Appellate Department, Superior Court, San Diego County, California.

Oct. 23, 1937.

1. Courts ⇨190(6)

On appeal from a municipal court judgment for plaintiff in an action based on an open book account, an account stated and a note, each for the same amount, the superior court was confined to an inspection of the judgment roll, where defendants did not appear at the trial or have settled or presented any statement on appeal.

2. Courts ⇨190(6)

On appeal from a municipal court judgment for plaintiff in action against a husband and wife based on an open book account, an account stated and a note, each for the same amount, wife was not entitled to a reversal on the ground that note, given by her husband alone, was a novation superseding prior transactions, where defendants failed to appear at the trial or have settled or present any statement on appeal thus confining Appellate Court to a consideration of the judgment roll which did not show that the judgment was based on the note, and interest awarded could have been based on the account stated.

3. Exemptions ⇨6

A statute exempting from execution or attachment an automobile not exceeding \$100 in value did not preclude attachment for a debt existing before the statute was enacted, since extension of an exemption statute so as to substantially affect the right of a pre-existing creditor is prohibited by the provision of the Federal Constitution against statutes impairing the obligation of contracts. Code Civ.Proc. § 690.24, as added by St.1935, p 1971; Const.U.S. art. 1, § 10.

4. Exemptions

A statute exempting automobiles not exceeding \$100 in value from attachment or execution was an amendment and not a mere legislative interpretation of existing exemption statutes, and thus permitted attachment for a debt existing before statute was enacted. Code Civ.Proc. § 690.24, as added by St.1935, p. 1971.

5. Courts , 97(6)

The decisions in the Appellate Department of a Superior Court and the federal District Court construing an amendment to state exemption statutes were not binding on the Appellate Department of another Superior Court, but were persuasive and conformed to on the principle of stare decisis. Code Civ.Proc. § 690.24, as added by St.1935, p. 1971.

Appeal from Municipal Court of San Diego; Dean Sherry and Eugene Daney, Jr., Judges.

Action by Ted E. Smith against W. Philip Hume, also known as Phylip Hume, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Phylip Hume and Mary B. Hume, in pro. per.

Russell V. Grant, of San Diego, for respondent.

HAINES, Presiding Judge.

The plaintiff and respondent sues in three counts as assignee of J. C. Austin, alleging that the defendants and appellants are husband and wife. The first count of the complaint alleges a balance due from defendants on an open book account for dental services incurred within the four years next prior to the filing of the complaint on May 17, 1937, in the sum of \$30. The second count alleges an indebtedness by defendants in a like sum of \$30 on an account alleged to have been stated on or about June 1, 1935, based on an account of more than one item; the date of the last item having been May 17, 1935. The third count is upon a promissory note of date May 17, 1935, given by Phylip Hume alone for \$30 and interest. The defendants answered separately. The effect of the answer of Phylip Hume is to deny that Mary B. Hume, whom he admits to be his wife, was in any way connected with the transac-

tions involved, to deny the assignment to the plaintiff and respondent, and, as to the first count of the complaint, to admit the incurring of the debt, but to allege payment, to deny the account stated alleged in the second count of the complaint, and allege the giving of a note by himself alone for the debt; and as to the third cause of action, to admit the giving by himself alone the \$30 note. The effect of the answer of Mary B. Hume is to deny generally the allegations of the complaint, except that she is the wife of the said Phylip Hume. The defendants, having failed to appear at the trial, judgment was given by the municipal court against both of them for \$30 and interest from May 17, 1937, with costs.

Both defendants have appealed from the judgment and both have also appealed from an order denying their motion to release from attachment and execution a certain Studebaker automobile.

[1, 2] It is claimed on behalf of defendants and appellants that the judgment against Mary B. Hume cannot be sustained for the reason, inter alia, that the giving of the note set up in the third count of the complaint amounted to a novation and superseded prior transactions, and that since she was not a party to the note she cannot be holden. Unfortunately for defendants and appellants, they did not appear at the trial or make objections at that time to any evidence that may have been produced, and, moreover, have failed to have settled or present here any statement on appeal, so that we are, in considering their appeal from the judgment, confined to an inspection of the judgment roll. We cannot, from that alone, say that the judgment was necessarily based on the third count of the complaint; nor does the mere fact that interest was allowed demonstrate that such was the case. Non constat but that the judgment was awarded on the second count of the complaint which ran against both defendants and will support an award of interest. We are of the opinion that, in the circumstances, error has not been made to appear, and that the judgment must be affirmed.

[3] There is no dispute that the indebtedness here involved was incurred prior to September 15, 1935, the effective date of the enactment of section 690.24, Code of Civil Procedure, as added by St.1935, p. 1971, exempting from execution or attachment one motor vehicle of a value not exceeding \$100. No specific lien, however,

having existed in plaintiff's favor upon the automobile here involved prior to the attachment in this case, it is contended on behalf of defendants and appellants that the mere circumstance that the debt was incurred before the statute was so amended as to specifically exempt such motor vehicles furnishes no reason why the exemption may not, without violence to constitutional limitations, be applied in this case. If the question were a new one, we would feel that there were considerable force in appellant's argument; but the tendency of the Supreme Court of the United States has been to discountenance as violating article 1, section 10, of the Federal Constitution, any extension of an exemption statute substantially affecting the right of a pre-existing creditor to obtain satisfaction of his debt. *Gunn v. Barry*, 15 Wall. 610, 21 L. Ed. 212; *Edwards v. Kearzey*, 96 U.S. 595, 24 L.Ed. 793; *Worthen Co. v. Thomas*, 292 U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344, 93 A.L.R. 173. In some of these cases, indeed, specific liens did exist in favor of the plaintiff before the legislation complained of was enacted, so that the decisions are in point only for their more general reasoning; but in *Edwards v. Kearzey* there was not such specific lien, just as there was not in the case at bar. It might still be arguable that the statutory amendment here involved did not have any such substantial effect, but the contrary has been expressly held by the Appellate Department of the Superior Court of Los Angeles county in *Medical Finance Ass'n v. Wood*, 63 P.

2d 1219, in which *The Queen, D.C.*, 93 F. 834, 837, was relied on as holding that the small amount of the exemption did not prevent its being an impairment of the creditor's rights, and the same view was taken in an elaborate opinion by the United States District Court for the Southern District of California in *Re Fox*, 16 F.Supp. 320. Both *Medical Finance Ass'n v. Wood* and *In re Fox* expressly involved the question of the retroactive application of section 690.24, Code of Civil Procedure.

[4, 5] Appellants further contend that section 690.24 ought not to be construed as an amendment at all, but rather as a legislative interpretation of the true force and effect of the previously existing exemption of means of transportation embodied in the former section 690, subdivision 6, Code of Civil Procedure. Not only, however, would that be seriously to strain any permissible construction of the statute as it formerly stood, but it is a construction by necessary implication foreclosed in *Medical Finance Ass'n v. Wood*, supra, and *In re Fox*, supra. While neither of these decisions is technically binding upon us, they are persuasive of the tendency of the courts in construing section 690.24 and on the principle of *stare decisis*, we do not see our way clear to depart from them.

The judgment and order appealed from are both affirmed.

We concur: GRIFFIN, J.; HARDEN, J.

FOWLER et al. v. ASSOCIATED OIL CO.

L. A. 15135.

Supreme Court of California.

Dec. 20, 1937.

Rehearing Granted Jan. 17, 1938.

I. Appeal and error ⇨1010(1)

The trial court's findings, supported by evidence, that corporate defendant in lessors' action to impeach lessee's accounting for oil royalties and forfeit oil lease for fraud, believed in good faith, though erroneously, that it was entitled to pay plaintiffs on basis of gravity net quantity, ascertained by incorrect methods of sampling and testing, and was not guilty of fraud tolling statute of limitations in using such methods, may not be disturbed on appeal (Code Civ. Proc. § 337, subd. 1; § 338, subd. 4).

2. Fraud ⇨7, 50

One's implicit faith in another's honesty and integrity is insufficient to establish fiduciary relationship and sustain presumption of constructive fraud (Civ.Code, § 1573).

3. Pleading ⇨56

The complaint in action founded on mutual mistake must contain appropriate allegations thereof.

4. Limitation of actions ⇨46(1)

Plaintiffs, in action to impeach lessee's accounting for oil royalties under oil lease, were properly denied recovery for shortages occurring over four years before commencement of action, in absence of evidence of fraud or mistake (Code Civ.Proc. § 337, subd. 1; § 338, subd. 4).

5. Mines and minerals ⇨73

An oil lease must be construed as written, where there is no uncertainty in its terms.

6. Mines and minerals ⇨73

An oil lease must be interpreted in light of circumstances when it was written, rather than those developing later, if uncertain in its terms.

7. Mines and minerals ⇨73

Technical and trade terms in oil lease must be interpreted in light of accepted and practical use thereof in trade when lease was executed, and parties are not bound by different meaning acquired thereby during operation of lease, unless they accepted such meaning by modification of lease or acts and conduct implying modification thereof.

8. Mines and minerals ⇨79(1)

An oil lease, obligating lessee to pay lessors royalty of one-sixth of net amount of all oil saved from demised premises after deducting quantity consumed in development and operation of property and to deliver royalty oil at lessee's tanks near well or purchase it from lessors for market price at well, required lessee to deliver or buy wet oil, including all impurities except free water, not cleaned or dry oil.

9. Mines and minerals ⇨79(1)

A lessee under oil lease was not guilty of fraud entitling lessors to additional oil royalties in using 3-point method of sampling and testing well fluid to determine gravity and quantity of oil, where nearly every operator and purchaser in field used such method at time, and lease was silent as to how or when tests were to be made (Civ. Code, §§ 1644, 1646).

10. Customs and usages ⇨15(1)

Usages and customs are aids in interpretation of doubtful expressions in oil lease, but lease itself controls, in absence of doubt or ambiguity.

11. Mines and minerals ⇨79(1)

A corporate lessee, obligated by oil lease to purchase from lessors royalty oil in lessee's tanks at wells at prevailing market price, was entitled to measure product by such quantity and quality tests as were standard and generally recognized in trade when used, bound to recognize and use improved methods of sampling and testing from time they became standard or recognized generally in trade, and liable to account to lessors for errors in quantity paid for because of its use of methods rejected as inaccurate after such new methods should have been used, unless lessors acquiesced therein.

—◆—
In Bank.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by George F. Fowler and others against the Associated Oil Company. From a judgment for plaintiffs in part, they and defendant appeal.

Affirmed in part, and reversed in part.

Prior opinion, 63 P.2d 1146.

Robert M. Searls and W. F. Kiessig, both of San Francisco, and Harrison Guio, of Los Angeles, for appellant Associated Oil Co.

Hanna & Morton, Byron C. Hanna, Harold C. Morton, and Leon B. Brown, all of Los Angeles, for respondents.

NOURSE, Justice pro tem.

Plaintiffs brought this action on June 18, 1932, to impeach as insufficient and fraudulent the accounting made by defendant to plaintiffs respecting their royalty interests commencing with the year 1926 under an oil and gas lease to premises in the Huntington Beach oil fields. Plaintiffs also sought a forfeiture of the lease because of the alleged fraudulent accounting. The trial of the issues was concluded on April 26, 1934, and resulted in a judgment that plaintiffs recover from defendant the sum of \$89,342, with interest from the date of the judgment, that defendant, in accounting to plaintiffs under the lease, had used incorrect methods of sampling and testing in ascertaining the quantity and gravity of the royalty oil, and was not entitled to make any deduction for the cost of treating, or cleaning the royalty oil, and that plaintiffs recover nothing from defendant because of any incorrect accounting or failure to pay in full for the royalty oil prior to June 18, 1928, a period four years prior to the commencement of the action. Both parties have appealed; the plaintiffs from that part of the judgment which denied recovery to them for the period prior to the running of the statute of limitations; the defendant from the entire judgment. To avoid confusion we will refer to the parties as they appeared in the trial court.

[1] As to plaintiffs' appeal, the trial court found that there was no fraud in defendant's dealings with the plaintiffs, but that the shortages in the accounting relied on were the result of errors made by defendant in good faith due to improper and erroneous methods of testing and sampling the royalty oil. For these reasons we are in accord with the disposition of plaintiffs' appeal made by the District Court of Appeal of the Fourth District and adopt as a part of this opinion the portions of the opinion of that court reading as follows:

"As heretofore noted, this appeal is only from that portion of the judgment which denies to plaintiffs recovery for any amount due them for that part of the royalty oil for which no payment was made prior to June 18, 1928. The trial court expressly found that defendant's failure to account to plaintiffs for royalty oil constituted a breach of the lease agreement between the parties and that recovery for any breach

that occurred more than four years prior to the commencement of the action is barred by subdivision 1 of section 337 of the Code of Civil Procedure. The contention of plaintiffs on their appeal is that the evidence which was produced during the trial was sufficient to convict the defendant of constructive fraud and that if this claim be denied the evidence was nevertheless sufficient to show that the monthly payments for royalty oil purchased by defendant were received and accepted by them in the mistaken belief that they constituted true and correct payments, and in either event the trial court was in error in holding that their claim for that part of the oil purchased prior to June 18, 1928, was barred by the above-mentioned statute.

"In connection with the contention thus advanced it should be observed that the trial court has specifically acquitted the defendant of actual fraud by finding that defendant at all times believed in good faith, though erroneously, that it was entitled to pay plaintiffs on the observed gravity-net quantity basis, using the 3-point sampling and centrifugal test with benzol as a diluent, and that defendant's acts in employing such methods did not constitute fraud. The record discloses that these findings have evidentiary support, and they may not therefore be disturbed.

[2] "Constructive fraud is defined in section 1573 of the Civil Code as 'any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault * * * by misleading another to his prejudice.' Constructive fraud most frequently arises from a breach of duty where a relationship of trust and confidence exists. *Darrow v. Robert A. Klein & Co., Inc.*, 111 Cal.App. 310, 315, 295 P. 566. The trial court here found that plaintiffs had implicit faith in the honesty and integrity of the defendant. This is not, however, sufficient to make out a fiduciary relationship. There must be more than mere confidence in another's honesty and integrity to sustain the presumption of constructive fraud. *Jackson v. Gorham*, 98 Cal.App. 112, 116, 276 P. 391; *Wilson v. Zorb*, 15 Cal.App.2d 526, 532, 59 P.2d 593. It is our conclusion that the facts and circumstances developed by the evidence which was produced during the trial fail to show that defendant was guilty of constructive fraud.

[3, 4] "We likewise entertain the opinion that the evidence is insufficient to dis-

close the existence of mistake that would make applicable the provisions of subdivision 4 of section 338 of the Code of Civil Procedure. This statute prescribes that no action for relief on the ground of fraud or mistake may be commenced when a period of three years has elapsed after discovery by the aggrieved party of the facts constituting fraud or mistake. For a proper consideration of the applicability of the above-mentioned statute to the instant case it is necessary to determine the real nature of the cause of action which was here instituted. Examination of the complaint wherein plaintiffs disclosed their cause of action indicates that it was one for breach of contract. Throughout the trial of the action plaintiffs consistently maintained that they were entitled under the lease to be paid for their royalty oil the prevailing market price of clean or dehydrated oil and the defendant by the employment of erroneous and incorrect methods of sampling and testing had not fulfilled its contract obligations. True, they claimed that defendant had defrauded them and sought to impeach the monthly accountings which defendants had rendered on the ground that defendant had acted fraudulently and in bad faith in making such accountings. The charge of fraud was, however, incidental to the real purpose and object of the suit which was to recover for breach of contract. It may be noted in passing that the complaint contains no proper allegation of mistake and no relief is demanded on this ground. Where a cause of action is founded upon an alleged mutual mistake, it is necessary that the complaint contain appropriate allegations thereof. *Bradbury v. Higginson*, 167 Cal. 553, 140 P. 254; *Harding v. Robinson*, 175 Cal. 534, 166 P. 808; *Quality Bldg. & Securities Co. v. Bledsoe*, 125 Cal.App. 493, 498, 14 P.2d 128. The record herein shows that the plaintiffs alleged and throughout the trial maintained that defendant was obligated by the terms of the lease contract to pay for the royalty oil which it purchased on the basis of the gravity of clean oil and on the quantity of such oil correctly determined by the employment of proper methods of sampling and testing. The trial court interpreted the lease in accordance with the contentions thus advanced by plaintiffs but specifically acquitted defendant of the charge of fraud or bad faith in its dealings with plaintiffs. We think that such acquittal is not unsupported by the evidence. We also entertain the opinion that the court applied the prop-

er statute of limitation and denied recovery of any shortages that occurred prior to June 18, 1928."

As to defendant's appeal, the case is a remarkable parallel to *Alamitos Land Co. v. Shell Oil Co.*, 3 Cal.2d 396, 44 P.2d 573, a case decided by this court on April 26, 1935. As that decision was rendered after the trial and judgment in this case, the learned trial judge did not have the benefit of that decision and fell into the same errors which were pointed out by this court in the *Alamitos* decision.

[5-7] In approaching the defendant's appeal we must bear in mind two settled principles; first, that if there is no uncertainty in the terms of the lease it must be construed as written, and that, if uncertainty exists, it must be interpreted in the light of the circumstances at the time it was written rather than those which might have developed later; second, that technical and trade terms used in the lease must be interpreted in the light of the accepted and practical use of those terms in the trade at the time the lease was executed, and that, if during the operation of the lease, any of those terms acquired a different meaning the parties are not bound thereby unless they have accepted such new meaning either by a modification of the lease or by such acts and conduct as would imply a modification.

The lease here in question was executed on August 30, 1920, between plaintiffs and the *Amalgamated Oil Company*. On December 28, 1923, it was assigned to defendant. Oil in paying quantities was first produced about January 1, 1923. The lease covered certain real property of approximately twenty acres. The pertinent portions of the lease are:

"The lessee also further agrees to pay to the lessors a royalty of one-sixth (1/6) of the net amount of all petroleum, oil, natural gas, naphtha and other hydrocarbon substances which may be produced and saved from the demised premises, after deducting from the gross product the quantity that may be consumed in the development and operation of said property while any of said substances are being produced from said premises, and in pumping said products a reasonable distance to a shipping point.
 * * *

"The lessee further agrees that at the option of the lessors it will deliver the royalty oil to the lessors at the tanks, reservoirs or sumps hereinabove referred

to, or will purchase the royalty oil from the lessors at the prevailing market price of such product at the well, provided that the lessors shall exercise such option by giving lessee notice in writing at least sixty (60) days prior to the commencement of a calendar year of lessors' desire in the premises for the next ensuing calendar year * * * and the prevailing market price hereinabove referred to shall be the market price at the well prevailing from time to time when the royalty oil would be deliverable hereunder if same were not purchased by the lessee, for oil produced in the oil field in which the demised premises are situated, of similar gravity or gravities as that produced from the demised premises.

* * *

"All of said hydrocarbon substances shall be collected in tanks, reservoirs or sumps upon the demised premises or upon property convenient thereto, * * * and the lessee shall store all royalty oil accruing to the lessors under this lease for a period not exceeding thirty (30) days, without expense to the lessors. * * *

"In the event the lessors elect in the manner hereinabove provided to receive royalty oil in kind, the lessee agrees to make delivery to the lessors at the tanks or reservoirs hereinabove referred to on or before the 20th day of each calendar month all royalty oil due the lessors from the oil produced during the preceding calendar month."

In all operations under the lease the plaintiffs elected to require the defendant to purchase its royalty oil for cash, and that was done throughout. A clear statement of defendant's contentions is found in the opinion of the District Court of Appeal, from which we quote: "Defendant uniformly, from the year 1926 up to the time of trial, purchased the royalty oil upon what is known as the 'observed gravity-net quantity' basis and paid therefor what it claimed was the prevailing market price of oil of such grade and gravity. In so doing it maintains that it completely fulfilled its obligation 'to purchase the royalty oil from the lessors at the prevailing market price of such product at the well.' Defendant insists that since the lease neither expressly nor by necessary implication requires the lessee to clean or otherwise to process the royalty oil produced, the lessors are bound either to take the oil in kind as produced and saved or to accept the prevailing market price in the field for unprocessed oil of similar gravity. It is particularly

urged that the word 'oil' as used in the lease means crude or wet oil, the uncleaned fluid as it comes from the well. The term 'net amount' as used in the lease provisions whereby the lessee 'agrees to pay to the lessors a royalty of one sixth (1/6) of the net amount of all * * * oil * * * produced and saved * * *' is declared to be expressly defined in the same provision as being that part which remains 'after deducting from the gross product the quantity that may be consumed in the development and operation of said property while any of said substances are being produced from said premises and in pumping said product a reasonable distance to a shipping point.'

"It is apparent that if defendant's contention that the word 'oil' which occurs approximately 41 times in the lengthy agreement which the parties entered into means, as defendant urges, the crude uncleaned fluid produced and brought to the surface of the earth by the wells drilled for the purpose, the problem presented on this particular appeal is comparatively simple of solution and must be resolved in defendant's favor. * * *

"Defendant's second contention is that the methods which it used in sampling and testing the well fluid were methods that were in general use in the particular oil field wherein the leased property is located and that, since the lease contract contains no provision requiring the use of other methods, its employment of methods that were in general use by purchasers of oil in this particular field was fully justified.

* * *

"Defendant's third contention is that it was amply justified by custom and usage in employing the observed gravity method for determining the gravity of the royalty oil and that the trial court's finding that such method is incorrect and erroneous is therefore lacking in proper evidentiary support. The observed gravity method is well described in the decision in *Alamitos Land Co. v. Shell Oil Co.*, 3 Cal.2d 396, at page 401, 44 P.2d 573. The significant feature of this method and the feature which provoked the contest between the parties as to the correctness of the method is that samples of 'wet oil' taken from the field tanks rather than cleaned or dehydrated oil are used for the purpose of discovering the gravity of the oil. * * *

"The defendant's complaint with respect to this feature of the case may be summarized as follows: Defendant is obligat-

ed by the terms of the lease contract to pay plaintiffs a royalty of 1/6 of the amount of oil produced from the demised premises. Plaintiffs are entitled to take the royalty oil in kind as it comes from the wells in its uncleaned undehydrated state or they may at their option require defendant to purchase the royalty oil at the prevailing market price therefor. Defendant is not, however, required by any provision of the lease contract to clean the royalty oil and if plaintiffs elect, as they have consistently done, to sell their share of the oil produced they are entitled to be paid therefor, not on the basis of clean oil having a certain gravity but on the basis of wet oil which concededly has a lower gravity than clean oil. When plaintiffs elected to require defendant to purchase the royalty oil and defendant, in compliance with the lease provisions, purchased the oil the parties to the lease agreement became respectively sellers and buyer of the oil dealing at arm's length and in such dealings defendant did not act as agent or trustee for plaintiffs or stand in a fiduciary relationship to them."

In answer to these contentions the plaintiffs argue that the lease called for the purchase of dry or clean oil; that defendant's methods of sampling and testing were later found to be inaccurate and incorrect resulting in a heavy loss to them; and that, in employing these methods, though in common use throughout the oil fields in the vicinity, defendant was guilty of fraud.

[8] To better understand the first point raised it should be said here that the parties agree that in the early development of wells in this vicinity the product was relatively free from sand, water, and other impurities, but that, as the wells grew older, the quantity of gas decreased and the amount of water and sediment increased. It is the universal practice in these operations for the lessee to capture the product as it flows from the well and to store it either in tanks located at the well, or in other "settling" tanks near by. As the product settles the free water and some of the sediment filters to the bottom of the tank, where it is drawn off by means of an outlet near the bottom of the tank. These tanks located near the well are the tanks referred to in the quoted portion of the lease which fix the place of delivery of the royalty oil and the place of purchase of such oil by the lessee. This product in these tanks is what is called crude oil or wet oil. It consists of oil, gas, water, sedi-

ment, and other impurities. At the time this lease was executed, and for many years of its operation, it was the universal practice in the industry to refer to the product of crude or wet oil as "oil" or "petroleum oil" when those words were used in reference to royalty oil under a production oil lease. This court had occasion to comment on these features of a similar lease in the Alamitos Case, *supra*, 3 Cal.2d 396, at page 401, 44 P.2d 573, 575, where it was said:

"To more accurately grasp the issue between the parties, it is necessary to state that the terms 'wet' oil and 'clean' or 'dry' oil have a well-understood meaning in the trade. Wet oil is such a petroleum liquid as carries in cohesion with it more than 3 per cent. by volume of water and sediment. Clean or dry oil is such a liquid as carries 3 per cent. or less of said impurities. The base or impure content of the liquid is also known in the trade as the 'cut' of the oil. When the gravity of the fluid in its crude state is taken, it is called its 'observed' gravity. Free water found in the liquid is not considered a part of the gross fluid for the purpose, as it is easily drained off from the bottom of the tanks. Usually also a well, when first put upon production, carries only dry or clean oil, but with increased pumping the encroachment of water becomes greater, and larger percentages thereof are emulsified with the petroleum. Oil is marketed upon the basis of its gravity as tested by the hydrometer. The instrument is immersed in the liquid as is likewise a thermometer. The readings on both instruments are taken and then, by use of Standard American Petroleum Institute tables, the hydrometer reading is corrected to conform to measurement at a temperature of 60° Fahrenheit. Upon this gravity reading as corrected, the prevailing price is applied to the net quantity of oil in the product. The net quantity of oil is found by actual dehydration of the entire volume of fluid or else by taking proper samples, applying to such samples the recognized A.S.T.M. standard tests, which disclose the percentage of water and other impurities; then by applying such percentage of deduction to the total volume of fluid, the approximate net quantity of oil is found.

"Plaintiff insist that under the lease here involved it is the duty of defendant to clean the wet oil, either actually or theoretically, and then apply the gravity test to the cleaned fluid, which will thus give it a higher gravity reading than in its wet state. In

other words, plaintiff contends that it was the duty of defendant to base its gravity test upon the same net substance that constituted the quantity or volume purchased. Upon the soundness of this view rests practically plaintiff's entire case.

"It will be noted that the lease is silent both as to how the quality and how the quantity tests shall be made. Likewise, the lease fails to require defendant to prepare the royalty oil for pipe line shipment in the event it is delivered in kind. To provide tanks for the storage of plaintiff's royalty oil is the only express obligation imposed. If delivery in kind is made, it is to be as produced and saved or as produced and stored in tanks on the premises. If this means a delivery of the gross fluid as produced, it certainly follows that, if required to purchase it, defendant must pay its own current price for the same substance. If the duty to theoretically clean is absent when the royalty oil is delivered in kind, it is absent when the royalty oil is to be purchased."

In reference to the frequent use of the words "oil," "petroleum oil," and "royalty oil" in the lease, this court said, 3 Cal.2d 396, at page 403, 44 P.2d 573, 576: "No one can say that the 'cleaned' or 'dry' product is referred to by the above language. Our construction of the lease conforms to the commonly understood meaning of the terms and is in every respect a reasonable deduction. In *Hammett Oil Co. v. Gypsy Oil Co.*, 95 Okl. 235, 218 P. 501, 502, 34 A.L.R. 275, it is said: 'There was no evidence as to what the word "oil" includes, when used in an oil and gas lease, or how the parties to the lease understood it, but a large amount of litigation has arisen over oil and gas leases, and the construction of such contracts, and the word "oil" as used in an oil and gas lease, has always been referred to by the courts and understood to designate the oil produced from a well, or crude petroleum in its natural state. There is nothing either in the contract or in the evidence to disclose that the parties in this lease contract used it in any other sense, but the contract does support the contention that it was used in its ordinary and popular sense, and refers to crude oil as it was produced from the mouth of the well.'"

The only material difference in the wording of these two leases is that in the Fowler lease the lessee agrees to deliver the "net" amount of all petroleum oil saved from the premises "after deducting from

the gross product the quantity that may be consumed in the development and operation of said property." From this it is argued that the lessee was required to deliver the cleaned or dry product and that all the costs of processing must be borne by the defendant. The answers to this contention are plain. First, the lease calls for the delivery of the royalty oil "at the tanks" maintained by the lessee in the premises; and it is conceded that oil "at the tanks" means the product as drawn from the well after the free water has been removed. If the product of some of the wells carries less than 3 per cent. of impurities, that is the "oil" which the lessors sell, and if some runs more than 3 per cent., it is likewise the "oil" which they sell; second, in view of the language quoted from the *Alamitos Case*, the words "oil" and "petroleum oil" have a well-defined meaning in the trade, and, hence, the lease was not ambiguous and called for no evidence of custom in that respect; and, third, that the call in the lease for the net amount "after deducting from the gross" the quantity used in operations permits no other deduction than that specified. It is plain that, if the parties had intended to use these terms in a different sense, or had intended that the lessee should clean the product, or that other deductions should be made from the gross, the lease should have so provided, and to hold otherwise would be to write a new contract for the parties.

It is proper to observe further on this subject that the parties to this lease placed this construction on their contract by their conduct running over a long period of years before the commencement of this action. It was not until the methods of sampling and testing the product were brought into dispute that the plaintiffs asked for a different interpretation of their contract in reference to the obligations of the defendant as to the "kind" of oil which was deliverable to them. As we are compelled to hold, in view of the decision in the *Alamitos Case* and the authorities supporting it, that plaintiffs were entitled to the delivery at the tanks of wet oil as that term is defined herein, it must follow that the defendant was obligated to purchase the same oil as it stood in the tanks, and to pay the prevailing market price of such product and no other.

[9] Defendant's second contention relates to the methods of sampling and testing the well fluid. In the matter of sampling, the defendant used the "3-point"

method whereby, after the free water was drained from the tanks, samples were taken from near the top, the middle, and the bottom of the tank. These samples were then placed in a rapidly rotating tube after certain solvents or diluents, were added. By this process the mixture is broken up, the foreign matter drops to the bottom of the tube and the clear oil is then tested. Throughout the period here in question the defendant used carbon bisulphide or benzol as a solvent in its centrifuge tests. Other purchasers used carbon bisulphide, and, after 1930, two used phenol. This court has heretofore held that the use of benzol was proper in the Alamitos Case, where it was said, 3 Cal.2d 396, at page 408, 44 P.2d 573, 578: "Prior to August, 1926, the solvent employed was equal parts of bisulphide and gasoline; subsequently the use of benzol was instituted. The test with either of these solvents was a standard method, producing about equivalent results. Benzol as a solvent or diluent was indorsed as a substitute for gasoline and bisulphide in 1926 by the American Society for Testing Materials, an institution universally recognized as the exponent of methods of testing materials. Defendant continued to use benzol from 1926 until about June 28, 1930, at which time, with some of the other companies, it substituted therefor the use of phenol as such diluent. During the entire period here involved the current method used by defendant had the indorsement of the American Petroleum Institute, the United States Bureau of Mines, and the above-mentioned American Society for Testing Materials."

The defendant frankly concedes that the "3-point" method of sampling results in some error and in *Meyers v. Texas Company*, 6 Cal.2d 610, 614, 59 P.2d 132, 134, this court said that "this method, although approximately correct when applied to dry or clean oil (oil containing less than 3 per cent. basic sediment and water), is inaccurate when applied to wet oil." The extent of defendant's concession and of the ruling in the *Meyers Case* is that some inaccuracies follow this method. In the latter case it was found that the "core" method was the proper one. But it has not been determined that such method is scientifically correct or free from error.

Since the lease is silent as to how or when the gravity and quantity tests are to be made, the rights of the parties depend upon the customs and usages of the trade. Civ.Code, §§ 1644, 1646. Here the trial

court held that the "core" method and the "running thief" method were both proper "methods of sampling tanks of 'wet oil' and methods of handling such fluid or 'wet oil' by which accurate measurement could be had of the quantity of oil produced." This was true in 1934 when the finding was made, but it was not accepted by the trade during the period here in question. The evidence here shows that prior to 1930 every operator in the field and every purchaser of oil therein, except the Shell Oil Company, used the 3-point method of sampling on both wet and dry oil. During the period from 1926 to 1930 laboratory experiments were made which disclosed a certain amount of error in this method when applied to wet oil. After July, 1930, the Texas Company adopted the "3 foot core" method which met the approval of this court in the *Meyers Case*, but which was not adopted by other operators in this field. After 1930 the Union Oil Company and the Shell Oil Company adopted a new method designated the "running thief" which has not been accepted generally as accurate or correct. The "3-point" method was used by practically all the small operators and purchasers of oil from this field.

Plaintiffs argue that the defendant should have taken the samples with a "core" rather than in the "3-point" method because later experiments have shown that to be a more accurate method. But the lease did not call for such method, and the defendant cannot be charged with fraud when it followed the lease and the usages and practices of the trade. Much has been said about the use of phenol as a diluent and of the "water by distillation" test, both of which are said to be more accurate than the methods used by this defendant. It is sufficient to say that during the period in dispute, or at least prior to 1931, the solvents employed by the defendant were generally and commonly used in that field, were what might be called "standard" methods at that time, and had the indorsement of the American Petroleum Institute, the United States Bureau of Mines, and the American Society for Testing Materials.

But, in the final analysis, this issue rests upon these principles; the plaintiffs agreed to sell their royalty oil at "the prevailing market price of such product at the well * * * the market price * * * for oil produced in the oil field * * * of similar gravity or gravities." The prevail-

ing market price was the price for wet oil at the wells, the gravity of which was measured or determined by the same methods of sampling and testing as were used by this defendant because that was the only product these plaintiffs had to sell. It matters not that some one may have advanced a theory for a better method of sampling and testing. The defendant accounted to the plaintiffs in accordance with the terms of the lease and could not be asked to do more. Whatever inaccuracies occurred from the use of these methods were a part of the trade, were included by implication in the contract, and must have been in the contemplation of the buyers in that field when the prevailing market price was set upon the "observed gravity net quantity." It is conceded by the parties that no perfect method of sampling or testing has yet been devised. The trial court expressly found that the "core" method of sampling tanks and the use of the "phenolated benzol test" are substantially accurate and sufficient for field purposes, and that such methods of sampling and testing may be used by the defendant in future operations under the lease. A judgment on such finding, based upon evidence of what occurred in the trade subsequent to 1930, would solve the controversy as to future operations if this action were one for declaratory relief rather than one for breach of contract. Before the trial, defendant made the offer to adopt any method of sampling and testing which the court should approve provided that the plaintiffs would agree to be bound thereby in future operations. The plaintiffs refused to agree, and the parties are left where they were when the lease was executed. It is manifest that the lessee is not required to adopt every new theory for sampling and testing, but that it is justified in following approved and accepted standards. The findings of the trial court that "during all the times herein referred to" the "core" and "running thief" methods of sampling and the use of phenol in testing were known to be accurate and correct are not supported by any evidence, as was clearly pointed out by this court in the Alamitos Case. As in that case the evidence here shows that such methods were not in general use before 1930, and that they have not been generally accepted as accurate or correct. The lessors here contend, as they did in the former case, that it was the duty of the defendant either to adopt the distillation test, or to earlier employ phenol as a solvent in the centri-

fuge test. But, as was said in that case, the defendant at all times employed the tests which were standard at the time. The fact that the trial court here found, in September, 1934, that other methods were more accurate has no bearing on the question of the diligence of the defendant in the matter of testing many years previously. We are not permitted to indulge in speculation as to what results might have been obtained by the use of theoretical deductions applied at a time when they were not known to the trade and which, even at this time, are of doubtful value.

[10] Defendant's third contention may be summarized as follows: Since it agreed to purchase plaintiffs' oil "at the tanks" and was required to pay the prevailing market price for such product at the well, it was entitled to observe the net oil content of the product thus agreed to be sold. When the lessors elected to sell their oil to defendant they dealt at arm's length as vendor and vendee. By the terms of the lease the defendant undertook to purchase plaintiffs' oil "at the tanks." It is not disputed that as to quantity the net oil content is the basis of sale. If the parties intended that this content should be determined upon tests of clean oil, pipe line oil, or refined oil, it would have been a simple matter to so specify in the lease. But the lease called for delivery in kind at the tanks or the purchase of the same product at the tanks. Hence, the lessors were selling the product as it stood in the tanks. The free water is drained off as a matter of accommodation, but if any further processing is required that is a matter for the lessors. We find nothing in the lease that would support plaintiffs' claim that there is an obligation on defendant to clean their oil either for the purpose of shipment or for the purpose of testing. It is of no aid in the interpretation of this lease to say that one of the large operators in this field voluntarily cleaned the oil before purchasing from its lessors, or that it took samples and made its tests after the oil had been cleaned. Usages and customs are an aid in the interpretation of doubtful expressions in a lease, but where there is no doubt and no ambiguity, the lease itself controls. Here the lease limits the obligation of the defendant to purchase the oil as produced and as it stands in the tanks at the wells. There is no obligation to dehydrate or clean, and no obligation to purchase oil in any other form. And "the market price at the well prevailing from time to time

when the royalty oil would be deliverable hereunder" means the prevailing market price of the product at the well which would then be deliverable if the lessors elected to take their royalty oil in kind. The root of the controversy between the parties rests in the fact that during the early years of production under the lease the oil was relatively free from water and foreign substances, but that as production went on the quantity of water and foreign substances increased, and the royalty payments to the lessors decreased accordingly. During the early days of production the evidence shows that defendant at all times used standard tests and standard methods of measurement. There is no support for plaintiffs' claim made at this late date that defendant should then have used other methods which, at a later date, were deemed by some parties to be more accurate.

Plaintiffs rely confidently upon the recent decision of this court in *Meyers v. Texas Company*, 6 Cal.2d 610, 59 P.2d 132. In this latter case this court did not overrule or depart from any part of the decision in the *Alamitos Case*, but said that the controlling factor in each case is found in the contract of the parties. Attention was then directed to the fact that (6 Cal.2d 610, at page 619, 59 P.2d 132, 136): "In the *Alamitos Case* the lease provided for the 'purchase of oil' by the defendant, whereas, in the present case, the defendant, under the facts, was bound to 'pay the lessors in money the proceeds thereof, less cost of handling after leaving the tank or container.'" Attention was again directed, in a modification of the opinion in the *Meyers Case*, to the peculiar terms of the lease there involved which required the lessee to market the lessors' oil upon the same terms as it markets its own "and pay to said lessors the proceeds therefrom, less the cost of handling after leaving the tank or container, but in no event shall it pay lessors less than the Standard's posted market price." 6 Cal.2d 610, at page 613, 59 P.2d 132, 133. This obligation to account for the proceeds required the lessee to pay such proceeds, and hence no question of sampling or of testing was involved. If, by whatever methods employed, the product was gauged at a price less than the Standard Oil posted price, the lessee was required to pay that price and to account to the lessors for the "proceeds." Here, as in the *Alamitos Case*, the lessee was required

to pay the "prevailing" market price for the product which the lessors had to sell. This is far different from an obligation to account for the proceeds.

[11] Our conclusions from the foregoing are: The plaintiffs agreed to sell and the defendant agreed to buy the royalty oil as it stood in the tanks at the wells; for the purpose of determining the prevailing market price of such product the defendant was entitled to measure that product by such quantity and quality tests as were standard and generally recognized in the trade at the time they were used; the defendant is bound to recognize and use such changes and improvements in the methods of sampling and testing from the time such new methods have become standard or recognized generally in the trade; if errors have occurred in the quantity of royalty oil paid for because of the use of methods which have been rejected as inaccurate, the defendant is liable to account for such errors occurring after the date when such new methods should have been used unless the plaintiffs have acquiesced in the conduct now criticized; if the plaintiffs elect to sell their oil on a clean, or dehydrated basis, and to have quantity and quality tests made on that basis, the cost of such preparation of the product is an expense to be borne by them. Since it has been determined in the *Alamitos Case* that the methods used by this defendant were standard and accepted methods prior to July, 1930, and since the evidence in this case is in accord therewith, the retrial should be confined to an examination of the conditions obtaining subsequent to that date and should be controlled by the principles herein announced on all other questions raised in the complaint.

Defendant pleaded special defenses of accounts stated, accord and satisfaction, estoppel, waiver, and laches. We do not pass on any of these defenses because, on a retrial of the questions of fact as herein directed, the evidence in relation to these special defenses might develop a different case from that now presented. Here the trial court found that there was no evidence of fraud on the part of the defendant. On the retrial, evidence might be offered that the defendant knowingly and purposely used incorrect methods to defeat plaintiffs' rights under the contract. In such event these defenses would have to be viewed in the light of those circumstances.

That portion of the judgment from which the plaintiffs have appealed is affirmed. The balance of the judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.



William J. PEARCE and Hannah E. Pearce
(Husband and Wife), **George G. Sanford and Elizabeth B. Sanford** (Husband and Wife), **George L. Kellogg and Etta L. Kellogg** (Husband and Wife) and **Katherine B. Beare, formerly Katherine B. Henry, Plaintiffs, Appellants, and Respondents,**
v. ASSOCIATED OIL COMPANY (a Corporation), **Defendant, Respondent, and Appellant.**

L. A. 15267.

Supreme Court of California.

Dec. 20, 1937.

Rehearing Denied Jan. 17, 1938.

In Bank.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Prior opinion, 63 P.2d 1157.

Michael F. Shannon, Thomas A. Wood, and Robert H. Dunlap, all of Los Angeles, and William M. Abbott, of San Francisco, for appellants.

Robert M. Searls, of San Francisco, Harrison Guio, of Los Angeles, and W. F. Kiesig, of San Francisco, for respondents.

PER CURIAM.

The plaintiffs sued for the purpose of impeaching as insufficient and fraudulent the accounting made by defendant to plaintiffs in respect to their royalty interest in an oil lease and to obtain a forfeiture of the lease because thereof. Judgment went for plaintiffs based upon findings that the shortages claimed were due to the use of incorrect and inaccurate methods of sampling and testing the royalty oil, and that the employment of such methods by the defendant was improper, but not fraudulent. Both parties have appealed and have raised the same questions as those in *Fowler v. Associated Oil Company*, Cal.Sup., 74 P.2d 727, this day decided. Additional points raised in this case

need not be considered as the judgment is founded upon the errors pointed out in the latter case and for that purpose must be retried in the manner and within the same rules as there directed.

For the reasons stated in the *Fowler Case*, that portion of the judgment from which the plaintiffs have appealed is affirmed. The balance of the judgment is reversed.



10 Cal.2d 450

WEINER v. ROOF et al.

L. A. 15349.

Supreme Court of California.

Dec. 29, 1937.

1. Trusts $\hookrightarrow$ 356(1)

An assignee of realty purchase contract was properly described in judgment as a "trustee," where contract expressly declared that assignor was not beneficial owner of the property but "simply holds legal title for purpose of protecting beneficial owner" and other designated purposes, since assignee had knowledge of trust and took subject thereto.

2. Vendor and purchaser $\hookrightarrow$ 334(2)

One induced to enter into realty purchase contract by untrue material representations of vendor's agent may rescind contract and recover consideration paid from vendor and vendor's assignee, though vendor and assignee were innocent, subject to assignee's right to show that it took purchase money merely as trustee for beneficial owner and had paid such money over to beneficial owner, and thus was not unjustly enriched.

3. Appeal and error $\hookrightarrow$ 117(6)

In action by purchaser of realty to rescind contract and recover money paid, on ground of misrepresentations by vendor's agent, on appeal from judgment against vendor's assignee who accepted purchase-money payments as trustees for beneficial owners, where subsequent to trial Supreme Court had rendered decision in another case, modifying former rule, that in cases of unjust enrichment recovery could be had against principal under similar circumstances, cause would be reversed to allow vendor's assignee to show that it had paid purchase-money

payments over to beneficial owner, was not unjustly enriched, and was thereby freed from liability.

In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Theodore Weiner against J. B. Roof and another, and the Citizens National Trust & Savings Bank of Los Angeles. From a judgment for plaintiff, the last-named defendant appeals.

Judgment against appealing defendant reversed, with directions.

Prior opinion, 65 P.2d 1335.

Chandler, Wright & Ward and John F. Gilbert, all of Los Angeles, for appellant.

Louis B. Minter, of Los Angeles, for defendants J. B. Roof and J. B. Roof, Inc.

Don Marlin and Isador Gralla, both of Los Angeles, for respondent.

WASTE, Chief Justice.

This is an action for the rescission of a contract and for the recovery of money paid thereunder. It appears that J. B. Roof, Inc., a corporation, agreed to purchase a tract of land from one Connolly and to subdivide and sell the same. Pursuant thereto title was conveyed to the Farmers & Merchants National Bank of Los Angeles, as trustee under a subdivision trust; Connolly and the Roof Company being the beneficiaries of the trust. The Roof Company acted as sales agent and the trustee executed all contracts of sale and collected the sale prices of the lots. On November 19, 1927, plaintiff and respondent entered into a contract with the trustee bank to purchase lot 109, described in the complaint, for the sum of \$3,500. Certain payments were made thereunder. Subsequently the contract was assigned by the trustee bank to the appellant bank and thereafter plaintiff paid \$1,890 to the latter bank as part of the purchase price. Later, upon discovering the falsity of certain representations made prior to and at the time of the execution of the contract by the selling agent, the Roof Company, which representations were an inducing factor in the execution of the contract, plaintiff gave notice of his election to rescind. Judgment was entered herein decreeing a rescission of the contract and awarding respondent \$3,807.01, with interest, against J. B. Roof and J. B. Roof, Inc., jointly and severally, and \$1,890 against

the appellant bank, as trustee; the latter amount representing the aggregate of the payments made by respondent to the appellant bank, which alone has appealed.

[1] Respondent's right to rescind is not here questioned. In its assault upon the monetary judgment entered against it, the appellant bank in its several briefs, and the respondent by way of answer thereto, advance many arguments and contentions in an effort to establish or define the relationship borne one to the other by the several parties to the transaction. We find it unnecessary to definitely determine their status other than to state that the appellant was properly described in the judgment as "trustee" if for no other reason than that the contract assigned to it expressly declared that appellant's assignor and predecessor in interest was not the "beneficial owner of the property," but that it "simply holds legal title to said premises for the purpose of protecting the beneficial owner of the property" and other designated purposes. In other words, the appellant, assignee, had knowledge of the existence of the trust and took subject thereto.

Subsequent to the trial of this cause we handed down our decision in the case of *Speck v. Wylie*, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760. As a limitation upon the rule theretofore announced in *Gridley v. Tilson*, 202 Cal. 748, 262 P. 322, to the effect that a principal was bound only by the representations embodied in a written contract when it was provided therein that the agent's authority went no further, we held in *Speck v. Wylie*, supra, that an innocent principal so contracting with another may relieve himself of liability in deceit for the fraud of his agent, but is nevertheless subject to rescission on the part of the defrauded party. This rule proceeds upon the theory that an innocent principal so contracting may not be permitted to enrich himself by reason of his agent's fraud, and that any property received by such principal is held by him as a constructive trustee for the person defrauded.

[2,3] This doctrine has application here. The fact that respondent's written contract to purchase a lot contained a clause restricting the representations to those therein set forth, did not preclude the respondent, under the foregoing rule, from rescinding the contract for the false representations of the selling agent and recovering the money paid thereunder from

the principal or any trustee to whom the same had been paid. However, inasmuch as the rule in *Speck v. Wylie*, supra, is grounded upon unjust enrichment, and was announced subsequent to the trial of this cause, we are of the view that the appellant, as trustee of the money paid to it by respondent, should be afforded the opportunity of showing, as it asserts it can, that it has paid over to the beneficial owner the money for which judgment has been taken against it. Such a showing, if made, will disclose that the appellant, an innocent party to the fraud, has not been unjustly enriched and will preclude the entry of a monetary judgment against it under the rule mentioned.

That portion of the judgment awarding plaintiff \$1,890 as against the appellant Citizens National Trust & Savings Bank, as trustee, is reversed, with directions to the court below to permit said appellant, if it be so inclined, to offer evidence as to the disposition of the money paid to it by the respondent, and the court is further directed, upon such showing being made, to make its findings and enter judgment as between said two parties in conformity with the views herein expressed.

We concur: EDMONDS, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.



10 Cal.2d 422

**PARRY v. BERKELEY HALL SCHOOL
FOUNDATION et al.**

L. A. 15526.

Supreme Court of California.

Dec. 27, 1937.

Rehearing Denied Jan. 24, 1938.

1. Deeds ⇨144(1)

A right of re-entry for breach of a particular condition is occasionally characterized as a "reversionary interest" or a "contingent reversionary interest" and is so regarded for some purposes.

2. Deeds ⇨144(1)

The "interest reserved in a grant of the fee simple on a condition subsequent" is not, strictly a residue of the estate left to grantor, but is merely a right to terminate

grantee's estate and retake it if there is a breach of the condition.

3. Deeds ⇨144(1)

A grantor may transfer an estate with a right of re-entry and also keep a reversion and the two interests will not merge.

4. Deeds ⇨144(1)

Successive grantors may reserve rights of re-entry for breach of conditions subsequent, whether these conditions are identical, similar, or different in form, since each grantee takes the whole fee with same rights as a grantee in fee-simple absolute as long as the conditions are obeyed and each grantor has right to terminate estate which he granted upon breach of any condition imposed by him.

5. Deeds ⇨144(1)

Conditions may be imposed which qualify or make subject to divestment the estate granted, but the right of re-entry reserved to the grantor upon breach of the condition is not divided into separate interests for each condition.

6. Trusts ⇨203

Where trustor reserved right of reversion on sale of intoxicating liquors on premises, and trustee, on conveying premises, reserved right of reversion to trustee on same condition, trust beneficiary could enforce the condition as to grantee of trustee, since right of re-entry for breach was a separate right of each grantor, as against contention that a right of re-entry is an estate in reversion, the trustor had already reserved that estate, and that consequently trustee had no such estate to reserve for itself or its beneficiaries.

In Bank.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Agnes S. Parry against the Berkeley Hall School Foundation and others, wherein the named defendant filed a cross-complaint making Agnes S. Parry and Charles Eaton cross-defendants. From an adverse judgment, Agnes S. Parry and Charles Eaton appeal, Charles Eaton subsequently filing a disclaimer.

Affirmed.

Prior opinion, 67 P.2d 691.

Conroy & Conroy and Edward L. Conroy, all of Hollywood, for appellant Charles Eaton.

Girard F. Baker and Macfarlane, Schaefer, Haun & Mulford, all of Los Angeles, for respondent Berkeley Hall School Foundation.

Gibson, Dunn & Crutcher and Robert F. Schwarz, all of Los Angeles, for respondent Rodeo Land & Water Co.

William M. Byrne, of Los Angeles, *amicus curiae*.

LANGDON, Justice.

This is an action to quiet title against conditions subsequent in deeds.

Rodeo Land & Water Company owned a 77-acre tract of land in Beverly Hills, Cal. Defendant Berkeley Hall School Foundation, a nonprofit corporation, maintained a children's school. The Foundation desired to secure new quarters in an undeveloped district which would give it room for the school and also for a residential district for parents and others interested in the school, under proper building and use restrictions. Accordingly, it entered into an arrangement with Rodeo Company for the purchase and subdivision of this tract into 375 lots. All of the lots, save those retained for school purposes, were sold in the following manner: Rodeo Company, as trustee, conveyed to Bank of America, as trustee, under a subdivision trust, with the Foundation as beneficiary. The trustee was authorized to sell at specified prices; a certain amount went to the Rodeo Company in payment of the land, and the balance of the proceeds went to the Foundation. Plaintiff bought three lots, receiving three separate deeds from the trustee bank.

The original deed of Rodeo Company to the trustee bank contained various restrictive provisions in the form of conditions subsequent with right of re-entry, including one prohibiting the use of the property for the purpose of selling intoxicating liquors. The declaration of trust provided that all lot sales should be subject to these conditions, and required the trustee bank to reserve to itself, for the benefit of the Foundation, a right of re-entry for breach of such conditions. The deeds to the lot owners, including plaintiff, contained the conditions are reserved rights of re-entry.

Plaintiff constructed a building on one of her lots, which she leased to cross-defendant Eaton. The latter operated a café in which he sold intoxicating liquors. The Foundation notified plaintiff and Eaton that it would exercise its right of re-entry un-

less the violation ceased. The sale of liquor nevertheless continued, and plaintiff thereafter brought this action to quiet title to her lots against the asserted rights. The Foundation cross-complained, seeking to enforce the condition by a reconveyance of the land to it, and asking also damages against plaintiff and Eaton, for failure to give up possession and convey title upon notice of breach of condition. Rodeo Company answered, but sought no affirmative relief. The lower court gave judgment for defendant Foundation, declaring it to be the owner of the lot which had been improperly used and ordering plaintiff to convey the same. The court also decreed that the title to the three lots was subject to the restrictive conditions, and gave an award of damages against plaintiff and cross-defendant Eaton in the amount of the rental value of the property wrongfully used.

Plaintiff appealed, and Eaton subsequently filed a disclaimer. The only interested parties, therefore, are the Foundation and plaintiff Parry.

The major point raised by appellant is the proposition that the Foundation had no right of re-entry to enforce, and by necessary inference that the condition which it imposed in the deed to plaintiff was void. The reasoning advanced is that a right of re-entry is an estate in reversion; that the Rodeo Company had already reserved that very estate by its deed; that consequently the trustee bank had no such estate to reserve for itself or its beneficiary, the Foundation, for that would result in having the identical estate in two parties, an impossibility.

No authority has been found either in favor of or against this specific proposition, but it is apparent that it would frequently defeat the objectives of those creating restricted tracts of land for various types of residential or other development. In the present case, for example, Rodeo Company obviously has no interest in the tract which it has sold; but the Foundation has a vital interest in maintaining its restricted character, and the imposition of conditions and the reservation of rights of re-entry on behalf of the Foundation was in pursuance of a plan of development admittedly legal, and not unusual. If it is a legal impossibility for successive grantors to reserve rights of re-entry for breach of conditions subsequent in deeds, it seems strange that it has never been so decided. And, upon reflection, we find no difficulty in holding these interests valid.

[1] Plaintiff's argument commences by making the assumption that a right of re-entry for breach of a particular condition is an estate in reversion, a definite, identified part of the fee which is left in the grantor and his successors after transfer of a lesser estate to the grantee. It is true that decisions occasionally characterize the right of re-entry as a "reversionary interest" or "contingent reversionary interest," and it is so regarded for some purposes. See *Strong v. Shatto*, 45 Cal.App. 29, 187 P. 159; *Barkhaus v. Producers' Fruit Co.*, 192 Cal. 200, 219 P. 435; *Backus v. Duffy*, 103 Cal.App. 775, 284 P. 954. But the situation with which these cases were concerned bear no resemblance to the facts of the instant case. Thus, in *Barkhaus v. Producers' Fruit Co.* and *Backus v. Duffy*, supra, the court upheld a sublease for the entire unexpired portion of the lessee's term on the ground that the lessee (sublessor), reserving a right of re-entry for breach of conditions, did not part with the entire term. And in *Strong v. Shatto*, supra, the decision was simply that the rule against perpetuities did not apply to right of re-entry.

[2,3] A more accurate analysis of the interests involved discloses that when the grantor conveys the fee simple on condition subsequent, he has no actual estate remaining with him. The grantee takes the entire estate of the grantor, and unless he breaches the conditions is in the same position as an owner in fee simple absolute. The interest of the grantor in such case is not, strictly speaking, a residue of the estate left in him; it is merely a right or power to terminate the estate of the grantee and retake the same, if there is a breach of condition. Restatement, Property, § 45, comment a, § 154; 1 Simes, Future Interests, § 159, p. 281. In the Restatement of Property the right of re-entry is called a "power of termination," and is clearly distinguished from the ordinary reversion. Restatement, Property, §§ 154, 155. The distinction is illustrated by the rule that the grantor may transfer an estate with a right of re-entry, and also keep a reversion. For example, the grantor may transfer land to the grantee for life, subject to a condition subsequent restricting its use. In such case the grantor has the reversion in fee and also a right of re-entry (or power of termination), and they do not merge. Restatement, Property, § 155, comment c; 1 Simes, Future Interests, § 165, p. 293.

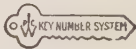
[4-6] Regardless of terminology, however, there is no reason in principle or authority why successive grantors may not reserve rights of re-entry for breach of conditions subsequent, whether these conditions be identical in form, similar in form, or different in form. In each instance, the grantee takes the whole fee, with the same rights as a grantee in fee-simple absolute, as long as the conditions are obeyed. Each grantor has the right or power to terminate the estate which he granted, upon breach of any condition or conditions imposed by him. Whatever be the correct term to describe the interest of the grantor, "right," "power," "estate," or "reversion," that interest is unaffected by the form or content of the conditions imposed on the granted estate. If the first grantor imposed a condition requiring set-back lines in building on the property, and the second grantor imposed a condition against the sale of liquor, can it be contended that the two conditions created identical rights of re-entry amounting to estates in the grantors? Such a contention would mean that only one grantor can ever attach conditions subsequent to an estate, because there can be but one reversion resulting from the right of re-entry. Yet this absurdity is matched by the implications from plaintiff's actual contention, for if two identical or similar conditions against sale of liquor, each imposed by a different grantor, create identical reversionary estates, while two different conditions do not, then it follows that there are innumerable different reversionary estates which may be created, depending upon the particular condition imposed upon the grantee's estate. This proposition demonstrates its own falsity. There is no such interest in real property as a "right of re-entry for breach of condition subsequent prohibiting sale of liquor in a certain manner as set forth in a particular deed in certain language," as distinguished from a "right of re-entry for breach of condition subsequent prohibiting the building of homes without set-back lines as set forth in a particular deed in certain language." In short, the law does not recognize thousands of different types of reversionary estates, including new ones which may be developed at any time, depending upon the ingenuity or objectives of the persons imposing the particular conditions subsequent. What the law does recognize is that conditions may be imposed which qualify or make subject to divestment the estate granted, but the right of re-entry reserved to the

grantor is not divided into separate interests for each condition. The law further recognizes that each owner of an estate may grant it, in whole or in part, absolutely or on condition; and if he grants it on condition, the right of re-entry for breach is a separate right of that grantor, and never identical with a right of re-entry reserved by a prior grantor for breach of conditions imposed by him.

With respect to other questions raised, such as alleged waiver of the restrictions and changed conditions of the neighborhood, we think the trial court's findings are supported by the evidence.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.



10 Cal.2d 435

BANKS et al. v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 15652.

Supreme Court of California.

Dec. 29, 1937.

1. Officers ⇨11

Limitations placed on Board of Supervisors and Civil Service Commission by terms of ordinance respecting seasonal positions had no application to position of jailer, since such position was permanent.

2. Prisons ⇨8

Salaries of jailers appointed subsequent to adoption of ordinance to fill vacancies were to be determined by Board of Supervisors and Civil Service Commission under provisions of ordinance and charter applying to vacancies.

3. Prisons ⇨8

Under charter provision that certain salaries shall be recommended by the officer having appointing power for such position and be fixed by the budget and annual salary ordinance, the salary recommended by sheriff for jailer appointed by him was not controlling.

4. Prisons ⇨8

Board of Supervisors was authorized to refer in salary ordinance to proposed schedule of Civil Service Commission and adopt by reference the salary schedule contained therein.

5. Prisons ⇨8

Proposed schedule of compensation of Civil Service Commission which fixed the entrance grade salary of jailers at \$170 per month, and which was adopted by reference in salary ordinance limiting salary of those appointed to vacancies occurring prior to adoption of salary standardization ordinance to the rate fixed by the Civil Service Commission schedule, was admissible in action by jailers to compel payment to them of difference in amount of salary received and that received by jailers who held positions prior to adoption of new charter and annual salary ordinance.

6. Prisons ⇨8

Proposed schedule of compensation prepared by the Civil Service Commission which fixed the entrance grade salary of jailers at \$170, and which was adopted by reference in salary ordinance limiting salaries of those appointed to vacancies occurring prior to adoption of salary standardization ordinance to the rate fixed by the Civil Service Commission schedule, was controlling as to the salary of jailers appointed by sheriff, subsequent to passage of salary ordinance fixing salaries of jailers then holding positions at \$197 per month, to fill vacancies.

7. Municipal corporations ⇨11(1)

An ordinance may by reference adopt an existing statute, ordinance, or other public document.

8. Constitutional law ⇨72.

The courts were without authority to remedy inequality of salaries of jailers resulting from fact that appointees to fill vacancies subsequent to adoption of salary ordinance were limited to \$170 per month, but power lay with Board of Supervisors upon whom charter imposed duty of fixing salaries of its officers.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Michael F. Banks and others for declaratory relief and for writ of mandate against the Civil Service Commission of the City and County of San Francisco and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

For prior opinion, 70 P.2d 615.

Charles B. Stone, of San Francisco, for appellants.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for respondents.

PER CURIAM.

In this matter, on the 23d day of July, 1937, an opinion and decision was rendered by this court which in its effect was an affirmance of the judgment from which the appeal had been taken. Thereafter, on the petition of the appellants, an order of rehearing of the cause was granted. In due course, following further argument and briefing by the respective parties herein, the appeal again has been submitted for determination. After further consideration thereof this court adheres to the conclusion which heretofore was expressed by it in the matter, and, with the exception of an explanatory statement which is interpolated in the latter part thereof, now adopts as its present opinion that which formerly was prepared by Mr. Justice Curtis of this court. That opinion with the said additional statement thereto is as follows:

"This action is for declaratory relief and for a writ of mandate directed to respondents requiring them to perform their respective duties, enjoined upon them by law, relating to the salaries of the plaintiffs as jailers of the city and county of San Francisco. Plaintiffs claim that their salary is \$197 per month for each plaintiff. The defendants, on the other hand, contend that the salary of each plaintiff is the sum of \$170 per month and no more. Plaintiffs, under legal appointment, entered upon the discharge of their duties as jailers of said city and county in April, 1932, and have regularly received the sum of \$170 per month. They ask judgment in addition to declaratory relief and for the issuance of a writ of mandate for the difference between the sum of \$197, the amount they claim as a monthly salary, and the sum of \$170, the amount paid them as salary, or the sum of \$27 per month each from April, 1932, to date of judgment. The action came on for

trial and resulted in a judgment for the defendants, from which judgment the plaintiffs have appealed.

"There is no dispute as to the facts of the case. They are all contained in a stipulation of facts which is before us in a bill of exceptions. The plaintiffs, prior to the year 1932, had passed the civil service examination for the position of jailer and were placed on the eligible list for appointment to that position. On January 8, 1932, the city and county of San Francisco adopted a new charter. On January 6, 1932, the board of supervisors of said city and county passed the annual salary ordinance, which was approved by the mayor on January 13, 1932. This ordinance was No. 9136 (new series), and will be referred to hereafter as ordinance No. 9136. By this ordinance there was appropriated the sum of \$197 per month for each position of jailer, beginning January 8, 1932, and ending June 30, 1932. A similar ordinance containing a similar appropriation was passed by said board of supervisors for the fiscal year beginning July 1, 1932. On January 22, 1932, the sheriff of said city and county, being authorized to make said appointments, requisitioned the Civil Service Commission for four jailers, stating the salary therefor at the sum of \$197 per month each. The commission returned said requisition to the sheriff, stating that the commission would not approve or file the requisition unless the sheriff changed the salaries stated in said requisition to the sum of \$170 per month each 'in conformity with and as provided by the terms of sections 71 and 73 of the charter of the city and county of San Francisco and section 73 of the annual salary ordinance passed by the Board of Supervisors * * * on January 6, 1932.' Thereupon the sheriff resubmitted said requisition, changing the salary from \$197 to \$170 per month for each of said positions. The commission then selected plaintiffs for said four positions and they were permanently appointed at the salary of \$170 per month each. They began work as such jailers on the 22d day of April, 1932, except plaintiff Gibbons, who began his employment in the month of July of that year, and they have continued ever since to fill said positions and to perform the services thereof at the salary of \$170 per month each.

[1, 2] "The positions to which the plaintiffs were appointed and are now holding are permanent positions, as distinguished

from seasonal positions mentioned in ordinance No. 9136. Therefore any limitations placed upon either the Board of Supervisors or the Civil Service Commission by the terms of said ordinance respecting seasonal positions have no application to the permanent positions to which plaintiffs were appointed. Furthermore, plaintiffs were appointed subsequent to the adoption of ordinance No. 9136 to fill vacancies in said positions occurring prior to their appointment, and the provisions of the charter and those of ordinance No. 9136 applying to vacancies must control the actions of the Board of Supervisors and the Civil Service Commission in determining the salary to be received by the plaintiffs appointed to such vacancies.

[3] "Plaintiffs rely upon section 71 of the charter, which reads in part as follows: 'Pending the adoption of salary standards as in this charter provided, the salary and wage rates for positions subject to such standardization shall be as recommended by the officer, board or commission having appointing power for such positions and fixed by the budget and annual salary ordinance; * * *'

"It is stipulated that since the effective date of the present charter of the city and county of San Francisco there has been no salary standardization ordinance adopted by the Board of Supervisors of said city and county.

"Petitioner contends that under the above-quoted provision of section 71 of the charter, the salary recommended by the sheriff, who was the appointive power in this instance, and who recommended a salary of \$197 per month for each position, fixed the salary of the plaintiffs after their appointment to such positions. But it will be seen by a reading of the above provision of the charter that it is the salary recommended by the appointive power 'and fixed by the budget and annual salary ordinance' which controls the compensation of such appointees. It is therefore necessary for us to examine the provisions of the budget and the annual salary ordinance to determine the amount of such compensation. No reference is made in the record or in the briefs to the budget or to the amount of salary 'fixed by the budget.' We will therefore assume that neither party to this controversy makes any point as to what the budget does or does not contain. We have already referred to the fact that the salary ordinance adopted January 6, 1932, and approved by

the mayor on January 15, 1932, appropriated the sum of \$197 per month for each position of jailer, and thereby fixed the salary for such position at that amount. This provision of the ordinance applied to all persons then holding the position of jailer. It would undoubtedly apply to persons subsequently appointed to fill such positions unless the ordinance provided otherwise. We think the ordinance has made such provision. We have noted above that the plaintiffs were appointed to fill vacancies then existing in the positions of jailer. Section 73 of the salary ordinance, in our opinion, governs the amounts of salary for such persons in said municipality who may be appointed to fill vacancies in any position therein. This section reads as follows: "'When a vacancy occurs in any position created by this ordinance which is subject to salary standardization, the person appointed to such vacancy shall receive only the salary of the entrance grade of the class to which the position belongs, as specified in the salary standardization ordinance; but in the event that said salary standardization ordinance has not yet been adopted when such vacancy occurs, the rate paid shall not exceed the rate fixed for such position in the proposed schedule of compensations issued by the civil service commission under date of April 9, 1930, or as amended or extended by the civil service commission as provided in Section 71 of the Charter. * * *'

[4-7] "As stated herein no salary standardization ordinance had at the time plaintiffs were appointed been adopted by said Board of Supervisors. By this section of the ordinance it will be seen that until such an ordinance has been adopted, the person appointed to fill a vacancy shall receive a salary at a rate not exceeding that fixed in a proposed schedule of compensation issued by the Civil Service Commission under date of April 9, 1930, 'or as amended or extended by the Civil Service Commission.' No claim is made that there has been any amendment or extension of the schedules of compensation issued April 9, 1930, by the Civil Service Commission. It is further conceded that the proposed schedule of compensation of the Civil Service Commission of April 9, 1930, fixed the entrance grade salary for the position of jailer at the sum of \$170 per month, and a maximum grade salary of \$190 per month. As we construe this provision of said proposed schedule the 'entrance grade salary' is the salary to be paid those appointed to fill

vacancies occurring in the positions of jailer, while those who have served for longer periods of time may eventually be entitled to receive the 'maximum grade salary.' We can see no legal objection to the action of the Board of Supervisors in referring to this proposed schedule of the Civil Service Commission and in adopting by reference the salary schedule contained therein. The plaintiffs objected to this proposed schedule when offered in evidence by the defendants. Their objection was overruled and plaintiffs now assign this action of the court as erroneous, relying upon the case of *King v. Leavy*, 124 Cal.App. 422, 12 P.2d 661, in which case the court held that this proposed schedule of compensation was not evidence in that case for either party. The case of *King v. Leavy* did not involve the salary of one appointed to a vacancy and section 73 of the salary ordinance was not involved in that action. The case is not, therefore, controlling. As section 73 expressly refers to said proposed schedules and limits salaries of those appointed to vacancies occurring before the adoption of a salary standardization ordinance to the rates therein fixed, we entertain no doubt as to its admissibility in evidence in this case and that its provisions are controlling to the extent that it was approved by section 73 of the salary ordinance and made a part of said ordinance by reference. There is no question as to the validity of an ordinance which by reference adopts an existing statute, ordinance; or other public document. In *re Burke*, 190 Cal. 326, 212 P. 193; In *re Kinney*, 53 Cal.App. 792, 200 P. 966. As section 73 of the salary ordinance has fixed plaintiffs' salary at the amount of \$170 per month, its provisions are binding upon both the plaintiff and the officials of said municipality."

In the case of *Francis v. Leavy*, 131 Cal. App. 620, 622, 623, 21 P.2d 979, it is held that the power to fix compensation for officers and employees of the city and county of San Francisco rests with its Board of Supervisors. Assuming that such ruling is correct, necessarily it would follow that the provisions that are contained in the several salary ordinances that yearly have been adopted by the Board of Supervisors, are controlling. In accord with that situation, as far as is pertinent to the instant matter, the salary of each of the plaintiffs was fixed as follows: For the fiscal year 1932-1933,

by the provisions of the salary ordinance the rate of compensation for jailers generally was fixed at \$197 per month. But by reason of the fact that each of the plaintiffs was appointed to fill a vacancy, by virtue of the provisions contained in section 73 of the salary ordinance, in accordance with the "proposed schedule of compensation issued by the Civil Service Commission under date of April 9, 1930," the salary of each of the plaintiffs was fixed at \$170 per month for that year.

In each of the fiscal years of 1933-1934, 1934-1935, and 1935-1936, by the provisions of the salary ordinance for those respective years, the salary of each of the plaintiffs was fixed at \$170 per month; consequently in neither of those years could the provisions of said section 73 of the salary ordinance, as far as they related to the recommendations of the Civil Service Commission, take effect or be operative in any way. But by the provision that was contained in the salary ordinance of 1936-1937, the salary of each of the plaintiffs was fixed at \$190 per month. By the time that ordinance became effective, each of the plaintiffs long since had passed not only the beginners' stage, but also the two succeeding years in his position, with the result that the provision in said section 73 of the salary ordinance, which related to one who had been appointed to fill a vacancy, had no application. But since the judgment from which the appeal herein was taken was rendered on July 29, 1935, it follows that at that time it was in complete accord with the law.

[8] "Plaintiffs complain that there are some fifty-eight other jailers serving the city and county of San Francisco, all of whom receive a salary of \$197 per month, and only the four plaintiffs are limited to a salary of \$170 per month. Apparently this is an inequality of which the plaintiffs may well complain, but the power to fix salaries of persons holding positions like or similar to those held by plaintiffs has been lodged by the charter in the Board of Supervisors. Plaintiffs' remedy lies not with the courts but with the authority upon whom the charter has imposed the duty of fixing the salaries of its officers."

The judgment is affirmed. It is further ordered that the appeal from the order by which the motion for new trial was denied is dismissed.

10 Cal.2d 442

GREAT WESTERN DISTILLERY PRODUCTS, Inc., v. JOHN A WATHEN DISTILLERY CO. et al.

L. A. 16337.

Supreme Court of California.

Dec. 29, 1937.

1. Monopolies ⇨17(2)

A contract making plaintiff, except one other, exclusive purchaser in California of defendant's warehouse receipts for whisky, was not void as contract restraining exercise of lawful trade or business. Civ.Code, § 1673.

2. Statutes ⇨181(2)

Statutes are interpreted in light of reason and common sense.

3. Monopolies ⇨12(1)

Contracts between individuals, main purpose and effect of which are to promote and increase business in line affected, will not be held to be in restraint of trade merely because operation of contract might in some possible theoretical way incidentally and indirectly restrict trade in such line. Civ. Code, § 1673.

4. Sales ⇨1(3)

A contract making plaintiff, except one other, the exclusive purchaser in California of defendant's warehouse receipts for whisky, was not fatally uncertain because price of merchandise was not fixed, since price could be supplied by implication that reasonable price was intended. Civ.Code, § 1729(4).

5. Sales ⇨78

When price is not specified in contract for sale of goods, whether executory or executed, price is supplied by implication that reasonable price is intended. Civ.Code, § 1729(4).

6. Contracts ⇨9(3)

The failure to specifically limit duration of contract making plaintiff, except one other, the exclusive purchaser in California of defendant's warehouse receipts for whisky did not fatally affect contract and did not give rise to right to terminate contract at will without liability for damages.

7. Sales ⇨84

Even where contract for sale of goods is silent as to its duration, the party seeking to terminate it must give the other party reasonable notice thereof, and such termina-

tion cannot be effected until at least a reasonable time has expired.

8. Contracts ⇨9(3)

A contract making plaintiff, except one other, the exclusive purchaser in California of defendant's warehouse receipts for whisky, as long as the plaintiff purchased and continued to purchase from defendant all of its warehouse receipts for whisky that it exploits in California, was sufficiently certain and valid as to duration.

9. Monopolies ⇨12(1)

In determining whether a contract is void as being in restraint of trade, a distinction is made between contracts tending solely to promote the business of the parties to the contract and those wherein a similar object is designed to be accomplished by stifling competition and securing a monopoly. Civ.Code, § 1673.

10. Monopolies ⇨12(1)

If public welfare is not involved and restraint on one party to contract is not greater than protection to the other requires, contract will be sustained though it in some degree may be said to restrain trade. Civ. Code, § 1673.

11. Monopolies ⇨12(1)

In absence of an attack on validity of apparent purpose of contract, which by its terms was not void as a contract restraining exercise of lawful trade or business, it would be considered valid. Civ.Code, § 1673.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Great Western Distillery Products, Incorporated, against John A. Wathen Distillery Company and another. From an adverse judgment, plaintiff appeals.

Reversed.

For prior opinion, see 66 P.2d 717.

Goldenhorn & Komins, I. Faerber Goldenhorn, and Robert Komins, all of Hollywood, and Solomon Rosenbaum, of Fitchburg, Mass., for appellant.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondents.

SHENK, Justice.

A petition for hearing was granted for the purpose of giving further consideration

to the contention that the contract sued on was void under section 1673 of the Civil Code. Upon such further consideration we adopt as a portion of the opinion of this court the opinion of the District Court of Appeal prepared by Mr. Presiding Justice Crail as follows:

"A general demurrer to the plaintiff's first amended complaint was sustained without leave to amend and judgment was entered accordingly. The appeal is taken from said judgment.

"Under the allegations of one of the counts of the complaint the parties entered into an agreement which, when boiled down, reads as follows: The defendant enters into an agreement with the plaintiff whereby the defendant agrees with the plaintiff that as long as the plaintiff purchases and continues to purchase from the defendant all of its John A. Wathen Distillery Company warehouse receipts for whiskey that it may require and sells and exploits in California said warehouse receipts, and refrains from selling and exploiting warehouse receipts from any other distillery, the defendant will not sell in California any of the said warehouse receipts [for resale to investors] to any other person except one in San Francisco. The complaint further alleges that the plaintiff, relying upon the said agreement, purchased from the defendant a quantity of said warehouse receipts at the time of entering into said contract and that thereafter the plaintiff continued to purchase quantities of said receipts from the defendant and at all times has been and now is and will continue to be ready, willing and able to purchase additional receipts and will refrain from purchasing receipts from other distilleries; that in reliance upon said agreement the plaintiff expended large sums of money for the purpose of advertising, circularizing and exploiting the defendant's warehouse receipts, and further large sums of money for opening branch offices in California for the purpose of carrying on the business contemplated by said contract, stating the amounts; that the defendant breached said contract, stating the facts, and that by reason thereof the plaintiff was damaged in certain sums, naming them.

"In another count plaintiff, in addition to the above, alleges that the defendant did wilfully, falsely and fraudulently enter into said contract with intent to deceive and defraud the plaintiff and to induce the plaintiff to purchase and agree to purchase in the future and sell, advertise, circularize and

exploit said warehouse receipts. That said representations, agreements and covenants of the defendant were fraudulent and false and known by the defendant to be fraudulent and false in that the defendant never intended to perform the same, and that defendant did, during the term of said representations, wilfully and maliciously and with intent to injure the plaintiff's business sell and dispose of large numbers of said warehouse receipts to others.

[1] "The first contention of the defendant is that the foregoing contract is void as a contract and unavailing as a representation, in this, that it violates section 1673 of the Civil Code, which provides, in effect, that every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind is to that extent void. In our view of the contract its terms indicate that it was entered into, not for the purpose of restricting any trade or business, but for the purpose of promoting one. It is true the contract makes the plaintiff, except one other, the exclusive purchaser in California of the defendant's warehouse receipts, but obviously, both the purpose and effect of the contract are, not to restrict the sale of the defendant's receipts, but to create an instrumentality by which the receipts will be exploited and sold. The contract does not restrain anyone from exercising a trade or business of any kind within the purview of section 1673 of the Civil Code.

[2,3] "Statutes are interpreted in the light of reason and common sense, and it may be stated as a general rule that courts will not hold to be in restraint of trade a contract between individuals, the main purpose and effect of which are to promote and increase business in the line affected, merely because its operations might possibly in some theoretical way incidentally and indirectly restrict trade in such line. This view has often been sustained by the Supreme Court of the United States in analogous cases. See numerous cases cited and digested in *Ripy & Son v. Art Wall Paper Mills*, 41 Okl. 20, 136 P. 1080, 51 L.R.A., N.S., 33.

[4,5] "The defendant's next contention is that the contract was fatally uncertain in that there is no agreement as to the price of the merchandise to be sold by the defendant and purchased by the plaintiff. There is no fatal uncertainty in this respect. The rule is that when no price is specified in a contract for the sale of goods, whether execu-

tory or executed, the price is supplied by the implication that a reasonable price is intended. *Dickerman v. Ohashi Importing Co.*, 63 Cal.App. 101, 218 P. 458; *Williston on Sales*, 2d Ed., 1924, § 171. This rule was adopted in the Uniform Sales Act and has been incorporated into our law by section 1729 (4) of the Civil Code, which provides as follows: 'Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.'

[6,7] "The final contention of the defendant is that the contract was for an indefinite time and therefore was terminable at the will of either party thereto. The failure to *specifically* limit the duration of the contract did not fatally affect it and did not give rise to a right to terminate the contract at will without a liability for damages. Even where a contract for the sale of goods is silent as to its duration, the party seeking to terminate it must give the other party reasonable notice thereof, and such termination cannot be effected until at least a reasonable time has expired. *Southern Pacific Co. v. Spring Valley Water Co.*, 173 Cal. 291, 159 P. 865, L.R.A.1917E, 680; 13 Cor.Jur. 604, § 630.

[8] "In the instant case the contract is not silent with regard to its duration. On the contrary, it provides that 'as long as the plaintiff purchases and continues to purchase * * *,' etc., the contract will remain in effect. The contract is very similar to the one involved in the case of *Noble v. Reid-Avery Co.*, 89 Cal.App. 75, 264 P. 341. In that case the agreement was that the plaintiff was to purchase for resale from the defendant a large quantity of welding rods, and would, from time to time, purchase additional amounts as necessary required and 'it was distinctly understood at the time of the first order of goods that the plaintiff should have exclusive right to sell the goods and represent the defendant in Southern California, *as long as* they were able to give faithful service and a business management to the trade and produce the trade that was warranted in the territory allowed to them, and no longer.' The court said, 'Such provisions for the duration of the contract are sufficiently certain and valid. As a general proposition the failure of an executory contract to state a time presently definite for its termination does not render it void for uncer-

tainty.' Citations for the rule are given and the question is rather fully discussed."

The defendants particularly rely on *Morey v. Paladini*, 187 Cal. 727, 203 P. 760, and *Chamberlain v. Augustine*, 172 Cal. 285, 156 P. 479, as compelling a contrary conclusion on the question whether the agreement is in restraint of trade. In *Morey v. Paladini* the contract was that the plaintiff's assignor was to deliver to the defendant at San Diego five tons of live and boiled lobsters each week during the "closed" season between April 2, 1917, and October 15, 1917; and the defendant was granted the exclusive right to sell the lobsters in a portion of California, and in Oregon, Washington and Nevada. The defendant refused shipments after May 15th. Judgment for the plaintiff was reversed. The ground of the reversal was that the evidence showed that the purpose of the plaintiff's assignor was to control the entire shipment of lobsters into the territory during the season noted, and that the reason for the refusal of the defendant to abide by the contract was the failure of the plaintiff's assignor to obtain that control of the fisheries and the shipments, as a consequence of which the market became overstocked. It was held to have been conclusively established by the evidence that in the inception of the transaction it was contemplated by the parties that the contract was one which would result in at least a partial restraint of trade. The facts concerning the real intent of the parties were thus brought to light upon the framing of the issues of fact and a trial on the merits.

The purport of the agreement in the case of *Chamberlain v. Augustine*, *supra*, as interpreted by the court, disclosed a contract directly within the contemplation of said section 1673. The defendant, upon the sale of certain corporate stock by him, had agreed not to engage in a business to compete with the corporation's business within a three-year period. It was held that the sale of stock was not a sale of the good will and did not bring the agreement within the exception of section 1674 of the Civil Code.

Likewise in *Endicott v. Rosenthal*, 216 Cal. 721, 16 P.2d 673, the facts surrounding its execution showed the contract to be part of a scheme to restrain competition in the business of clothes' dyeing and cleaning in Los Angeles and Orange counties.

[9] A distinction between contracts tending solely to promote the business of

the parties to the contract and those, such as involved in *Morey v. Paladini*, supra, wherein a similar object is designed to be accomplished by stifling competition and securing a monopoly, is recognized in *Associated Oil Co. v. Myers*, 217 Cal. 297, at page 304 et seq., 18 P.2d 668. In that case the defendant had agreed to sell at retail on premises leased to him by the plaintiff, only the petroleum products vended by the plaintiff. The contract was held to be valid. Any inconsistent announcement made in the case of *Coombs v. Burk*, 40 Cal.App. 8, 180 P. 59, also relied upon by the defendant herein, was rejected as "not controlling."

[10] The decisions in this state have recognized and applied the distinction made by authority elsewhere that if the public welfare be not involved and the restraint upon one party be not greater than protection to the other requires, the contract will be sustained although it in some degree may be said to restrain trade. *Associated Oil Co. v. Myers*, supra, 217 Cal. 297, at page 306, 18 P.2d 668; *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 P. 1041; *Grogan v. Chaffee*, 156 Cal. 611, 105 P. 745, 27 L.R.A., N.S., 395; *Herriman v. Menzies*, 115 Cal. 16, 44 P. 660, 46 P. 730, 35 L.R.A. 318, 56 Am.St.Rep. 81; *Twomey v. People's Ice Co.*, 66 Cal. 233, 5 P. 158; *Schwalm v. Holmes*, 49 Cal. 665; *Noble v. Reid-Avery Co.*, 89 Cal.App. 75, 264 P. 341; *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360, 361, 53 S.Ct. 471, 474, 77 L.Ed. 825; *Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683, Ann.Cas.1918D, 1207; *United States v. American Tobacco Co.*, 221 U.S. 106, 179, 180, 31 S.Ct. 632, 55 L.Ed. 663; *Gibbs v. Baltimore Gas Co.*, 130 U.S. 396, 409, 9 S.Ct. 553, 32 L.Ed. 979; *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, 171 Mich. 158, 136 N.W. 1113, 42 L.R.A., N.S., 843, and cases cited in note; *J. W. Ripy & Son v. Art Wall Paper Mills*, 41 Okl. 20, 136 P. 1080, 51 L.R.A., N.S., 33.

In *Grogan v. Chaffee*, supra, 156 Cal. 611, at page 615, 105 P. 745, 27 L.R.A., N.S., 395, it was noted that the provisions of the code sections here involved must be construed in the light of such well-settled principles.

[11] We conclude that the complaint in the present case alleges a contract which on

its face discloses merely an intent to provide for the promotion of the business of the defendant in the sale of warehouse receipts issued by it on its stores of bourbon whiskey. It may not be supposed that the promotion of sales to investors by the plaintiff exclusively, in the territory designated of none other than bourbon whiskey storage receipts issued by the defendant, would have any tendency to stifle competition or create a monopoly in that class of commodity. Alone and in the absence of an attack upon the validity of the apparent purpose of the contract, it must be considered valid. *Pacific Factor Co. v. Adler*, 90 Cal. 110, 121, 27 P. 36, 25 Am.St.Rep. 102. The contract alleged is nothing more than an attempt by the parties to create a market, within a small designated territory, for the warehouse receipts of bourbon whiskey of one firm to investors in that type of security. Such a limited restriction does not appear to affect the public interests and is obviously designed only to protect the respective parties in dealing with each other. Furthermore, it does not appear that it was the intent of the parties to control by monopoly the market price of the securities or in any manner to interfere with the normal fluctuations resulting from the law of supply and demand. The practical effect of the contract was to make the plaintiff the exclusive agent of the defendant in the territory assigned. In other words, the plaintiff was in reality employed by the defendant to develop a market for the sale of the commodity within the limited territory. The special character of the commodity indicates that the price in the market might tend to fluctuate from day to day. It should also be noted that under all the circumstances the parties no doubt intended to leave the matter of the price to be controlled by the existing market conditions at the several times of sale by the defendant to the plaintiff. This apparent intention, therefore, should govern in arriving at the conclusion that the contract alleged was complete and valid although no price was stated.

The judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; NOURSE, Justice pro tem.

10 Cal.2d 359

74 P.2d

**CONTRA COSTA COUNTY v. AMERICAN
TOLL BRIDGE CO.****S. F. 15342.**

Supreme Court of California.

Dec. 11, 1937.

Rehearing Denied Jan. 10, 1938.

1. Bridges ⇐15

A provision of an ordinance granting franchise to operate inter-county toll bridge that 2 per cent. of gross toll receipts should be paid for benefit of counties joined by bridge was valid, notwithstanding ordinance provided for \$100 per month license tax and statute places limitation of \$100 per month on any license tax on holder of toll bridge franchise, since 2 per cent. revenue provided for by ordinance is neither a "license tax" nor an "ad valorem tax," but is in nature of compensation for privilege granted. Pol. Code, § 2843 et seq.; § 2845, subd. 2.

[Ed. Note.—For other definitions of "Ad Valorem Tax" and "License Tax," see Words & Phrases.]

2. Bridges ⇐15

The county board of supervisors had power in March, 1923, to exact compensation for granting of franchise to construct and maintain inter-county toll bridge. Pol. Code, § 2843 et seq.; § 2872; Pol. Code 1923, § 4041, subd. 35.

3. Bridges ⇐15

The Legislature may authorize county board of supervisors to require holder of inter-county toll bridge franchise to pay 2 per cent. of gross tolls annually collected for benefit of counties joined by bridge, and has power to ratify and confirm action of supervisors in making such a requirement. Pol. Code, § 2872.

4. Bridges ⇐15

An operator of an inter-county toll bridge under franchise who has obtained benefits of franchise was not entitled to resist performance of obligation imposed by franchise ordinance to pay 2 per cent. of gross receipts for benefit of counties joined by bridge.

5. Appeal and error ⇐755

Where plaintiff's appeal from portion of judgment was not pressed and no briefs were filed in support thereof, reviewing court was not required to pass on its merits.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Contra Costa County, a political subdivision of the state of California, against the American Toll Bridge Company. From the judgment, defendant appeals, and plaintiff files a notice of appeal from a portion of the judgment.

Affirmed.

J. E. Rodgers and A. F. Bray, both of Martinez, and Dudley D. Sales, of San Francisco, for appellant.

Dunn, White & Aiken, of Oakland, for appellant American Toll Bridge Co.

James F. Hoey, Dist. Atty., of Concord, Warren Cunningham, Deputy Dist. Atty., of Martinez, and Francis P. Healey, Dist. Atty., of Richmond, for respondent.

SHENK, Justice.

This is an action to recover 2 per cent. of the gross tolls collected by the defendant from the operation of the Carquinez bridge from the date of its opening on May 22, 1927, to July 28, 1932. Judgment was entered for the plaintiff in the sum of \$86,769. The defendant has appealed from the whole of the judgment and the plaintiff has filed a notice of appeal from a portion thereof.

By ordinance, effective March 19, 1923, the board of supervisors of Contra Costa county granted a franchise to the Rodeo-Vallejo Ferry Company, the predecessor of the defendant, to construct a bridge across the Straits of Carquinez and to maintain the same for twenty-five years from and alter the effective date of the ordinance.

At the point where the bridge is constructed, the Straits of Carquinez form the boundary line between the counties of Contra Costa and Solano. The application of the Rodeo-Vallejo Ferry Company, filed September 27, 1922, was appropriately addressed to the board of supervisors of Contra Costa county, being the county on the left bank descending the Sacramento river. Section 2843, Pol. Code. Thereafter proceedings were regularly had and taken before that board under the provisions of the Political Code, § 2843 et seq., relating to the granting of authority to construct and maintain toll bridges. The franchise ordinance contains the following provision: "That the license tax to be paid by the

Rodeo-Vallejo Ferry Company, a corporation, its successors and assigns, for taking tolls on said bridge shall be One Hundred (100) Dollars per month, payable annually, commencing from the date of the operation of the bridge. That two (2%) per cent of the gross receipts derived from the use and operation of said bridge shall also and in addition be paid to the county of Contra Costa for the benefit of the counties of Contra Costa and Solano for the use of said franchise."

The license tax of \$100 per month has been paid as required by the ordinance, but the additional payment of 2 per cent. of the gross tolls has not been paid. Notwithstanding its definite agreement to meet this charge, the toll bridge company resists its enforcement on the ground that such requirement was beyond the power of the board of supervisors of Contra Costa county to include in the franchise as one of the obligations of the franchise holder.

[1] The position of the defendant is that if the 2 per cent. revenue be considered as a license tax it is invalid for the reason that subdivision 2 of section 2845 of the Political Code placed a limitation of \$100 per month on any license tax to be required of the holder of a toll bridge franchise; and since the defendant's franchise specifically provides for a license tax of \$100 per month, the power of the board of supervisors to impose such a charge was thereby exhausted. But the 2 per cent. revenue is neither a license tax nor an ad valorem tax. When authorized to be collected it is in much the same category as the 2 per cent. payments required in franchises granted under the Broughton Act, St.1905, p. 777, which payments were held in *County of Tulare v. City of Dinuba*, 188 Cal. 664, 206 P. 983, to be neither a tax nor a license and not subject to the "in lieu" provisions of section 14 of article 13 of the Constitution later adopted, but were in the nature of compensation for the privilege granted.

[2] The defendant nevertheless insists that nowhere in the law is there any authority in the board of supervisors to exact compensation for the granting of a franchise to construct and maintain a toll bridge across a body of water which forms the boundary line between two counties, and that since specific authority to that end is absent, the challenged provision of the franchise ordinance in question is void.

The question of the powers of the board of supervisors in granting such a franchise was involved in *Galvin v. Board of Supervisors*, 195 Cal. 686, at pages 693 and 694, 235 P. 450, 453, wherein this court said: "The powers of the board of supervisors with relation to the grant of franchises of this character are set forth in part 3, tit. 6, c. 4, of the Political Code, and in the sections thereof between 2843 and 2881, inclusive, and also in subdivision 35 of section 4041 of said Code." References to the same effect are found in *Newsom v. Board of Supervisors*, 205 Cal. 262, 270 P. 676.

At the time the defendant's franchise was granted, in March, 1923, the general powers of boards of supervisors were defined in section 4041 of the Political Code. It was there provided: "Boards of supervisors, in their respective counties shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law * * * 35. To grant licenses and franchises for the construction, keeping and taking of tolls on roads, bridges, ferries, wharves, streets, booms and piers, and to grant franchises along and over the public roads and highways for all lawful purposes, *upon such terms and conditions and restrictions as in their judgment may be necessary and proper*, and in such manner as to present the least possible obstruction and inconvenience to the traveling public."

It is the contention of the plaintiff that the foregoing language of the Code section which we have italicized was sufficient authority to enable the board of supervisors to insert in the franchise the 2 per cent. requirement, and that there are no legal limitations or restrictions on the authority thus granted. We fail to discover in the law any limitation or restriction on the power of the board to insert such requirement. Moreover, even in the absence of specific statutory authority, it has been held that the public body making the grant can prescribe terms and conditions in the granting and for the acceptance of a franchise. *City and County of Denver v. Stenger (C.C.A.)* 295 F. 809; 26 Cor.Jur. 1030. One of these conditions may be the requirement of payment of money, the amount of which may be fixed without regard to the cost of supervision or inspection. 19 R.C.L. 1153. And when so required, this condition becomes a part of the contract which the grantee has voluntarily assumed. *St. Louis v. Western Un-*

ion Telegraph Co., 148 U.S. 92, 13 S.Ct. 485, 37 L.Ed. 380; 12 R.C.L. 193. We are unable to draw the distinction urged by the defendant between a franchise to use a public street or highway for the purpose of revenue and a franchise to use a bridge which has public highway approaches and which from the time of its dedication to public travel became a public highway. See *Sears v. Tuolumne County*, 132 Cal. 167, 64 P. 270. In each case the grantee is enjoying a sovereign prerogative not otherwise exercisable.

The defendant, however, invokes the familiar rule of strict construction as applied to powers granted to subordinate governmental agencies, and great reliance is placed on the case of *Gardella v. County of Amador*, 164 Cal. 555, 129 P. 993. That case is cited as holding in effect that the general powers of the board of supervisors, as outlined in subdivision 35 of section 4041 of the Political Code above referred to, have no application to the granting of franchises to construct and maintain toll bridges across waters separating two counties. It is true that in that case it was held that subdivision 33 of said section 4041 had no application to such bridges. But that subdivision did not purport to deal with the subject of the granting of franchises to take tolls on bridges. That subject was then covered by subdivision 32. *St.1909*, p. 131. Subdivision 33 was limited to the granting of licenses and franchises to take tolls on "public roads or highways." The holding in the *Gardella Case* is not questioned, but it is not controlling on the question of the proper construction to be placed on subdivision 35 as it stood in 1923.

Another case strongly relied upon by the defendant is *Pool v. Simmons*, 134 Cal. 621, 66 P. 872, 873. That case involved the question of whether a franchise to operate a ferry on the Sacramento river between the counties of Yolo and Sutter granted under sections 2843 et seq. of the Political Code should have been awarded to the highest bidder in accordance with the provisions of "An act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises." *St.1893*, p. 288. It was held that the act of 1893 had no application to the granting of a ferry franchise and in the course of the opinion it was stated: "The whole policy of the law, as shown in the Political Code, is to allow franchises like

this to be granted by the board to a suitable person, to subserve a public benefit, subject to rules and regulations, and that the license required to be paid, as fixed by the board, is to be full compensation to the counties, and to be divided between them."

The foregoing language cannot be taken as an adjudication that the exaction of compensation for the use of such a franchise, in addition to the license tax, could not properly be authorized by a law of the state. The declaration is no more than a statement of the policy of the law as shown by the particular sections (2843 et seq.) of the Political Code when under consideration. The court did not assume to define the general powers of the board of supervisors under section 4041 of the Political Code. What was said concerning the policy of the law was not necessary to the disposition of the case and is not controlling when the precise point, as here made, is presented for decision.

In addition to the efficacy of the Code sections in authorizing the board of supervisors to impose the condition of additional compensation, or, as in this case, to agree with the grantee that such additional compensation be paid, we take notice of an amendment to section 2872 of the Political Code in 1923, approved May 8 of that year. *St.1923*, p. 272. That amendment added the following significant provision to the statute: "All licenses and franchises granted subsequent to the fourteenth day of March, A. D. one thousand eight hundred eighty one for the construction of any such bridges across the Sacramento or San Joaquin rivers, the Suisun bay, or Carquinez straits, the Petaluma, Napa or Sonoma creeks, whether above or below the head of navigation of said waters or streams, are hereby ratified, approved, confirmed and made valid for all purposes."

[3] It must be taken for granted that it is and has been, since the enactment of any legislation on the subject, within the power of the Legislature to authorize the board of supervisors to require the payment of 2 per cent. of the tolls annually collected by the holder of the franchise. It is also true as a general rule that whatever the Legislature could have authorized the board of supervisors to do in the first instance it could thereafter ratify and confirm. *Cole v. City of Los Angeles*, 180 Cal. 617, 182 P. 436; *Los Angeles City Water Company v. City of Los Angeles (C.C.)* 88 F. 720; 18 Cal.Jur. p. 796.

The defendant points out that the ratifying act of 1923 refers to specifically named navigable waters of this state and contends that as thus framed it is a special and local act prohibited by subdivision 33 of section 25 of article 4 of the Constitution. It is argued that since the Legislature could not have authorized by special act the board of supervisors to grant a franchise to construct the Carquinez bridge, it could not thereafter ratify the franchise by special act, citing *Stange v. City of Dubuque*, 62 Iowa 303, 17 N.W. 518. The act is claimed to be special because it operates only upon persons holding franchises granted between 1881 and 1923 for toll bridges over the enumerated waters, and to be local because it does not apply throughout the state, but only to the places designated.

The first acts of the Legislature on the subject prohibited the construction of toll bridges over navigable waters. St.1854, p. 123; St.1855, p. 182. In 1863 boards of supervisors in their several counties were vested with control of toll bridges across streams that were not navigable. St.1863, p. 720. In 1869 the Legislature for the first time authorized the construction of bridges over navigable waters, but, with the specific prohibition against the licensing of "bridges across the Sacramento or San Joaquin Rivers, the Petaluma, Napa or Sonoma creeks, or San Francisco, San Pablo or Suisun bays." Stats.1869-70, p. 887. From the time of its enactment in 1872 until its amendment in 1923, section 2872 of the Political Code contained the following proviso: "Provided, that the board of supervisors shall not have power to license bridges across the Sacramento or San Joaquin rivers, the Suisun bay, or Carquinez straits, the Petaluma, Napa, or Sonoma creeks, except at points above the head of navigation on said streams."

This proviso was declared to be repealed by implication by the act of March 14, 1881, St.1881, p. 76, which authorized boards of supervisors to do generally what was specifically prohibited by the proviso of 1872. *Chico Bridge Co. v. Sacramento Transp. Co.*, 123 Cal. 178, 55 P. 780. It is contended by the plaintiff that the ratifying act of 1923 may be said to have encompassed every franchise to construct a bridge over the navigable streams and bodies of water mentioned in the proviso of 1872 which could have been granted lawfully prior to 1923, and therefore that the amendment of 1923 was uniform in its operation.

It is readily observed that whenever the Legislature has directed its attention to the subject of toll bridges across navigable waters it has dealt with it by specifically mentioning the principal navigable streams and bodies of water in this state. Without further consideration, it may not be said with certainty that in dealing with such an important local problem as the proper construction, maintenance, and operation of a toll bridge across Carquinez Straits the Legislature could not have done so by special act. The fact that the franchise in question was granted under the general act makes the question more difficult. However, it is deemed unnecessary to determine the question at this time for the reason that power in the board of supervisors under the general act appears to have been sufficiently clear to justify the judgment of the trial court on that ground.

[4] Certain it is that the Legislature by its enactment in 1923 sought to do everything that could have been done by an act more general in terms, in order that the defendant's franchise might be secure and its securities free from attack. It is asserted by counsel for the plaintiff and is not denied that the ratifying statute was passed at the instance and for the benefit of the holder of the franchise. This defendant as holder is not, for obvious reasons, taking the position that the board of supervisors was wholly lacking in power to grant the franchise in the first instance. Having obtained the advantages that have flowed from the grant, the holder may not now with good grace, if at all, effectively resist the performance of an obligation thereunder which it voluntarily and lawfully agreed to undertake. See *Hershey v. Reclamation District No. 108*, 200 Cal. 550, 564, 254 P. 542; *Gregory v. Hecke*, 73 Cal. App. 268, 284, 238 P. 787; 12 Cor.Jur. p. 773.

[5] The plaintiff's appeal from a portion of the judgment is not pressed. No briefs have been filed in support thereof. We are therefore not called upon to pass upon its merits. In its briefs as respondent the plaintiff has requested an affirmance of the judgment in toto. The order about to be made will dispose of both appeals.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; HOUSER, J.; SEAWELL, J.

EDMONDS, Justice.

I concur in the judgment upon the ground that the toll bridge company, having accepted the benefits of the franchise granted by the ordinance of Contra Costa county and still continuing to do so, is estopped from challenging its provisions. The company cannot claim both under and against the enactment by which the franchise was created and now exists. It is a contract between the corporation and the county. "One cannot in the same proceeding both assail a statute and rely upon it," *Crittenden County v. McConnell*, 237 Ky. 806, 36 S.W. 2d 627, 630; *Hurley v. Commission of Fisheries*, 257 U.S. 223, 42 S.Ct. 83, 66 L. Ed. 206; nor can he claim under a franchise and at the same time repudiate some of its provisions. The appellant acquired from the original grantee of the franchise the rights which it enjoys and cannot now question the validity of the challenged requirement. *State v. Portland General Electric Co.*, 52 Or. 502, 95 P. 722, 98 P. 160.



10 Cal.2d 409

McALPINE v. BAUMGARTNER et al.

L. A. 16475.

Supreme Court of California.

Dec. 22, 1937.

1. Municipal corporations ⇨890, 961

The duty of city council, controller, and mayor to provide funds to meet budget for city employees' retirement fund and to levy tax sufficient to meet budget is a continuing one, and any order that might be made by Supreme Court with reference thereto might be made applicable not only as far as might concern future appropriations, but also future tax levies.

2. Statutes ⇨228

Generally, the purpose of a "proviso" in a statute, or in an ordinance, is to create merely an exception to the principal provision of the statute or ordinance which precedes such proviso, and it may limit principal part of statute or ordinance only as far as it expressly or impliedly purports to do so.

[Ed. Note.—For other definitions of "Proviso," see Words & Phrases.]

74 P.2d—48

3. Municipal corporations ⇨120
Statutes ⇨228

The office of a "proviso" in a statute or ordinance is to explain, qualify, or restrain operation of a preceding provision, and it is to be read in light of subject-matter of statute or ordinance.

4. Municipal corporations ⇨120
Statutes ⇨228

Where enacting clause of statute or ordinance is general in its language and objects, and a proviso is afterwards introduced, proviso is construed strictly, and takes no case out of enacting clause which does not fall fairly within its terms.

5. Mandamus ⇨113

Where city charter directed city council to adopt a general tax ordinance for each fiscal year not later than last day of August, and to annually levy a tax sufficient to meet budget for the city employees' retirement fund, "provided, however," that it might appropriate from any available fund for such budget, in which event tax levy to be made for fund should be clearly sufficient to provide difference between amount so appropriated and total amount of all items in budget, court was powerless after August 31, 1937, to compel city council to provide funds for budget for city employees' retirement fund for fiscal year 1937-1938.

6. Mandamus ⇨176

Though Supreme Court was without power to compel city council to provide funds for budget for city employees' retirement fund for fiscal year 1937-1938 because city charter required adoption of general tax ordinance for each fiscal year to be adopted not later than last day of August, and council failed to provide funds by last day of August, court would order that before last day of August, 1938, a general tax be levied which should be sufficient to provide total amount of all items in statute of city employees' retirement fund for fiscal year 1938, or, as an alternative, to levy a tax for the fund which should be sufficient to provide difference between amount so appropriated, if any, and total amount of all items in the budget.

In Bank.

Application by John F. McAlpine against John W. Baumgartner and others, members of the city council of the City of Los Angeles, Frank L. Show, mayor of the

City of Los Angeles, and Dan O. Hoyer, controller of the City of Los Angeles, to compel them to provide funds to meet the budget for the city employees' retirement fund.

Judgment in accordance with opinion.

Loren A. Butts, of Los Angeles, for petitioner.

Robert J. Stahl, of Los Angeles, amicus curiae for Wm. J. McNichols, C. J. Turner, James Paul, William Laurence, N. T. Powell, and M. M. Meyer.

Ray L. Chesebro, City Atty., and Leon Thomas David and William H. Neal, Asst. City Attys., all of Los Angeles, for respondents.

HOUSER, Justice.

From the record herein, the fact is disclosed that by the various provisions of article XXXIV, which includes sections 500 to 513, inclusive, of the charter of the city of Los Angeles, a retirement system for specified classes of employees of said city was created. Therein, after provision had been made to the effect that the management and control of said system should be vested in and intrusted to a "Board of Administration," and, in connection with the duties of said board, that annually it should prepare a budget, which, among other things, should show the financial necessities for the operation of the system for the ensuing year, by the provisions of section 506 of the charter, relating to the method by which such moneys were proposed to be made available for the purpose of carrying out the manifest intent of the system, it was provided as follows: "For the purpose of providing funds to meet the budget for said City Employees' Retirement Fund the Council or Controller shall annually levy, in addition to all other taxes levied by the City, a tax clearly sufficient to provide the total amount of all items in said budget; provided, however, that said City Council may appropriate from any available funds, all or any part of the total amount of all or any of the items in the budget for said City Employees' Retirement Fund, in which event the tax levy to be made for said fund shall be clearly sufficient to provide the difference between the amount so appropriated and the total amount of all items in said budget."

In addition to such special provisions of the charter, by the terms of section 352 thereof, in substance, the city council was

required to adopt a general tax ordinance for each (fiscal) year not later than the "last day of August." And by the terms of each of several different sections of the charter, the mayor of the city was authorized to exercise a veto upon such ordinance, subject, however, to "passage by the council over the mayor's veto by a two-thirds vote." It also appears that although in due course, and preceding "the last day of August," 1937, the city council adopted an ordinance by the terms of which in effect a tax was levied for the purpose of providing funds for general and some special uses, no provision was made therein "for the purpose of providing funds to meet the budget for said city employees' retirement fund." Nor has any ordinance, either in substance or at all, to the latter effect, ever been so adopted. Section 504 of the city charter includes a provision that: "In order that the system created by this Article may become operative as of the 1st day of July, 1937, the Controller is authorized and directed to loan to the retirement fund from the reserve fund such sums as may be required, such loan to be repaid by the retirement fund from the first available money therein." And by the provisions of subdivision 10 of section 47 of the charter of the city of Los Angeles, the controller is authorized to maintain "each fund on a parity with its obligations at all times by transferring from the reserve fund as a loan to any fund which may become depleted through tardy receipt of revenues. He shall, in all cases, upon receipt of revenues sufficient to make such allocation as will restore each such fund to parity, retransfer the amount of such loan to the reserve fund."

In such circumstances, at the instance of one of the retired employees of the city of Los Angeles, who apparently was entitled to benefit by the terms of the said retirement plan, this court caused its alternative writ of mandate to issue, directed to the several respondents therein named, by which they were required generally to perform the various and respective acts thus specified, or, on a designated date, that they show cause before this court why they had failed in that regard. The several respondents having answered herein, the matter is now ready for determination.

One of the allegations that is contained within the petition for the issuance of the writ herein is that: "The principal and only question to be determined is whether or not

it is the mandatory duty of the Council of the City of Los Angeles to provide funds to meet the costs of the items set forth in the budget adopted by the Board of Administration of said retirement system."

[1] But in that connection it now appears that by each of the several parties that are affected by the proceeding, it is expressly conceded that, with respect to the several requirements specified in section 506 of the charter, the duty of the city council either to levy a tax or to appropriate available funds "to meet the budget for said City Employees' Retirement Fund" is mandatory; also, that in accord with the provisions of the charter, as far as concerns the date before which the city council might have included such special tax levy, or the several items thereof, within the general tax ordinance, to wit, "the last day of August," 1937, has long since expired; and that as a consequence of the existence of such latter situation, as far as it may or does relate to the specified date of August 31, 1937, no power may or can compel the obedience of the said city council to the plain mandate of the said charter provision. As far as concerns the controller, although in reliance upon the terms contained within section 506 of the charter, mandatory relief originally was prayed by the petitioner against that official of the city, by the express statements of the petitioner that are contained within his brief filed herein, particularly for the asserted reason that in accord with former adjudications by this court on analogous facts, that part of the charter provision is unconstitutional, his prayer with regard to the controller has been withdrawn; notwithstanding which, although the several respondents do not admit the illegality of the charter provision in that particular, or that the controller ordinarily would not be legally qualified to act, for the asserted reason that by the provisions of section 353 and 506 of the charter, the right of the controller to levy a tax becomes operative only when the city council has failed to make any levy "at all," and since the fact herein is that the city council did make a levy (omitting therefrom the budget item of the city employees' retirement fund) the respondent members of the city council concede the law to be that the controller is lacking in authority to make any levy at this time. In addition to the foregoing, all the respective parties are in accord one with the other to the effect that, as to the city council, not only is

mandate a proper remedy to be invoked in the premises, but also that if such remedy be exercised herein, the duty of the said respective respondents being a "continuing" one, any order that may be made by this court with reference thereto may be made applicable not only as far as may concern future appropriations, but also future tax levies, to be made or ordered respectively by ordinance of the city council of the city of Los Angeles. And in that regard, the several rulings by this court with reference to that situation apparently support their position. *Union Safe Deposit Bank v. Menlo Park*, 3 Cal.2d 264, 266, 43 P.2d 811; *American Securities Co. v. Forward*, 220 Cal. 566, 571, 572, 32 P.2d 343, 96 A.L.R. 1268; *Pasadena J. C. Dist. v. Board of Supervisors*, 216 Cal. 61, 13 P.2d 678. So that, other than as may relate to the respondent members of the city council of the city of Los Angeles, acting as such, it does not appear that either of the remaining respondents has ever failed or refused to perform his official duty in the premises. Particularly is that true with reference to the duty of the mayor of said city. As heretofore has been stated, no tax ordinance that relates to the city employees' retirement fund has ever been adopted by the city council; and as a consequence of such dereliction in duty, the mayor has had no opportunity either to approve or to reject any proposed legislation in connection with the plan to make money available for that fund. And the situation of the controller in the matter, if not identical with, at least is analogous to, that of the mayor. Other than the controller's allegations that are contained in his answer herein to the effect that he is "informed and believes and therefore alleges that under the terms of section 353 and section 506 of the charter, it is his duty thereunder to proceed, as provided in said section 353, to make a supplemental tax levy for the purpose of raising the funds required by the City Employees' Retirement System for the fiscal year 1937-1938, but that his power so to do has been denied by the other respondents herein, and that unless ordered so to do by this Honorable Court he will not proceed to make such levy in the manner provided in said section 353 of the City Charter"; also, that "the City Controller has power to maintain the said City Employees' Retirement Fund on a parity with its obligations by transferring from the Reserve Fund enough to meet the said obligations until such time as receipt of revenues is had suf-

ficient to restore such fund to parity and permit of transfer of the amount of the loan to the Reserve Fund; * * * the record fails to disclose anything upon which a mandate of this court by which the controller might be ordered to perform any duty in the premises might properly be based. Neither in the petition for the writ, nor in the answer of either the mayor or the controller, may any allegation be discovered which either unequivocally, or at all, states the essential fact that a demand heretofore has been made by a specified and properly authorized official or body of the city of Los Angeles that the mayor or the controller respectively perform either or any of the acts which, by the provisions of the charter, he is charged with the duty to perform; or in that regard, that he either has failed, neglected, or refused to perform such act. In that connection, as hereinbefore has been set forth, the most that is disclosed is that which appears in the separate answer of the controller, to wit, that although by the express provisions of section 353 of the charter, on the failure of the city council to perform its duty, the controller is authorized "to make a supplemental tax for the purpose of raising the funds, * * *" the power to do so "has been denied by the other respondents." But nowhere within either the petition or the answer of either of the several respondents may be found any allegation that "the other respondents" are, or that either of them is, clothed with any authority in that regard. As far as is indicated by any pertinent charter provision to which the attention of this court has been directed, neither the mayor nor the city council has any greater right or authority than has any private citizen to "deny" or to prevent the performance of any authorized act of the controller, or in any manner to influence him with reference to his official act or acts as it or they may concern a mandate or direction by virtue of the provisions of the city charter as it or they may affect the city controller with relation either to a possible levy by him of a "supplemental tax," or to his "power to maintain the city employees' retirement fund on a parity with its obligations." However, by the prayer attached to the answer of each of the several respondents, it appears that they are and each of them is desirous that this court render a decision wherein the several duties of each of the said different city officials may be not only clearly defined, but also that forthwith he be ordered to per-

form each of such duties. In the circumstances here presented, it is clear that this court should not comply with either or any of such suggestions.

The only point that is now presented by the petitioner, and which is founded upon allegations that are supported by sufficient facts set forth in the petition, is whether, in consideration of the situation that hereinbefore has been outlined, the city council is now authorized to make an appropriation "for the purpose of providing funds to meet the budget for said city employees' retirement fund" for the fiscal year 1937-1938, and, if so, whether this court will order the city council to make the appropriation which it is asserted is contemplated by the provisions of section 506 of the city charter.

To that end, it becomes advisable that the several pertinent provisions of the charter be examined. In that connection, it will at once appear that the provisions of section 506 of the charter furnish the foundation. Without herein quoting that section in full, it may suffice to state that the greater part thereof relates to the duties of the board of administration, particularly with reference to the time when it shall prepare and submit to the mayor and the controller a budget which shall include therein specified items of expense with respect to the estimated cost of maintaining the city employees' retirement fund; following which is the provision hereinbefore set forth which relates to the method by which the money necessary for the maintenance of the fund is authorized to be provided. By reference thereto, it will be noted that, for that purpose, the city council is directed to "annually levy, in addition to all other taxes levied by the city, a tax clearly sufficient to provide the total amount of all items in said budget. * * *" Concerning the date or the time within which the city council is thus restricted in its official act in the premises, although solely by the terms of section 506 of the charter, the city council is required to act "annually" only, the provisions of section 352 of the charter limits the date of such performance to "on or before the last day of August of each year." So that in any event, as far as may concern the levying of a tax for the purpose of providing funds to meet the budget for the city employees' retirement fund, it is clear that, in the instant matter, the time limit fixed by the charter having expired, in the absence of qualifying charter provisions or other authority in the matter, and particu-

larly in consideration of that which may be understood as the stipulation of the parties herein, it well may be that at this time this court is powerless to make an order by which the dereliction of the city council in that regard may be corrected. However, as hereinbefore has been set forth, by the terms of section 506 of the charter, in lieu of providing funds for the city employees' retirement fund by including a required percentage within the general tax levy, the city council was authorized to adopt an alternative method, in that for the intended purpose it might "appropriate from any available funds, all or any part of the total amount of all or any of the items in the budget. * * *" Had the charter provision stopped at the close of the language just quoted, and had no qualifying words appeared either in the section under consideration or elsewhere in the charter, it is conceivable that even though the time limit for adopting the annual general tax ordinance had expired, the language thus employed in said section possibly might have admitted of a construction by which the city council might have been empowered "after the last day of August" to appropriate funds to be used for the specific purpose of maintaining the city employees' retirement system during the current year. But unfortunately, as far as such a conclusion is concerned, not only in accord with a rule of construction, but also by other language that is contained in section 506 of the charter, it appears that, in adopting the charter provisions, the intention of the electors of the city of Los Angeles was not to confer upon the city council the right to make such appropriation excepting at a time which preceded the date when the city council was required to adopt the general tax ordinance.

[2-4] It may be remembered that the authority of the city council to levy the necessary tax for the purpose of providing money for the fund is followed by a "provided, however," which purports to authorize the city council to make an appropriation for the same purpose. In that connection, it is well established that, in general, the purpose of a "proviso" in a statute, or in an ordinance, is to create merely an exception to the principal provision of the statute or ordinance which precedes such proviso; with the result that the principal part of the statute or ordinance thus modified remains intact excepting as it may be thus qualified. In other words, the proviso may, and usually does, limit the principal part of the

statute or ordinance only as far as it expressly or impliedly purports to do so. In California Jurisprudence, volume 23, page 744, it is said that the office of a proviso "is to explain, qualify, or restrain the operation of a preceding provision." And it is to "be read in the light of the subject-matter" of the act. *People v. Morrill*, 26 Cal. 336, 355. Also, in *Dufton v. Daniels*, 190 Cal. 577, 580, 213 P. 949, 950, it is said: "The language of the section is plain and unambiguous, and it is not necessary to invoke the settled rule of construction that an exception contained in a statute to a general rule laid down therein is to be strictly construed (*Black, Interpretation of Laws*, p. 275; *Lewis' Sutherland, Statutory Construction*, 2d Ed., § 352)." And further, in the case of *Forbes v. City of Los Angeles*, 101 Cal.App. 781, 788 [282 P. 528, 531], it is said: "'Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof.' *U. S. v. Dickson*, 40 U.S. [15 Pet.] 141, 10 L.Ed. 689." With that in mind, it becomes obvious that the proviso that occurs in section 506 of the charter with respect to the power of the city council simply to make an appropriation cannot adversely affect the time limit within which either the general tax levy may be provided by ordinance by the city council, or an appropriation may be made; and since in accord with other provisions of the charter the general tax levy must be made "before the last day of August," it follows that the making of an appropriation is similarly limited. Attention is also directed to the clause in section 506 of the charter, to the effect that, instead of providing for the raising of funds by taxation, the city council may appropriate either the whole or any part thereof "from any available funds; * * * in which event (the making of an appropriation) the tax levy to be made for said fund shall be clearly sufficient to provide the difference between the amount so appropriated and the total amount of all items in said budget."

As hereinbefore has been indicated, in the matter of adopting an ordinance by which the annual general tax levy is made, the city council is required to act "on or before

the last day of August." In that regard, it is granted no extensive or permissive leeway; and included within that ordinance (whenever adopted) must be either "the total amount of all items in said budget" for said city employees' retirement fund, or "the difference between the amount (so) appropriated and the total amount of all items in said budget." Furthermore, concerning the limitation of time within which the city council is authorized to make an appropriation, and particularly in determining the meaning that should be attributed to section 506, the word "difference," which is used in connection with the authority of the council, is significant. As used, it connotes that before the amount to be allowed for the city employees' retirement fund may be properly ascertained as an item to be considered in making the general tax levy, the amount of any appropriation which up to that time may have been made by the city council must be deducted from the figures which shall have appeared in the budget that theretofore should have been prepared by the board of administration and transmitted by it to the mayor and the controller. In effect, that is to say that the or any appropriation for any given fiscal year must have been made before the general tax levy ordinance may be adopted. Furthermore, as is expressly declared within section 506 of the charter, one of the purposes of the general tax levy is to provide "funds to meet the budget." It will again be noted that the method by which that result is proposed to be finally accomplished is by means of a general tax levy; "provided, however," that it is within the power of the city council and reduce the amount of the total tax, or the percentage of the general tax levy, by officially ordering by its ordinance, that either the whole or any part of the amount which ordinarily would have to be included within the general tax levy, may be taken from "available funds" of the city and used "for the purpose of providing funds to meet the budget." But however the desired result may be accomplished, that is, either by means of taxation, or by the appropriation of available funds, or by both means, it is manifest, as in effect is declared by the provisions of section 506 of the charter, that if by tax only, the tax shall be "clearly sufficient to provide the total amount of all items in said budget"; and that "if the funds to meet the budget" have been only partly secured or made available by means of an appropriation, then the tax shall be based upon "the

difference between the amount so appropriated and the total amount of all items in said budget." It is obvious that if "before the last day of August" the city council is required to levy a general tax which must include an item that will provide for the total amount specified in the budget of the city employees' retirement fund, less any appropriation that theretofore may have been made in support of that fund, the city council may properly do so only on the basis of previous knowledge on its part of facts that may be contained within, and conveyed to the city council by means of, said budget, together with like knowledge of the amount of money (if any) which theretofore may have been appropriated to the fund. Within the contemplation of the provisions of section 506 of the city charter, the general tax levy is the final act for providing the funds necessary for the proper maintenance of that fund. Any tax that might be based upon either a greater or a lesser sum than that which would be so represented and calculated, clearly would be in violation of the express terms of the charter provision. And if proper in amount, as required by the charter provision, it is equally manifest that any appropriation in aid of the fund, that might be made after the last day of August, in effect would amount to double taxation. It thus appears that, in adopting the charter, it must have been within the legal contemplation and the intention of the electors that if the money that was necessary for the support of the fund had not theretofore been appropriated by the city council for that purpose, the required total amount would be provided by the levy of a general tax, and that the ordinance which would be adopted by the city council to that end would be its final act in the premises; and, as hereinbefore has been stated, when the general tax ordinance was adopted "on or before the last day of August," and no provision having been made in said ordinance with respect to the fund that here is the subject of consideration, and since the powers of the city council are limited by the express or the implied terms of the charter provisions of the city, it follows that in the absence of any charter provisions other than those contained in section 506 thereof, by which the city council is authorized to appropriate funds "to meet the budget for said city employees' retirement fund," it now has no power to make an appropriation for that purpose as far as such an appropriation may directly affect the budget for that fund for the fiscal year 1937-1938. How-

ever, solely in that connection, such conclusion should not be understood as indicative of a ruling by this court that the city council is entirely lacking in authority to minister to the financial necessities of the city employees' retirement fund. In that regard (although not to be accepted as anything more than a suggestion by this court) among other possible means of relieving an embarrassing situation, the attention of respective counsel is directed not only to the opening sentence, but also to subdivision 3, and the closing sentence of section 506 of the city charter, wherein it may appear that "annually" (apparently without express limitation as to the date thereof) the board of administration shall prepare a budget for the apparent purpose of furnishing information to the city council to the end that it may levy a tax "clearly sufficient to provide the total amount of all items in said budget"; also, that at a time "before the last day of August" the city council is authorized to "appropriate from any available funds, all or any part of the total amount of all or any of the items in the budget for said city employees' retirement fund," which for the fiscal year 1938-1939 may include an item for "The amount of any deficit which may remain in said retirement fund in the event the appropriation of any previous year shall have proved insufficient to pay the demands drawn against said retirement fund."

[5, 6] As a result of the foregoing considerations, and especially in reliance upon the authority that is contained within the adjudicated cases hereinbefore cited, to wit, *Union Safe Deposit Bank v. Menlo Park*, 3 Cal.2d 264, 266, 43 P.2d 811; *American Securities Co. v. Forward*, 220 Cal. 566, 571, 572, 32 P.2d 343, 96 A.L.R. 1268; *Pasadena J. C. Dist. v. Board of Supervisors*, 216 Cal. 61, 13 P.2d 678, it is ordered that, "before the last day of August," 1938, each of the several individual respondents herein (other than Frank L. Shaw, as mayor of the city of Los Angeles, and Dan O. Hoye, as controller of the city of Los Angeles), acting each with the others in their official collective capacity as the city council of the city of Los Angeles, levy a general tax which, in addition to all other taxes levied by the city of Los Angeles, shall include a tax sufficient to provide the total amount of all items in the budget of the city employees' retirement fund for the fiscal year 1938, which budget theretofore shall have been prepared and transmitted to the mayor

and the controller of said city by the board of administration of the said city employees' retirement fund; or, as an alternative thereof, that if before the last day of August, 1938, the said city council of the city of Los Angeles shall have appropriated from any available funds all or any part of the total of all or any of the items in the said budget for said city employees' retirement fund; in that event, it is ordered that before said last day of August, 1938, the said individual respondents, acting as aforesaid as said city council, shall levy a tax for said city employees' retirement fund which shall be clearly sufficient to provide the difference between the amount so appropriated (if any) and the total amount of all items in said budget.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; EDMONDS, J.



10 Cal.2d 454

In re GRIVEL'S ESTATE.

GRIVEL v. WARDLAW.

L. A. 15229.

Supreme Court of California.

Dec. 30, 1937.

1. Executors and administrators ⇐528(3)

As regards liability of administrator and his sureties, partnership property coming into possession of the administrator of a deceased partner was not a part of the estate of the deceased partner, and could have been recovered by the surviving partner. Civ.Code, § 2419.

2. Executors and administrators ⇐282

A finding that administrator of deceased partner's estate came into possession of cotton belonging to partnership under agreement with surviving partner that administrator would pay certain partnership debts, but that administrator failed to liquidate such debts and through his agent paid out the proceeds from the sale of such cotton for other purposes, without any finding that administrator misappropriated the proceeds, did not authorize charging administrator with the amount of such partnership debts. Civ.Code, § 2419.

In Bank.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Proceeding in the matter of the estate of Rene Grivel, deceased, by Leon R. Grivel, administrator with the will annexed of the estate of Rene Grivel, against John R. Wardlaw, administrator of the estate of Charlie T. Wardlaw, deceased, former administrator with the will annexed of the estate of Rene Grivel. From an order making certain charges against the estate of Charlie T. Wardlaw, and against his sureties, as administrator with the will annexed of the estate of Rene Grivel, John R. Wardlaw appeals.

Reversed, with directions.

For prior opinion, see 65 P.2d 360.

Sherman Anderson and Guy Richards Crump, all of Los Angeles, for appellant.

Lawler & Felix, of Los Angeles, amici curiæ for Hartford Accident & Indemnity Co.

Edgar T. Fee and Franklin J. Cole, both of Los Angeles, for respondent.

EDMONDS, Justice.

The controversy presented by this appeal concerns only the right of the estate of Rene Grivel to the proceeds of the sale of certain cotton which, it is claimed, came into the possession of its administrator and was sold by him without accounting to the estate therefor. Sustaining objections made to the account of the administrator, the probate court made an order charging him and his sureties with the sum of \$17,500 and interest. The appellant, who is the administrator of the estate of the deceased administrator, contends as ground for reversal that the findings of fact are not supported by the evidence and that these, in turn, do not support the order.

For about ten years and until his death in 1928, C. T. Wardlaw was the administrator with the will annexed of the estate of Rene Grivel by appointment from the superior court of Imperial county. After his death, an amended and supplemental account of the estate was presented by John R. Wardlaw, as administrator of the estate of C. T. Wardlaw. This account was settled and allowed as to all items, except the cotton now in dispute, by an order which was affirmed upon appeal. In re Estate of Grivel, 128 Cal.App. 186, 17 P.2d 172. Upon a further hearing of

the account for the purpose of determining the issues concerning ownership of the cotton and the proceeds of its sale, the court upheld the objections of the successor administrator who claims that C. T. Wardlaw as administrator received 271 bales of cotton belonging to the estate of Rene Grivel and made no account therefor.

The findings of the court are that C. T. Wardlaw, while acting as administrator of the estate of Rene Grivel, came into possession of 271 bales of cotton which were the property of Rene Grivel and Henry De Nancy, a partnership; that Mr. De Nancy as the surviving partner of the deceased agreed with the administrator that he would deliver to him every alternate bale of cotton harvested from the partnership lease subsequent to the death of Grivel "as full payment of land rentals owing the Long Ranch and/or their lessees or landlord, and also that out of said cotton said * * * administrator would satisfy in full the note of \$17,500 owing the Globe Oil Mills Company, a corporation"; that the administrator procured 20 bales of cotton belonging to the partnership from the Globe Oil Mills Company, a corporation, "upon the assurance * * * that he would pay the partnership note of \$17,500 from the proceeds of the sale of the partnership cotton"; that none of the proceeds of the sale of the cotton, which amounted to \$39,906, was applied to the payment of the \$17,500 note or the land rentals, but was paid by one O. G. Hopkins, whom Mr. De Nancy "dealt with" as the agent of the administrator, to other persons and for other purposes with the knowledge and consent of the administrator and in violation of his agreement with the surviving partner. The conclusion of law from these facts is that the deceased administrator and his sureties are chargeable with \$17,500 and interest.

[1,2] The trial court found that C. T. Wardlaw received the cotton as administrator, and pursuant to an agreement to pay land rental and a note which were debts of the partnership, it also found that the cotton was the property of the partnership. As partnership property it was not a part of the estate of the deceased partner. Section 2419, Civ.Code; *Perelli-Minetti v. Lawson*, 205 Cal. 642, 272 P. 573, and could have been recovered by the surviving partner. *Wrightson v. Dougherty*, 5 Cal.2d 257, 54 P.2d 13; *Fong*

Sing v. O'Dell, 50 Cal.App. 55, 194 P. 745; Swanson v. Siem, 124 Cal.App. 519, 12 P.2d 1053. The court did not find that Mr. Wardlaw misappropriated the proceeds of the cotton. It found only that they were used by Mr. Hopkins, with Mr. Wardlaw's consent, for purposes other than the payment of the two specified partnership debts. This is not a finding of fact which would charge the deceased administrator with the sum of \$17,500 or any other amount.

The order is reversed, and inasmuch as it appears that no substantial showing could be made on a retrial that the cotton did not belong to the partnership, the trial court is directed to settle and allow the account as presented by the administrator of the estate of C. T. Wardlaw, deceased.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; NOURSE, Justice pro tem.



10 Cal.2d 307

**CARPENTER, Insurance Com'r, v. PACIFIC
MUT. LIFE INS. CO. OF CALIFORNIA
et al. (two cases).**

L. A. 16182, 16222.

Supreme Court of California.

Dec. 7, 1937.

Rehearing Denied Jan. 6, 1938.

1. Appeal and error ⇨544(1)

A policyholder taking an appeal on judgment roll from order affirming insurance commissioner's plan for rehabilitation of insolvent life, health and accident insurance company should have brought record before Supreme Court if he desired to discuss charges and insinuations which could be supported if at all, only by a reference to the evidence. St.1935, pp. 540-553, §§ 1010-1061.

2. Appeal and error ⇨714(5)

A policyholder appealing from order affirming insurance commissioner's plan for rehabilitation of insolvent life, health and accident insurance company should not have made charges and insinuations in his brief which could be supported, if at all, only by

a reference to the evidence, where appeal was taken on judgment roll. St.1935, pp. 540-553, §§ 1010-1061.

3. Appeal and error ⇨767(1)

An appellate court can strike from its files a brief or other document containing disrespectful, scandalous, or abusive language directed against courts, officials, or litigants, or it can take such other action as the circumstances may require.

4. Appeal and error ⇨767(1)

The Supreme Court would assume that experienced attorney presenting improper argument in his brief was mindful of significance of language used.

5. Appeal and error ⇨767(1)

A motion to strike brief containing intemperate and improper language was denied where several contentions made could only be properly considered by reference to brief and case was of public importance and widespread interest.

6. Insurance ⇨44

The insurance commissioner filing a petition to be appointed conservator and to be authorized to work out rehabilitation plan for insolvent life, health and accident insurance company instituted a proceeding which was but one proceeding until proposed plan was ultimately passed upon, and intervening orders were merely preliminary orders which could be considered on appeal from order affirming commissioner's rehabilitation plan. St.1935, pp. 540-553, §§ 1010-1061.

7. Appeal and error ⇨518(1)

The record on policyholders' appeal on judgment roll from order affirming insurance commissioner's plan for rehabilitation of insolvent life, health and accident insurance company started with commissioner's original petition to be appointed conservator and to be authorized to work out rehabilitation plan and not with petition ultimately resulting in order appealed from, so that orders preceding latter petition could be considered on appeal from order affirming plan. St.1935, pp. 540-553, §§ 1010-1061.

8. Judges ⇨42

A judge's ownership of life policy disqualifies judge from participating in or deciding any cause or proceeding to which insurance company is a party where such ownership gives judge an interest in funds of company.

9. Judges $\hookrightarrow$ 42

A judge owning life policy issued by insolvent life, health and accident insurance company was disqualified to hear insurance commissioner's rehabilitation proceeding against company, and orders issued by judge in such proceeding were void. St.1935, pp. 540-553, §§ 1010-1061.

10. Judges $\hookrightarrow$ 56

The invalidity of disqualified judge's orders in insurance commissioner's rehabilitation proceeding against insolvent life, health and accident insurance company did not invalidate commissioner's acts pursuant to such orders where his acts were subsequently ratified by valid orders of another judge. St.1935, pp. 540-553, §§ 1010-1061.

11. Insurance $\hookrightarrow$ 44

Under Insurance Code, insurance commissioner could take possession of assets of insolvent life, health and accident insurance company without prior court order, and hence the invalidity of disqualified judge's orders pursuant to which commissioner took possession of assets of company did not make commissioner's taking possession of assets unlawful. St.1935, p. 541, § 1013.

12. Appeal and error $\hookrightarrow$ 916(1)

On policyholders' appeal on judgment roll from order affirming insurance commissioner's plan for rehabilitation of insolvent life, health and accident insurance company, Supreme Court would assume truth of allegation in petition filed by commissioner as conservator for approval of rehabilitation and reinsurance agreement, that commissioner organized new company, after taking possession of assets of insolvent company, with a name similar to that of insolvent company, as a corporate agent to assist him in carrying on business of insolvent company. St. 1935, pp. 540-553, §§ 1010-1061.

13. Insurance $\hookrightarrow$ 44

The right of life, health and accident insurance company to do business in California and other states ceased when insurance commissioner took possession of company. St.1935, p. 541, § 1013.

14. Appeal and error $\hookrightarrow$ 931(1)

On policyholders' appeal on judgment roll from order affirming insurance commissioner's plan for rehabilitation of insolvent life, health and accident insurance company, Supreme Court would assume that trial court appointing commissioner conservator and approving his acts in connection with

formation of new company had thoroughly investigated and found that his acts were reasonably necessary. St.1935, pp. 540-553, §§ 1010-1061.

15. Appeal and error $\hookrightarrow$ 1071(1)

The statutory requirement of findings is mandatory, and failure to make them constitutes reversible error. Code Civ.Proc. §§ 632, 633.

16. Appeal and error $\hookrightarrow$ 931(1)

On judgment roll appeal, mere nonappearance of findings required by statute does not necessarily establish error. Code Civ. Proc. § 634.

17. Appeal and error $\hookrightarrow$ 901

Error is never presumed, but must be affirmatively shown.

18. Appeal and error $\hookrightarrow$ 931(9)

Where findings do not appear, and are required on judgment roll appeal, it will be conclusively presumed, in absence of proper record showing the contrary, in support of judgment, that such requirement was waived.

19. Appeal and error $\hookrightarrow$ 656(1)

The failure to authenticate or certify portion of record could not be cured by attorney's affidavit that such portion of record was copied from a certified copy of court reporter's transcript.

20. Appeal and error $\hookrightarrow$ 931(9)

On policyholders' appeal on judgment roll from order affirming insurance commissioner's plan for rehabilitation of insolvent life, health and accident insurance company, Supreme Court would conclusively presume in support of order that findings were waived where that portion of record purporting to show that findings were demanded and refused and exceptions noted could not be considered by Supreme Court. St.1935, pp. 540-553, §§ 1010-1061.

21. Trial $\hookrightarrow$ 388(2)

The insurance commissioner's proceeding for rehabilitation of insolvent life, health and accident insurance company was not a proceeding for enforcement or protection of a right, or for redress or prevention of a wrong, or for punishment of a public offense, and was not a controversy between private parties, but was a proceeding by state in interest of public, and hence under statutes was a "special proceeding" in which findings were not necessary in absence of

provision in Insurance Code under which proceeding was had requiring findings, so that order affirming commissioner's rehabilitation plan was not error, notwithstanding that order may not have been preceded by a finding of fact.—St.1935, pp. 540-553, §§ 1010-1061; Code Civ.Proc. §§ 22, 23, 632, 633.

[Ed. Note.—For other definitions of "Special Proceeding," see Words & Phrases.]

22. Trial ⇨388(1)

Findings are required and necessary only where a statute so provides.

23. Trial ⇨388(2)

Under statutes, findings are required, unless waived, in all civil actions. Code Civ. Proc. §§ 632, 633.

24. Trial ⇨388(2)

Findings are required in special proceeding only when a statute so requires, and are not required when statute dealing with such proceeding is silent as to requirement of findings.

25. Insurance ⇨44

The business of insurance is affected with a public interest, and the state has an important and vital interest in the liquidation or reorganization of such a business.

26. Insurance ⇨3

Neither insurance company nor policyholder has inviolate rights that characterize private contracts, but contract of policyholder is subject to reasonable exercise of state's police power.

27. Insurance ⇨3

The exercise of state's police power in respect to insurance contracts must be reasonably related to public interest and must not be arbitrary or improperly discriminatory.

28. Insurance ⇨44

The Insurance Code contemplates that when an insurance company is in financial difficulties the insurance commissioner would first be appointed by court as conservator with the duty to operate company and to try to remove the causes leading to its difficulties, and, if this could not be done, that commissioner would attempt to rehabilitate business of company as conservator or liquidator by entering into, with court approval, either reinsuring or rehabilitation agreements, and if this could not be done and further efforts would be futile, that liquidation

would be resorted to. St.1935, pp. 540-553, §§ 1010-1061.

29. Constitutional law ⇨154(3), 276

Under contract and due process clauses of Constitution, noncancellable accident and health policies issued by insurance company could not be changed by company. Const. art. 1, §§ 13, 16.

30. Constitutional law ⇨113, 251

The contract and due process clauses of Constitution do not apply to state acting under its police powers. Const. art. 1, §§ 13, 16.

31. Insurance ⇨44

The Insurance Code is clearly intended to preserve business of insolvent insurance company whenever possible. St.1935, pp. 540-553, §§ 1010-1061.

32. Insurance ⇨44

Under Insurance Code, a new insurance company may be organized for rehabilitation of insolvent insurance company. St.1935, pp. 540-553, §§ 1010-1061.

33. Insurance ⇨44

A rehabilitation plan providing for organization of new insurance company to which substantially all assets of insolvent life, health and accident insurance company would be transferred, and which would assume all policies and obligations of insolvent company to extent provided, and would reinsure policies of insolvent company, provided, as authorized by statute, for "reinsurance" of business of insolvent company. St.1935, p. 547, § 1043.

[Ed. Note.—For other definitions of "Reinsurance," see Words & Phrases.]

34. Insurance ⇨44

The term "reinsurance" in provisions in Insurance Code conferring right of reinsuring in event of liquidation of insurance company was not limited to its indemnification meaning of one company insuring risks of another company, which still remains liable on original risk, but included broader meaning of contract by which one company takes over insurance risks of another company and becomes substituted as insurer in the place of original insurer. St.1935, pp. 511, 547, §§ 620, 1043.

35. Novation ⇨1

A policyholder consenting to rehabilitation plan for insolvent life, health and accident insurance company by which new com-

pany reinsures policies of insolvent company enters into a "novation" with new company, and cannot thereafter complain that he has been treated unfairly. St.1935, p. 547, § 1043.

[Ed. Note.—For other definitions of "Novation," see Words & Phrases.]

36. Constitutional law ☞93(1)

A creditor or policyholder of insolvent life, health and accident insurance company has no vested right in liquidation or any property right, in constitutional sense, in any form of remedy, and all that the law requires as to a creditor or policyholder dissenting from rehabilitation plan is that he receive the liquidated value of his contract rights without unreasonable delay, and hence a dissenting policyholder cannot complain because insurance commissioner determines to rehabilitate and not to liquidate the insolvent company. St.1935, p. 547, § 1043.

37. Insurance ☞44

A policyholder dissenting from rehabilitation plan for insolvent life, health and accident insurance company is entitled only to the equivalent of what he would receive on liquidation. St.1935, p. 547, § 1043.

38. Appeal and error ☞907(3)

On policyholders' appeal on judgment roll from order affirming insurance commissioner's plan for rehabilitation of insolvent life, health and accident insurance company, Supreme Court would assume that evidence was introduced as to value of assets which were reserved for nonassenting policyholders and as to what such policyholders would have received in liquidation, and that such evidence demonstrated that dissenters would receive as much or more as they would have received on liquidation. St.1935, p. 547, § 1043.

39. Appeal and error ☞907(3)

On policyholders' appeal on judgment roll from order affirming insurance commissioner's plan for rehabilitation of insolvent life, health and accident insurance company, Supreme Court would assume that recital in order that adequate provision was made in plan for each class of policyholders was amply supported by evidence. St.1935, p. 547, § 1043.

40. Insurance ☞44

A plan for rehabilitation of insolvent life, health and accident insurance company providing that new company organized to take over assets of insolvent company would assume without change all obligations of in-

solvent company under all existing policies except noncancellable accident and health policies, as to which the new company would assume all obligations thereunder at old premium rates on a reduced benefit schedule and would restore further benefits from certain designated sources of income of new company, was not unlawfully discriminatory, where difference in treatment was necessary to preserve rights of both holders of non-cancellable accident and health policies and holders of other policies. St.1935, p. 547, § 1043.

41. Insurance ☞44

A plan for rehabilitation of insolvent life, health and accident insurance company providing for transfer of assets of insolvent company to new company organized to assume policies and obligations of insolvent company did not permit a fraudulent conveyance which was void under statutes, where transfer of assets occurred pursuant to statutory authority and order of court. Civ. Code, §§ 3439, 3442; St.1935, p. 547, § 1043.

42. Insurance ☞44

Under statutes, failure to appoint insurance commissioner liquidator before assets of insolvent life, health and accident insurance company were transferred, as provided in rehabilitation plan, to new company organized to assume policies and obligations of insolvent company, did not invalidate transfer, where commissioner had been appointed conservator. St.1935, pp. 541, 547, §§ 1016, 1043.

43. Appeal and error ☞907(3)

On appeal from order on judgment roll, all intendments are in support of order appealed from.

44. Appeal and error ☞907(3)

On policyholders' appeal on judgment roll from order approving insurance commissioner's plan for rehabilitation of insolvent life, health and accident insurance company providing for organization of new company whose stock was to be purchased with assets of insolvent company, Supreme Court would conclusively presume that permit from commissioner to himself as conservator for issuance of stock of new company, if required under Insurance Code, was secured. St. 1935, pp. 520-528, 547, §§ 820-860, 1043.

45. States ☞119

The state's "interest" in rehabilitating insolvent insurance companies is not a vested interest contemplated by constitutional

provision prohibiting state from being interested in stock of any company, association, or corporation. St.1935, pp. 547, 552, §§ 1043, 1057; Const. art. 12, § 13.

[Ed. Note.—For other definitions of "Interest," see Words & Phrases.]

46. States ⇨119

A plan for rehabilitation of insolvent life, health and accident insurance company providing for insurance commissioner's purchase of outstanding stock of new company organized to take over assets and obligations of insolvent company was not violative of constitutional provision prohibiting state from loaning its credit or subscribing to or being interested in stock of a corporation, notwithstanding that commissioner was a "state officer," where stock was purchased with assets of insolvent company and commissioner acted pursuant to statute with court approval. St.1935, pp. 547, 552, §§ 1043, 1057; Const. art. 12, § 13.

[Ed. Note.—For other definitions of "State Officer," see Words & Phrases.]

47. Insurance ⇨44

Whether use of word "mutual" in name of new company organized under rehabilitation plan to take over assets and obligations of insolvent life, health and accident insurance company was justified was question for court, notwithstanding that both new and insolvent companies were stock companies, where word had always been in insolvent company's name, and had been placed in new company's name by insurance commissioner to conserve value of old name, and plan provided for ultimate mutualization of new company on certain designated conditions. St.1935, p. 547, § 1043.

48. Appeal and error ⇨548(3)

On policyholders' appeal on judgment roll from order approving insurance commissioner's plan for rehabilitation of insolvent life, health and accident insurance company, Supreme Court would not determine relative merits of other rehabilitation plans submitted to trial court where evidence as to relative merits of various plans was not before Supreme Court. St.1935, pp. 540-553, §§ 1010-1061.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Rehabilitation proceeding by Samuel L. Carpenter, Jr., Insurance Commissioner of

the State of California, against the Pacific Mutual Life Insurance Company of California, wherein William H. Neblett, Vernon Bettin, William George Dickinson, Alfred F. MacDonald, and others, were represented. From an order affirming the plan of rehabilitation proposed by the Insurance Commissioner, William H. Neblett, Vernon Bettin, William George Dickinson, and Alfred F. MacDonald appeal.

Order affirmed.

Rehearing denied; SEAWELL, J., dissenting.

Alfred F. MacDonald, of Los Angeles, in pro. per.

William H. Neblett, of Los Angeles, in pro. per., and R. Dean Warner, LeRoy B. Lorenz, E. Walter Guthrie, and A. H. McCurdy, all of Los Angeles, for appellant and respondent William H. Neblett.

Bettin, Painter & Wait and Vernon Bettin, all of Los Angeles, in pro. per., for appellants and respondents Vernon Bettin and another.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., Shepard Mitchell, Mitchell, Silberberg, Roth & Knupp and Peery Price, all of Los Angeles, and Frank L. Guarena, of San Francisco, for respondent Samuel L. Carpenter, Jr., Insurance Com'r.

O'Melveny, Tuller & Myers and Overton, Lyman & Plumb, all of Los Angeles, for respondent Pacific Mut. Life Ins. Co. of California.

Hugh K. McKevitt, of San Francisco, for respondents Charles Ross Cooper and others.

Rupert B. Turnbull, of Los Angeles, for respondents Rupert B. Turnbull and others.

Manierre & Cuthbertson, of Los Angeles, for respondents George W. Manierre and others.

Kenyon F. Lee, of Los Angeles, for respondents E. B. Tilton and others.

H. S. Dottenheim, of Los Angeles, for respondents Marshall D. Hall and others.

Neil S. McCarthy, of Los Angeles, in pro. per. and for other respondents.

W. B. Etheridge, of Pasadena, for respondents Dr. Arthur B. Allen and others.

Delvy T. Walton, of Los Angeles, for respondents David Lynn Openshaw and others.

Albert E. Coger, of Los Angeles, for respondent Henry B. Senn.

Herbert E. Freston, of Los Angeles, in pro. per.

Jacob J. Lieberman and Aaron B. Rosenthal, both of Los Angeles, for respondents Robert J. Webb and others.

Lawler & Felix, of Los Angeles, for respondent R. Rabinowitz.

Roscoe R. Hess, of Los Angeles, in pro. per., and David R. Rubin, of Los Angeles, for respondent Roscoe R. Hess.

Chapman, Snider, Duke & Landis, of New York City, Hiram W. Johnson, Jr., of San Francisco, and Frank P. Doherty, of Los Angeles, for respondents G. C. Parsons and others.

Rex Hardy, of Los Angeles, for respondents Austin O. Martin and Rex Hardy.

Ivan Merrick, of Seattle, Wash., for respondent William A. Sullivan, Insurance Com'r of Washington.

Arthur E. White, of Los Angeles, in pro. per.

Oscar Lawler and Harold Judson, both of Los Angeles, for respondents George I. Cochran and others.

Shattuck, Davis & Story, of Los Angeles, for respondents William A. Beckett and others.

Paul Overton, of Los Angeles, for respondent Arthur D. Wunner.

Latham, Watkins & Bouchard, of Los Angeles, for respondents C. N. Wesley and others.

Bell, Boyd & Marshall, of Chicago, Ill., and Newlin & Ashburn, of Los Angeles, for respondents Wilbur G. Katz and others.

Carl C. Ktleman, of Los Angeles, in pro. per. and for other respondents.

Andrew J. Copp, Jr., of Los Angeles, in pro. per.

Garnet C. Rainey, of Los Angeles, for respondent Ralph C. Hamlin.

Chapman & Chapman, of Los Angeles, for respondents Rowe Sanderson and others.

Hahn & Hahn, of Pasadena, for respondents Robert Casamajor and others.

Ben S. Hunter, of Los Angeles, in pro. per.

M. W. Purcell, of Los Angeles, for respondents Clara M. Garunan and others.

John P. Oliver, in pro. per.

Loeb, Walker & Loeb, of Los Angeles, for respondents Harold S. Cook and others.

William M. Rains, of Los Angeles, for respondents Edwin Janss and others.

D. M. Ellison, of Baton Rouge, La., for respondent E. A. Conway, Secretary of State of Louisiana.

John N. Cramer and Cosgrove & O'Neil, all of Los Angeles, for respondents Carroll C. Day and others.

A. A. Carmichael, of Geneva, Ala., for respondents J. Parker Evans and others.

Asa V. Call, of Los Angeles, amicus curiae.

PER CURIAM.

The above numbered appeals have been taken by the four named appellants, policyholders of the Pacific Mutual Life Insurance Company of California, from an order of the superior court in and for the county of Los Angeles, affirming a plan of rehabilitation of that company proposed by the state insurance commissioner pursuant to the provisions of section 1043 of the Insurance Code. Stats.1935, c. 145, p. 547, Deering's 1935 Supp. to Codes, Laws and Const. Amendments, Act No. 3748, p. 878.

In appeal L. A. No. 16182, and solely in connection with appellant Neblett, a motion of respondents Day, Fabling, Gantz, Paschall, and Wetzel to strike the opening brief of appellant Neblett from the files has been submitted to be decided with the cause on its merits. The motion is made on the ground that the challenged brief contains disrespectful and impertinent language directed against two judges of the trial court, against the Attorney General and his deputies, and against the insurance commissioner. Neither the insurance commissioner nor his counsel has joined in this motion.

[1,2] Mr. Neblett is an attorney of long standing. In the court below he appeared by counsel, but on this appeal filed the challenged brief in propria persona. No useful purpose would be served in setting forth in detail the charges and objectionable matter found in the brief. The appeal is taken upon the judgment roll. None of the evidence introduced below is before us. Notwithstanding this fact appellant Neblett has made many charges and insinuations which could be supported, if at all, only by a reference to the evidence. While he contends that his charges are supported by the judgment roll, an examination of the record discloses that his contentions are not supported therein. If evidence was introduced below on these matters, and appellant Neblett desired to discuss them, he should have brought the record before us. This he has not done.

The reference thereto in the brief, under the circumstances, is unjustified. Moreover, many of the charges are couched in highly intemperate and improper language which under no circumstances of the case could be sanctioned.

[3-5] There can be no doubt of the power of an appellate court to strike from its files a brief or other document containing disrespectful, scandalous, or abusive language, directed against the courts, officials, or litigants, or to take such other action as the circumstances may require. In *re Estate of Randall*, 177 Cal. 363, 170 P. 835; *Gage v. Gunther*, 136 Cal. 338, 68 P. 710, 89 Am.St.Rep. 141; *San Diego Water Co. v. San Diego*, 117 Cal. 556, 49 P. 582; *Sears v. Starbird*, 75 Cal. 91, 16 P. 531, 7 Am.St.Rep. 123. The experience of Attorney Neblett has been such that it must be assumed that in presenting the improper argument to this court he was mindful of the significance of the language used. In view of the widespread interest in, and the public importance of these causes, and in view of the fact that several of the contentions made can only be properly considered by a reference to the challenged brief, we think the ends of justice would best be served by denying the motion to strike.

As already stated, the appeals are upon the judgment roll. That record consists of over 1,450 printed pages. In order to understand the contentions of the parties it is necessary to briefly summarize, chronologically, the contents of the judgment roll.

On July 22, 1936, there was filed in the court below by Samuel L. Carpenter, Jr., as insurance commissioner of the state of California, a petition entitled, "Application for Order Appointing Conservator." The petition recites that the Pacific Mutual Life Insurance Company of California is a California corporation engaged in the business of life, health and accident insurance in this and other states; that the commissioner, pursuant to his statutory duty, together with a number of insurance commissioners from other states, has made a convention examination of the business of the named insurance company as of December 31, 1935, a copy of the report being annexed to the petition; that such examination disclosed that the company's affairs are such that its further transaction of business would be hazardous to its policyholders, its creditors, and to the public; that the company is insolvent within the meaning of that term as defined in the Insurance Code

(St.1935, p. 496); that the hazardous and insolvent condition is principally caused by reason of the fact that for many years the company has issued a large number of non-cancellable accident and health policies (hereafter referred to as non-can policies) at a rate inadequate to maintain the lawful reserves behind such policies; that it is necessary that the commissioner be authorized to immediately take possession of all the assets of the company for the purpose of conserving them in the interest of all the policyholders, creditors and stockholders and the public in general; that it is necessary that the commissioner be appointed conservator and that certain described restraining orders permitted by the Insurance Code be issued. It is further alleged that the insurance company has assets in excess of \$200,000,000 and has obligations on policies issued in excess of \$600,000,000, insuring the lives and health of policyholders in excess of 200,000 persons; that in addition the company has outstanding in excess of 75,000 accident and health policies; that because of the magnitude of the business it is proper as a matter of public policy that petitioner be authorized and directed to work out a rehabilitation and reinsurance plan to protect the interest of all. The attached report of the convention examination discloses that as of December 31, 1935, there was a deficiency of approximately \$23,000,000 in the reserves behind the non-can policies, but that as to its life and other policies the company was in a sound position. The report likewise discloses that the difficulties of the company were largely caused by the sale of non-can policies at an inadequate premium rate.

On the same date the insurance company filed its appearance and consent that the cause might be immediately presented and tried, and likewise consenting to the relief prayed for by the commissioner. The matter was thereafter presented to Judge Edmonds, then judge of the Los Angeles county superior court, and on July 22, 1936, he issued an order appointing Carpenter conservator of the company and granting the other relief prayed for in the petition.

Immediately thereafter, and on the same day, Carpenter filed an "Application for Order to Liquidate," reciting his appointment as conservator; that the company is insolvent; that further efforts to proceed as conservator would be futile; that the best interests of all concerned would best be served by appointing him liquidator; that

in order to preserve the valuable intangible assets of the company, such as its good will and its agency organization, it is necessary that a rehabilitation and reinsurance plan be worked out. The commissioner prayed that he be appointed liquidator; that his title as conservator be confirmed; that he be authorized and directed to work out a rehabilitation and reinsurance plan; and that certain restraining orders be issued. The company having filed its consent to the making of the order, Judge Edmonds, on July 22, 1936, granted the petition appointing Carpenter liquidator and granting the other relief prayed for substantially in accordance with the prayer of the petition.

Immediately thereafter, and on the same day, there was filed by the commissioner a "Petition for Order Permitting, Approving, and Authorizing Rehabilitation, Sale and Transfer of Assets, and Reinsurance Plan and Agreement of the Pacific Mutual Life Insurance Company of California." The petition recites the steps already taken, and that, pursuant to the prior orders, the commissioner has worked out a rehabilitation and reinsurance plan, a copy of which is attached, and prays for its approval. The proposed plan (which as slightly modified is the plan the approval of which is challenged on these appeals) so far as now pertinent, provided for the organization by the insurance commissioner of a new corporation to be known as the Pacific Mutual Life Insurance Company with a capital of \$1,000,000 consisting of 10,000 shares of the par value of \$100 each; for the commissioner to purchase all of the outstanding stock of this new company with assets of the old company for \$3,000,000; for petitioner to transfer to the new company substantially all of the other assets of the old company, excepting the stock of the new company; and for the new company to agree by contract to assume all the policies and obligations of the old company to the extent provided in the agreement. Under this proposed contract the new company was to agree to reinsure all life policies on exactly the same terms as such policies had been issued by the old company. Any life policyholder not assenting to the plan was to file a claim with the commissioner as liquidator of the old company, all allowed claims to be paid by the new company as limited in the agreement. As to non-can policyholders, the new company was to agree to assume and to reinsure their policies at existing premium rates, but dis-

ability payments on such policies were to be assumed on a basis of from 20 per cent. to 90 per cent. of the face of such policies, depending upon the year of issue. Certain provisions were incorporated in the proposed agreement for future increased benefits to be paid to consenting non-can policyholders from certain profits of the new company. Nonconsenting non-can policyholders were to file claims with the commissioner as liquidator of the old company, all allowed claims to be assumed by the new company as provided in the agreement. The petition for the approval of this proposed plan of rehabilitation alleged that if it were approved the business formerly carried on by the old company could continue without interruption and the intangible assets such as good will and agency organization would, so far as possible, be preserved.

On July 22, 1936, after notice to the old company and the filing of its consent, and after finding that the plan was fair and equitable to all concerned, Judge Edmonds made an order permitting and approving the proposed plan and authorizing the execution of the proposed agreement and the transfer of the assets as therein provided.

On July 23, 1936, the commissioner petitioned for approval of an amendment to the rehabilitation plan, the court's jurisdiction having been retained in the order of July 22d. The amendment was approved and authorized by order of Judge Edmonds made and entered the same day.

On July 23, 1936, the new company filed a "Petition for Intervention and for Order to Show Cause." The petition recited the proceedings already taken, and the fact that pursuant to order of court the new company had been organized and the rehabilitation agreement executed. The new company petitioned for leave to intervene for the purpose of having its title to the assets of the old company and all the other steps already taken confirmed upon hearing of an order to show cause to all interested. On the day this petition was filed, Judge Edmonds granted the petition to intervene and ordered all interested to show cause on a day certain why all actions already taken by the court or by Carpenter pursuant to the prior orders should not be ratified, confirmed, and approved.

Shortly after July 23d, various persons—stockholders, policyholders, or directors of the old company—in response to the order to show cause, filed complaints in interven-

tion. All requested that the prior orders be set aside, attacked the provisions of the Insurance Code under which the orders had been made as unconstitutional, and attacked the rehabilitation plan as being unfair, discriminatory, and illegal.

On August 11, 1936, Judge Willis, judge of the superior court of Los Angeles county, made an "Order Appointing Conservator and Restraining Order." It is therein recited that on July 22d a petition of Carpenter to be appointed conservator was filed and granted by Judge Edmonds; that since that date Judge Edmonds had advised the court that he is the holder of a life policy in the old company in sum of \$5,000; that because of the doubt as to Judge Edmonds' qualifications because of the ownership of such policy it appears advisable to the court that it should rehear and reconsider the petition. The court thereupon decreed that the order of July 22d of Judge Edmonds appointing Carpenter conservator be "ratified, approved and confirmed; and that said order and said restraining order be and they are now hereby adopted and continued in force." In addition, however, the court ordered that Carpenter "be and he is hereby appointed conservator of said respondent corporation, its business, assets, and affairs, and that said commissioner be and he is hereby ordered to take possession forthwith of all the books, records, property, real and personal, and assets, wheresoever situated of said respondent corporation, and to conduct, manage, transact and operate the business and affairs of respondent as a going insurance business, and to do any and all things which the petitioner may deem necessary and appropriate for that purpose." The court also ordered Carpenter as conservator to work out a rehabilitation and reinsurance plan, and issued the requested restraining orders. The court concluded its order with the statement that the making of this new order did not constitute a revocation of the orders made by Judge Edmonds nor a ruling with respect to his qualifications. It is to be noted that by this order of August 11th, Judge Willis not only purported to confirm and ratify the prior order of Judge Edmonds, but also made his own order appointing Carpenter conservator of the old company.

On August 13th, Carpenter, as conservator, petitioned to be appointed liquidator, which petition, so far as the record here presented is concerned, never has been acted upon. On August 14th, Carpenter

filed a "Petition with Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement," in which, after reciting the prior steps taken and the doubt in reference to the validity of the orders made by Judge Edmonds, Carpenter asks for confirmation of his prior acts, and authorization to proceed. Apparently no further steps were taken in reference to this petition.

Thereafter the commissioner and the new company filed answers to the many pleadings filed by interveners and others. Between August 14th and August 29th, many other parties and groups of parties responded to the order to show cause and filed objections to the confirmation of the plan. On August 29th, the trial court through Judge Willis made and entered its order granting the petition of the new company to intervene as of the date of the filing of its petition, July 23, 1936, and adopting and ratifying the Edmonds' order to show cause. Thereafter many other parties appeared and filed pleadings objecting to the plan of rehabilitation.

We now come to the start of the specific proceedings ultimately resulting in the specific order here sought to be reversed. On September 25, 1936, Carpenter as conservator filed a "Petition for Approval of Rehabilitation and Reinsurance Agreement." By this petition the commissioner, pursuant to the orders of Judge Willis of August 11th, sought approval of the rehabilitation plan worked out by him. The petition recites substantially the same facts already reviewed in connection with the similar petition filed on July 22, 1936. It is further recited that pursuant to court order Carpenter as conservator has taken possession of the business and assets of the old company, and has carried on the business of the old company; that it is in the interests of all concerned to preserve the good will, the agency organization, and the going concern value of the old company; that in order to accomplish these ends the commissioner organized the new company and on July 22, 1936, purchased all its stock with \$3,000,000 of old company funds, and on the same date transferred to the new company all the other assets of the old company except the stock of the new company and certain described claims; that "since said July 22, 1936, your petitioner, as conservator, and through the agency and instrumentality of the new company, has continued to carry on and conduct the business and affairs of the old company,

and to preserve, so far as possible, its good will, going concern value, and agency organization." The petitioner also recites that as conservator he has given diligent study and attention to the problem of determining what steps would best serve the interests of all concerned; that he has invited the presentation of plans and offers; that he has carefully examined and considered all plans and suggestions submitted to him for the rehabilitation of the old company, or the reinsurance of its business; that "in the opinion of your petitioner no plan of rehabilitation or offer of reinsurance has been presented which affords to the policyholders of the old company the measure and the opportunity of protection provided by that contained in the proposed Rehabilitation and Reinsurance Agreement * * * under which your petitioner proposes to rehabilitate the old company * * *

Your petitioner accordingly submits said proposed agreement, and asks approval thereof." Petitioner asks for an order directing all interested to show cause why the proposed agreement should not be approved, and why all the prior acts of the commissioner should not be ratified, confirmed, and approved. On the day this petition was filed, the court, per Willis, judge, issued its order to show cause, returnable October 19, 1936. The order prescribed in detail the nature of the notice of the hearing required to be given. Pursuant thereto, notice, in a form prescribed by the court, was posted in three designated public places in Los Angeles; published on ten consecutive days in certain prescribed newspapers in Los Angeles, San Francisco, and Sacramento; mailed to the insurance commissioner of every state in which the old company did business; and mailed to every policyholder and stockholder of the old company.

On October 8, 1936, Judge Willis issued an order amending, nunc pro tunc, the orders of July 22d and August 11th, appointing the conservator. The amended order stated more fully the facts before the court at the time the original orders were made.

The hearing on the order to show cause of September 25th, started October 19th and proceeded continuously to December 4, 1936. At that hearing many persons representing various interests were represented. During the hearing, and prior thereto, various persons and groups proposed plans of rehabilitation different from that proposed by the commissioner. One

such plan was proposed by L. M. Giannini, who suggested the liquidation of the old company through a sale of the assets and business to him. This plan was indorsed by the insurance commissioner of the state of Washington, by two large groups of policyholders, and by various individual policyholders. Appellant Neblett suggested a plan, as did intervenor Hess and others. At the hearing full opportunity was given to all who appeared to submit evidence and argue their contentions. On December 4, 1936, Judge Willis made an order approving the plan of rehabilitation proposed by the commissioner. The order recites that this plan makes adequate provision for each class of policyholders, the creditors, and stockholders of the old company; that this plan is fair and equitable; that the plan does not discriminate unfairly or illegally in favor of any class of policyholders; that the intangible assets of the old company were worth "several million dollars"; that the approved plan is designed to preserve and conserve these intangible assets; and that if the old company were dissolved and its assets sold such assets would be of substantially less value than if sold as a part of a going concern. The court not only approved the commissioner's plan, but also ratified, confirmed, and approved all prior steps taken by him. It is from this order of December 4th that these appeals are presented. In the court below several hundred policyholders appeared in person or by counsel. Of this large number, only four have appealed. In L. A. No. 16182, the three appellants are Neblett, Bettin, and Dickinson, while in L. A. No. 16222, on the same record, the appellant is MacDonald. Appellant Neblett is the owner of a life policy in the old company, the other three appellants being owners of non-can policies in that company.

The plan approved by the trial court on December 4, 1936, is an extremely detailed plan, only the essential features of which need be referred to in this opinion. Some of its features have already been mentioned. The new company had already been organized by the commissioner as his corporate agent with a capital of \$3,000,000 provided from the assets of the old company, all the new company's stock being held by the commissioner as conservator of the old company. As already mentioned the approved plan provided for the transfer to the new company of all of the assets of the old company with the

exception of the new company's stock and certain described claims. The new company agrees to assume without change all of the obligations of the old company under all existing policies, except non-can policies. As to these last-named policies, the new company agrees to assume all obligations thereunder at old premium rates on a reduced benefit schedule, and agrees to restore further benefits and possibly full benefits to such policyholders from certain designated sources of income of the new company. The proposal contemplates that in due course the commissioner will be appointed liquidator of the old company, and in that capacity will receive, liquidate, and pay all claims against the old company from the old company's assets not transferred to the new company (including the new company's stock), and from certain moneys furnished to the liquidator by the new company as provided in the agreement. The plan does not require that old company policyholders are compelled to accept the offer of the new company to assume the old company's policies. Each policyholder is given a reasonable time to elect whether to accept or reject the offer. A dissenting policyholder is required to file a claim for damages with the liquidator of the old company and the new company agrees to pay such allowed claims in the manner and to the extent as provided in the agreement. The plan also provides that the commissioner, either as conservator or liquidator, shall continue to hold all the stock of the new company as a protection to all old company policyholders. Ultimate mutualization, in the event the policyholders so elect, is also provided for. The trial court reserves jurisdiction over the entire proceeding.

That in substance is the plan approved by the lower court.

Before considering the contentions of the parties in reference to the legality of the approved plan, it is first necessary to pass upon certain preliminary contentions.

[6,7] Respondents point out that the appeals are all from the order of December 4th and contend that the proper appeal record consists only of those pleadings and orders filed on and since September 25th, the date of the filing of the petition ultimately resulting in the order appealed from. It is apparently the contention of respondents that the filing of the September 25th petition constituted the institution of a

new proceeding separate and apart from any steps theretofore taken, and that, if appellants desired prior orders reviewed, separate appeals should have been taken therefrom. With these contentions, we do not agree. It is true that on these appeals we are solely concerned with the validity of the order of December 4th. But it is also true that when the commissioner files a petition to be appointed conservator and asks authority to work out a rehabilitation plan, he has instituted a proceeding which is but one proceeding until the proposed plan is ultimately passed upon. The intervening orders are merely preliminary orders. Any other construction of the provisions of the Insurance Code would result in interminable delays in any proceeding thereunder, and would defeat the obvious purpose of the Legislature in adopting the provisions of that Code here involved. We agree with appellants that the judgment roll, and therefore the proper appeal record, starts with the petitions and orders of July 22, 1936.

[8-14] We also agree with appellants that all of the orders made by Judge Edmonds, including the order appointing Carpenter conservator on July 22, 1936, were void by reason of his disqualification. It is well settled that the ownership of a life insurance policy, when such ownership gives the judge an interest in the funds of the insurance company, disqualifies such judge from participating in or deciding any cause or proceeding to which the insurance company is a party. *New York Life Ins. Co. v. Sides*, 46 Tex. Civ.App. 246, 101 S.W. 1163; *Woodmen of the World v. Alford*, 206 Ala. 18, 89 So. 528; *Sovereign Camp, Woodmen of the World, v. Hale*, 56 Tex.Civ.App. 447, 120 S.W. 539. The rule of these cases applies with particular force to the instant case. Here the petitions filed on July 22d disclosed on their face that the commissioner was seeking a special form of liquidation of the insurance company, and that in such proceeding there was involved a conflict of interest between life policyholders and non-can policyholders. We can see no material legal difference between ownership of a policy entitling the recipient to dividends, and ownership of stock in a corporation. Ownership of stock, according to the overwhelming weight of authority, disqualifies the judge. 48 A.L.R. 617. We are not without authority in this state.

Adams v. Minor, 121 Cal. 372, 53 P. 815; Hall v. Superior Court, 198 Cal. 373, 245 P. 814; City of Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1084, 48 A.L.R. 610. All three of these cases were decided before subdivision 2 of section 170 was added to the Code of Civil Procedure (now amended by St.1933, p. 1828) expressly making stock ownership a ground of disqualification, and were decided under the general "interest" provisions of that section. It therefore follows that, by reason of his ownership of the life policy in the old company, all orders made by Judge Edmonds were void. This holding, however, contrary to the contention of appellants, in no way affects the validity of any of the subsequent proceedings. The validity of the subsequent proceedings is not dependent on the validity of any order made by Judge Edmonds. The subsequent proceedings before Judge Willis stand by themselves independently of the prior orders. In fact, the holding that all of the orders made by Judge Edmonds were void, does not even constitute a holding that the taking possession of the assets of the old company by Carpenter on July 22d, without a prior valid court order, was unlawful. Not only were all the acts performed by Carpenter, including the taking possession of the assets of the old company, and the organization of the new company, after a full hearing ratified, confirmed, and approved by the valid orders of August 11th and of December 4th, but also the Insurance Code confers the right on the commissioner to take possession of the assets of an insolvent insurance company without a prior court order. Section 1013 of that Code (St. 1935, p. 541) confers on the commissioner, whenever it shall appear to him that any insurance company is in such condition that its further transaction of business will be hazardous to its policyholders or creditors, the power to take summary possession "without notice and before applying to the court for any order." Similar provisions for summary seizure exist in the Bank Act (St.1909, p. 87, as amended) and Building and Loan Act (St.1931, p. 483, as amended). These sections have uniformly been sustained against the claim of illegal seizure. State Savings, etc., Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675; North American Building, etc., Ass'n v. Richardson, 6 Cal.2d 90, 56 P.2d 1221. The petition for appointment as conservator, containing

proper allegations, was filed July 22d. On that date, Carpenter took possession of the assets of the company. This he could lawfully do without court order. He thereupon organized a new company with a name similar to that of the old company as a corporate agent to assist him in carrying on the business of the old company. This is alleged in the petition of September 25th, and we must assume that such allegation was supported by evidence. That Carpenter acted advisedly in forming the new corporation is amply demonstrated, when the nature of the problem facing him is considered. He was in possession of the assets and business of a company that was doing business not only in California, but also in many other states. These assets totalled over \$200,000,000. The company was technically insolvent as that term is defined in the Insurance Code, but by no means bankrupt. The old company possessed an agency organization, good will, and a going concern value which the court holds was worth several millions of dollars. The moment Carpenter took possession of the company its right to do business in this and other states ceased. Obviously if this cessation of business continued for any appreciable period the intangible assets already mentioned would have been irreparably lost to the injury of all concerned. It was obvious to him that these assets could be salvaged if the business of the old company could be continued during the rehabilitation period. Faced with this emergency, he formed the new company and purchased all of its stock with assets of the old company, to carry on such business during that period. He did this after first filing a petition setting forth in full the reasons for his proposed action. It is true that he also secured an order of court approving such proposed action, and it is also true that such approval was unavailing, the order being void. But as soon as the fact that the order was void was discovered, on August 11th, he secured a new order appointing him conservator, and approving everything he had done in connection with the formation of the new company. We must assume that the court below thoroughly investigated this phase of the situation, and found the acts were reasonably necessary. We find no irregularity or illegality in this phase of the transaction.

[15] Turning now, directly, to a consideration of the validity of the order

of December 4th, it is appellants' main contention that such order must be reversed for the reason that the judgment roll discloses that it was not preceded by findings of fact and conclusions of law. It is the theory of appellants that the proceeding here involved is an ordinary civil action and therefore governed by the provisions of sections 632 and 633 of the Code of Civil Procedure. Predicated on this basic premise, appellants rely on the rule that the requirement of findings in these sections is mandatory, and that failure to make them constitutes prejudicial and reversible error. This is undoubtedly the law, if such findings are necessary and have not been waived. In *re Estate of Pendell*, 216 Cal. 384, 14 P.2d 506; *Williams v. Wren*, 88 Cal.App. 607, 263 P. 1038; *Frascona v. Los Angeles Ry. Corporation*, 48 Cal.App. 135, 191 P. 968.

[16-18] Assuming that findings were required in the present proceedings, a point later to be discussed, and assuming without deciding that the many recitals in the order are not sufficient to constitute findings (but see *In re Petition of Los Angeles Trust Company*, 158 Cal. 603, 112 P. 56), we are nevertheless of the opinion that appellants have not presented a proper case where the rule above discussed is applicable. These appeals have been taken on the judgment roll. The properly authenticated record does not disclose that findings were not waived. From an early date it has been held in this state that on a judgment roll appeal the mere nonappearance of findings where required by statute does not necessarily establish error. The statutes requiring findings recognize that this requirement may be waived. See section 634, Code Civ.Proc. Error is never presumed, but must be affirmatively shown. Where findings do not appear, and are required on a judgment roll appeal it will be conclusively presumed, in the absence of a proper record showing the contrary, in support of the judgment, that such requirement was waived. *Mulcahy v. Glazier*, 51 Cal. 626; *Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 92 P. 70, 125 Am.St.Rep. 47.

[19, 20] Appellants, while recognizing the existence of this rule, contend that the record discloses that findings were demanded and refused, and exceptions noted. To support this contention they refer to a purported colloquy between cer-

tain counsel appearing below and the trial judge following the oral opinion of the trial judge. The purported oral opinion and conversation are printed at the end of the last volume of the transcript. An examination of the transcript discloses that the comments referred to are not properly made part of the appeal record. The purported comments are not certified, appearing in the transcript after the formal certification by the clerk. This portion of the purported record is not authenticated nor certified in any way. Appellants seek to remedy this defect by the affidavit of the attorney appearing for appellant Neblett in the court below, attached to appellants' reply brief, to the effect that the trial court's opinion and conversation were copied from a certified copy of the court reporter's transcript. Obviously the defect in the record cannot be cured in that fashion. Assuming that the portion of the purported transcript referred to is capable of the interpretation that the trial court refused to make findings, and that appellants did not waive them, this court cannot properly consider that portion of the purported record. It therefore follows that it must be conclusively presumed in support of the judgment, that findings were waived.

[21-24] Another complete answer to the present contention is that the proceeding here involved is a special proceeding in which findings are not required. Section 22 of the Code of Civil Procedure defines an "action" as "an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Section 23 provides that "every other remedy is a special proceeding." Under these definitions the proceedings here involved are obviously special proceedings. The commissioner was not prosecuting an action "for the enforcement or protection of a right," or for the "redress or prevention of a wrong," or for the "punishment of a public offense." The proceeding was had under sections 1010 to 1061 of the Insurance Code (St.1935, pp. 540-553) which specially deal with the rehabilitation and liquidation of insurance companies. Those sections set up a comprehensive statutory scheme to accomplish those results. The proceeding is not one in which another party is prosecuting another

party at all. It is simply a proceeding in which the state is invoking its power over a corporate entity permitted by the state to engage in a business vitally affected with the public interest upon condition of continuing compliance with the requirements provided by the state. It is not a controversy between private parties but a proceeding by the state in the interest of the public.

Once it is determined that the proceeding is a special proceeding, it follows that, since the provisions of the Insurance Code in question do not require findings, none are required by sections 632 and 633 of the Code of Civil Procedure. Findings are required and necessary only where a statute so provides. *Matter of Danford*, 157 Cal. 425, 108 P. 322. Sections 632 and 633 of the Code of Civil Procedure are found in part 2 of that Code which deals with "Civil Actions." By virtue of those sections findings are required, unless waived, in all civil actions. But those sections have no application to special proceedings, some of which are covered in part 3 of the Code (section 1063 et seq.). As to special proceedings, findings are only required when the statute so requires. As to many special proceedings findings are required either by direct provision, or indirectly, by reason of the statutes dealing therewith incorporating that portion of part 2 of the Code that includes sections 632 and 633. Thus, to give but one example, findings are required in probate proceedings by virtue of section 1230 of the Probate Code, formerly sections 1716 and 1717 of the Code of Civil Procedure. However, when the statute dealing with a particular special proceeding is silent as to the requirement of findings, none is required. Thus in a proceeding for change of name findings are not required. In *re* *Petition of Los Angeles Trust Co.*, 158 Cal. 603, 112 P. 56. One of the leading cases is *Matter of Danford*, 157 Cal. 425, 108 P. 322, where it was held that, since the sections of the Code of Civil Procedure dealing with the procedure to be followed in disbarment proceedings did not directly or indirectly provide for findings, none were required. A reading of the provisions of the Insurance Code here involved demonstrates that there is neither a direct requirement of findings nor are sections 632 and 633 of the Code of Civil Procedure incorporated by reference. It therefore

follows that in the present special proceeding findings are not required.

As already stated, the proceedings here under review were taken under sections 1010 to 1061 of the Insurance Code, adopted in 1935. While many of the provisions of that Code were merely reenactments of existing law, several of the provisions contained therein in reference to the rehabilitation of insolvent insurance companies were new sections in this state, having been copied, substantially from similar provisions in the New York Insurance Law ([*Consol.Laws*, c. 28] § 400 et seq.). *Cahill's Consol.Laws of New York 1931-1935 Supp.* c. 30, p. 320. In the court below many of those attacking the commissioner's plan, including several of the appellants, contended that the provisions of the Insurance Code dealing with rehabilitation of insolvent insurance companies were unconstitutional in that they violated the due process, equal protection of the law, and the contract clauses of the Federal Constitution. On the oral argument appellant Neblett conceded, for himself at least, that the provisions in the Code are valid and constitutional, but contended, as do several of the other appellants, that the plan and procedure approved by the court below are violative of the Federal Constitution. The two phases of the problem are interrelated, and will be considered together.

[25-28] It seems to be the view of several of the appellants that, if the Insurance Code permits the reorganizing of an insolvent company by the organizing of a new company, instead of requiring outright liquidation, the sections are invalid. It is also argued that the approved plan is invalid in that it unfairly and unlawfully discriminates between life policyholders and non-can policyholders. These contentions are without merit. It is no longer open to question that the business of insurance is affected with a public interest. The state has an important and vital interest in the liquidation or reorganization of such a business. *Mitchell v. Taylor*, 3 Cal.2d 217, 43 P.2d 803; *German Alliance Ins. Co. v. Lewis*, Kansas Ins. Supt., 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189. Neither the company nor a policyholder has the inviolate rights that characterize private contracts. The contract of the policyholder is subject to the reasonable

exercise of the state's police power. The only restriction on the exercise of this power is that the state's action shall be reasonably related to the public interest and shall not be arbitrary or improperly discriminatory. Section 1010 et seq. of the Insurance Code (St.1935, p. 540 et seq.) deal with rehabilitation and liquidation of insurance companies in financial difficulties, and with the reinsurance of their business. This phase of state control is extremely important. Insurance is a public asset, a basis of credit, and a vital factor in business activity. Obviously, if an insurance company gets into financial difficulties, something must be done to remedy the situation. Either the company must be liquidated, and its assets distributed to its creditors, thus immeasurably injuring many of its policyholders who are thus deprived of insurance protection, or the business must, if possible, be rehabilitated. The public has a grave and important interest in preserving the business if that is possible. Liquidation is the last resort. *National Surety Corporation v. Nantz*, 262 Ky. 413, 90 S.W.2d 385; *In re Globe & Rutgers Fire Ins. Co.*, 148 Misc. 497, 266 N.Y.S. 29; *In re Bond & Mortgage Guarantee Co.*, 157 Misc. 240, 283 N.Y.S. 623. The provisions of the California Insurance Code recognize the public interest involved and provide for rehabilitation of such companies, if possible. Section 1011 (page 540) provides for the filing by the commissioner of a petition for appointment as conservator whenever, among other things, it is disclosed after examination that the company is in such a condition that its further transaction of business would be hazardous to its policyholders, or creditors, or to the public; that when the commissioner files a verified petition, as was done here, together with a copy of the last report of examination showing the company is insolvent, the trial court shall issue its order vesting the commissioner with title to all the assets of the company and directing the commissioner as such conservator to conduct the business. Section 1012 (page 541) provides that the order above mentioned shall remain in force until it shall appear to the court that the company can properly resume the conduct of its business. Section 1013 (page 541), already discussed, gives the commissioner power of summary seizure without notice or prior court order. Section 1015 (page 541) requires the commissioner immedi-

ately after a summary seizure to institute proceedings under section 1011. Section 1016 (page 541) provides that if, after his appointment as conservator, it shall appear to the commissioner that further efforts to proceed under section 1011 "would be futile" he may apply for an order to liquidate the company. Section 1020 (page 542) confers on the court power to issue certain restraining orders in connection with granting orders under sections 1011 or 1016. The sections immediately following provide for the procedure to be followed in handling and disposing of claims in the liquidation proceedings. Section 1035 (page 545) confers on the commissioner power to employ special deputy commissioners, clerks, and assistants "and to give to each of them such power as may by him be deemed necessary." Section 1037 (page 545) defines the wide powers conferred on the commissioner as conservator or liquidator. Section 1043 (page 547) confers on the commissioner either "as conservator or as liquidator," subject to the approval of the court, the power to "mutualize or re-insure the business," of the company or to "enter into rehabilitation agreements." Section 1057 (page 552) makes the commissioner in all proceedings, under the provisions of the Code, the trustee for the benefit of all creditors and other interested parties.

Under the statutory plan thus embodied in the Insurance Code, the state, acting under and within its police power, has provided that the commissioner, when an insurance company is in financial difficulties, shall first be appointed by the court as conservator. As such, it is his duty to operate the company and to try to remove the causes leading to its difficulties. If this cannot be done, then he must attempt to rehabilitate the business of the company as conservator or liquidator, by entering into, with court approval, either reinsuring or rehabilitation agreements. Only if this cannot be done and further efforts "would be futile" should liquidation be resorted to.

[29, 30] In the present case the merits of the legislative policy of rehabilitation if possible instead of liquidation is well illustrated. The old company has been doing business in California since 1868. At the time the commissioner petitioned to be appointed conservator the old company was doing business in 43 states and in the Dis-

trict of Columbia. As of December 31, 1935, it had life insurance in force of over \$600,000,000. It had about 300,000 policyholders. Its assets were in excess of \$200,000,000. Its life insurance business was on a sound basis and very profitable. Its difficulties were caused almost entirely by reason of inadequate reserves behind its non-can policies, which was caused by inadequate premium rates based on actuarial under calculations. The convention examination disclosed that the old company was fundamentally sound, and that all its reserves were unimpaired, except those pertaining to the non-can policies, as to which there was a deficiency of approximately \$23,000,000. The company had intangible assets consisting of good will, going concern value, and an extensive agency organization worth several millions of dollars. All these intangible assets would be lost if the old company were liquidated. The old company was powerless to change the existing non-can policies. The contract and due process clauses prohibited the company from making any changes therein. Const. art. 1, §§ 13, 16. But these prohibitions do not apply to the state acting under its police powers. Obviously, if the agency organization were to be preserved pending court approval of a rehabilitation plan, the business of the old company had to be continued. Faced with these facts the commissioner determined to organize a new company to continue the business pending the approval of a rehabilitation plan. All these steps, after a full hearing, were later approved by the court. Under the rehabilitation agreement, approved by the trial court, the new company takes over substantially all of the assets of the old company, with the exception of the new company's stock, assumes as to consenting policyholders all policies of the old company, reduced as to non-can policyholders as provided in the agreement, and assumes, as therein provided, the liabilities of the old company.

This method of rehabilitation by the formation of a new company is obviously contemplated by the Insurance Code. A similar plan for the rehabilitation of National Surety Company has been sustained by various courts in a similar proceeding under the New York law upon which the California law is modeled. The superintendent of insurance of New York found the National Surety Company, a New York corporation, to be insolvent. That company, like the old company here, was engaged in a nation-wide business of great magnitude, and the com-

pany had a good will of great value. As statutory rehabilitator he proposed a plan, approved by the court, to conserve the assets by organizing a new company—the National Surety Corporation—with a capital of \$1,000,000 and a surplus of \$3,000,000 paid in from the assets of the old company in exchange for all of the stock of the new company, which was to be held by the commissioner for the protection of all concerned. The new company was to assume a portion of the liabilities of the old, and the new company was to receive all the liquid and most desirable assets of the old. A second corporation was organized to liquidate certain mortgage securities of the old company out of certain assets transferred to it. A third corporation was organized to receive certain frozen assets of the old company, and to pay therefrom certain obligations not assumed by the other two new corporations. The plan was attacked on the ground it was beyond the power of the commissioner and was unconstitutionally discriminatory. Among other things it was held that the Legislature had the power to permit rehabilitation instead of liquidation and that in working out a plan of rehabilitation a new corporation could be formed to receive the assets of the old in order to save the profitable business and good will of the old company. The New York court upheld the plan against several objections here made by appellants. Application of *People by Van Schaick*, 239 App.Div. 490, 268 N.Y. S. 88. The New York Court of Appeals in *People by Van Schaick, v. National Surety Co.*, 264 N.Y. 473, 191 N.E. 521, affirmed the Supreme Court, Appellate Division, on the authority of *Matter of People by Van Schaick (Title & Mortgage Guarantee Co. of Buffalo)*, 264 N.Y. 69, 190 N.E. 153, 96 A.L.R. 297. In this last-entitled case many of the provisions of the Insurance Code of New York dealing with rehabilitation were upheld.

The National Surety Company rehabilitation plan was later subjected to attack in Kentucky. The courts of that state likewise upheld the rehabilitation, emphasizing the importance to all concerned of preserving the good will of the old company and of rehabilitation in place of liquidation. The Kentucky court upheld the plan against the contention of a creditor of the old company who claimed discrimination in that his debt was not assumed in full. *National Surety Corporation v. Nantz*, 262 Ky. 413, 90 S.W.2d 385.

The legality of the plan was likewise attacked in the federal courts of South Carolina. In that action it was contended, as appellant Neblett contends here, that the plan of rehabilitation amounted to a fraudulent transaction whereby the new corporation took the valuable assets of the old corporation, the latter company by this maneuver seeking to evade its liabilities. It was contended that equity should annul the fraud. The court held that the transfer to the new company of the desirable assets of the old was in the ultimate interests of all creditors, and that thereby valuable intangible assets were saved that by liquidation would have been lost. The plan was again upheld and approved. *Thrower v. Kistler* (D.C.) 14 F.Supp. 217.

In several other cases the courts have approved plans for rehabilitation of companies in which a new company was organized to carry on the business of the old. In *re Bond & Mortgage Guarantee Co.*, 157 Misc. 240, 283 N.Y.S. 623; In *re New York Title & Mortgage Co.*, 156 Misc. 186, 281 N.Y.S. 715; In *re Rehabilitation of Lawyers' Mortgage Co.*, 158 Misc. 579, 287 N.Y.S. 625; *Gauss v. Central West Casualty Co.*, 266 Mich. 159, 253 N.W. 252.

[31, 32] In the face of these many well-reasoned cases, appellants contend that the Insurance Code does not permit the rehabilitation of an insolvent company by the organization of a new company. Specifically it is contended that the Code merely permits rehabilitation agreements and the reinsuring of an insolvent company's business. It is urged that the plan as approved, calling as it does for a transfer of assets to a new company, is neither a rehabilitation agreement, nor a reinsurance of the old company's business. The plan as approved is called by appellants a "reorganization" of the old company, and it is urged that a reorganization is not included within the meaning of rehabilitation; that the term "rehabilitation" necessarily implies the continuance of the old company as a going concern. The New York cases are attempted to be distinguished on the ground that section 52 of the New York Insurance Law (Consol.Laws, c. 28) expressly permits reorganization of insurance companies, and that no similar provision exists in California. These points are without merit. An examination of the New York cases definitely discloses that they were decided under the rehabilitation sections of the New York law, and not under section 52. It is to be

noted that under section 1043 of the California Insurance Code (St.1935, p. 547) the Legislature was careful to provide for the rehabilitation and reinsuring of the "business" of an insolvent company. The Legislature provided for the rehabilitation of the business of the old company, not of the company itself. The Code when read as a whole discloses a clear and unequivocal intent to preserve whenever possible the "business" of the insolvent company, and if to preserve such business—if to rehabilitate such business—a new corporation must be organized, the power clearly exists.

[33, 34] Equally untenable is the argument that the plan as approved does not call for the "reinsurance" of the business of the old company. Appellants contend that the term "reinsurance" has but one meaning—one company reinsuring the risks of another company, the latter company still remaining liable on the original risk. Reference is made to section 620 of the Insurance Code (St.1935, p. 511) containing such a definition. But the term has likewise another well-recognized meaning, that is, a contract by which one company (the new company here) takes over the insurance risks of another company (the old company here) and becomes substituted as insurer in the place and stead of the original insurer. 33 Cor.Jur. 58, sec. 736; *People v. American Cent. Ins. Co.*, 179 Mich. 371, 146 N.W. 235. Inasmuch as section 1043 of the Insurance Code confers the right of reinsuring in event of liquidation, obviously the term as used in that section was not intended to be limited solely to its indemnification meaning, but also includes the broader meaning above discussed.

[35, 36] Appellants attack the plan as being unlawfully discriminatory, in that life policyholders are taken into the plan on more liberal terms than non-can policyholders. In the first place it is to be noted that every policyholder is given his election to accept or reject the plan. Every policyholder who consents to the plan clearly enters into a novation with the new company. Having done so, such consenter cannot complain that he has been unfairly treated. *Mulcahy v. Baldwin*, 216 Cal. 517, 15 P.2d 738. As to the dissenter to the plan, it is clear that he has no legal cause for complaint simply because the commissioner determined to rehabilitate rather than liquidate. The United States Supreme Court has unequivocally determined that a creditor or policyholder has no vested right in liquida-

tion in event of insolvency. There is no property right, in the constitutional sense, in any form of remedy. *Doty v. Love*, 295 U.S. 64, 55 S.Ct. 558, 79 L.Ed. 1303, 96 A.L.R. 1438; *Gibbes v. Zimmerman*, 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342; see, also, *Daniel v. Layton* (C.C.A.) 75 F.2d 135. All that the law requires as to a dissenter is that he receive the liquidated value of his contract rights without unreasonable delay—he has no vested right to immediate payment. In *Doty v. Love*, *supra*, 295 U.S. 64, at page 71, 55 S.Ct. 558, 562, 79 L.Ed. 1303, 96 A.L.R. 1438, the United States Supreme Court in reference to a bank reorganization stated: "The argument is made that some of the assets of the old bank are placed at the risk of the business of the new one. * * * The finding is that collections are made more promptly and readily by a going concern than by one in liquidation. * * * Adequate precautions are embodied in the plan to assure the enjoyment of these benefits by the creditors and not by others. It is one of the terms of the decree that none of the profits of the business may be used for the new shareholders until every dollar's worth of assets turned over by the superintendent has been paid to the creditors or delivered to the pool."

[37-39] All the dissenter is entitled to is the equivalent of what he would receive on liquidation. Appellant Bettin urges that his remedy against the old company is ineffective because that company has conveyed all its assets of value to the new company. The record shows the contrary. It discloses that as trustee for all creditors of the old company, including dissenters, the commissioner holds all of the stock of the new company, the agreement of the new company to pay him certain sums equivalent to the reserves established on policies whose owners dissent, and the agreement of the new company to pay over to him for the benefit of all creditors of the old company portions of its future earnings. There is nothing in the judgment roll to indicate the value of these assets. The record is also silent as to what the policyholders would have received in liquidation. All that the judgment roll discloses is that under the approved plan the assets are far in excess of what they would be on liquidation. On these appeals, without the evidence before us, in support of the judgment, we must assume that evidence was introduced on these vital points, and that such evidence demonstrated that dis-

senters under the plan will receive as much, or more, as they would have received on liquidation. The order appealed from contains a recital that adequate provision is made in the plan for each class of policyholder. We must assume that such recital was amply supported by evidence.

It is true that the approved plan treats consenting life policyholders differently from consenting non-can policyholders, but if they dissent they are treated the same—they are allowed and will be paid the amount allowed by law as the measure of damages from the assets of the old company above enumerated.

[40] Moreover, the record demonstrates that under the circumstances here existing the difference in treatment was justified. The life policyholders, and the commercial health and accident policyholders were paying adequate premiums for their insurance and these phases of the old company's business were highly profitable. The non-can policyholders were not paying adequate premiums, and this fact was the primary cause of the difficulties of the old company. The non-can policies were draining the old company to disaster. If any plan of rehabilitation was to succeed it was imperative that the integrity of the life business be preserved in order to earn profits for the benefit of all concerned, including the non-can policyholders. Continued profits from the life business, and from the profitable accident and health business, furnished the only sources from which full contract benefits to non-can policyholders could ever be resumed. Under the plan 10 per cent. of the net earnings of participating life policies, nearly all the net earnings of the nonparticipating life policies, and nearly all the net earnings of the commercial accident and health policies are made available for the ultimate restoration of full benefits to non-can consenters, and for full payment of all claims of non-can dissenters. It is quite clear that, since the old company was insolvent, the new company could not assume all the liabilities of the old company or it too would be insolvent. Appellants urge, however, that the reduction in assumption should have been equalized. None of the evidence produced over a six weeks' period is before us. The evidence might well have shown, and the conclusion seems to us quite a logical one, that, if life policies were reduced so as to be equalized with the non-can policies, such reduction would dangerously impair the possibility of writing new life

insurance which would ultimately disorganize and destroy the agency organization. The evidence might well have shown (and probably did) that such reduction in life policies would cause lapses and surrenders in such policies, particularly of those still insurable in other companies, leaving only undesirable risks accepting the reduction. If the evidence showed these facts it might well be that the evidence also showed that equalization would produce less for the non-can policyholders than the plan adopted. In other words, the difference in treatment can be justified on the theory that such difference was necessary not only to preserve life policyholders' rights, but also the rights of non-can policyholders. Other grounds for the difference in treatment readily occur to us. Under such circumstances we must assume that the holding of the trial court that the plan does not unfairly discriminate was supported by the evidence.

[41] Appellants Neblett and MacDonald next argue that the approved agreement permits a fraudulent conveyance in violation of sections 3439 and 3442 of the Civil Code. Under the first section "every transfer of property * * * and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor." Section 3442 provides that generally "the question of fraudulent intent is one of fact and not of law; * * * provided, however, that any transfer or encumbrance of property, made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors." The sections, obviously, have no application to the proceedings here involved. We are not here presented with a case where an insolvent individual or corporation by private contract conveys away his or its assets with intent to defraud creditors. Here the transfer was made pursuant to a valid statute after court approval. Clearly there can exist no intent to defraud when the transfer is made under the terms of a valid statute and pursuant to a court order. The old company did not convey its assets to the new company while insolvent. The commissioner, as already held, validly took possession of the assets of the old company on July 22, 1936. On August 11, 1936, he was validly appointed conservator, his prior acts approved, and his title to the assets expressly confirmed. By operation of law, pursuant

to the express terms of the statute, title to all of the assets of the old company became legally vested in the commissioner as trustee for all creditors. The transfer of these assets from the commissioner to the new company occurred pursuant to statutory authority and order of court.

These two appellants strongly rely on *Shapiro v. Wilgus*, 287 U.S. 348, 53 S.Ct. 142, 77 L.Ed. 355, 85 A.L.R. 128. The case merely serves to emphasize the distinction here involved. In that case there was involved a conveyance of his assets by a harassed individual to a corporation for the purpose of obstructing his creditors. It was conceded that the conveyance was made to hinder and delay his creditors. In the present case the conveyance was made after a full court hearing, by court approval and order, pursuant to the terms of a valid statute. The conveyance to the new company was not made by the insolvent debtor, but by the commissioner, a state official, and was made, as held by the court, for the purpose of preserving and protecting the rights of creditors. All of the cases cited by appellants relate to private transactions, and are not in point.

[42] Appellant MacDonald contends that the conveyance to the new company was void because Carpenter was not validly appointed liquidator before making the conveyance. It will be remembered that Judge Willis appointed Carpenter conservator on August 11th, but did not appoint him liquidator. The argument of appellant MacDonald is predicated on the contention that to rehabilitate a company the commissioner must first be appointed liquidator under section 1016 of the Insurance Code (St.1935, p. 541). That section has nothing to do with the power to rehabilitate. That is expressly covered by section 1043 (St.1935, p. 547) providing that "the commissioner, as conservator or as liquidator," may, with court approval, enter into rehabilitation agreements.

[43, 44] Appellants next urge that the order of December 4th is void because the commissioner did not secure a valid permit for the issuance of the stock of the new company. It is contended that under sections 820-860 of the Insurance Code (St. 1935, pp. 520-528) an insurance company must secure from the commissioner a permit to issue stock. It is stated that the commissioner at no time secured a permit from himself as commissioner to himself

as conservator, but that the only permit secured was from himself to himself as liquidator. To support this contention one of the appellants attaches to his brief what purports to be a permit from himself as commissioner to himself as liquidator, authorizing the new company issue, and states, without reference to the record, that this was the only permit issued or secured. To state the contention is to answer it. The law does not require idle acts. We doubt whether the provisions of the Insurance Code requiring the securing of a permit from the commissioner for the issuance of stock apply to the commissioner himself, where court approval of the issuance is contemplated and secured. In the second place the record does not support appellants' contention. The record does not disclose that the permit set forth in the brief was actually issued, nor that that permit was the only one secured. If appellants desired to raise this point it was their duty to present a proper record to this court. They have elected to appeal on the judgment roll. All intendments are in support of the order appealed from. If a permit from the commissioner to himself as conservator was required, in support of the order, we must conclusively presume that such permit was secured.

[45, 46] Appellants MacDonald and Neblett urge that section 1043 of the Insurance Code, and the plan as approved, are violative of section 13 of article 12 of the State Constitution which provides: "The State shall not in any manner loan its credit, nor shall it subscribe to, or be interested in the stock of any company, association, or corporation." Relying on *Mitchell v. Taylor*, 3 Cal.2d 217, 43 P.2d 803, where it was held that the insurance commissioner in taking charge of insolvent companies is a state officer acting on behalf of the state, it is contended that, since the commissioner as conservator has subscribed to all of the stock of the new company, the state has so subscribed and the Constitution violated. Of course the insurance commissioner is a state officer, and of course the state has an interest in rehabilitating insolvent insurance companies, but that interest is not a vested interest as is contemplated by the above constitutional provision. Section 1057 of the Insurance Code, above referred to, expressly provides that in all proceedings thereunder the commissioner acts as trustee for the benefit of all of the creditors of the insolvent company. It is quite clear that the

commissioner by subscribing to the stock of the new company has not loaned the credit of the state to the new company. Not a penny of state money has gone into the treasury of the new company. No liability under the agreement is imposed on the conservator either in his official or personal capacity. There was no loan of credit at all. The commissioner acting pursuant to a statute, with court approval, took certain assets of the old company and transferred them to the new company in exchange for the stock which he holds as trustee for the benefit of the creditors of the old company. Obviously, the commissioner as a state officer did not subscribe to the stock of the new company so as to make the state a stockholder. The point is without merit.

[47] Equally untenable is appellant Neblett's contention that the use of the word "mutual" in the name of the new company is misleading, illegal, and fraudulent, in that the company is not a "mutual" company. It is to be noted that the challenged term has been in the old company's name since its incorporation in 1868. The new name was obviously chosen by the commissioner so as to conserve, so far as possible, the value of the old name. The record does disclose that the old company and the new company are stock companies, but it is also disclosed that the new company (as was the old company) is authorized to issue participating life policies as well as nonparticipating policies. The record also shows that the approved plan provides for the ultimate mutualization of the company on certain designated conditions. Whether these facts justify the use of the term "mutual" in the new company's name was a question for the consideration of the trial court.

[48] Some reference is made in the briefs and in the judgment roll to other plans of rehabilitation submitted to the trial court. The evidence as to the relative merits of the various plans is not before us. The record shows that the commissioner and the trial court studied and gave consideration to all proposed plans and found the one here approved to be the one best fitted to protect and preserve the rights of all concerned. Obviously, this court, without any evidence before it, cannot now determine the relative merits of any of the submitted plans.

We have considered all of appellants' contentions. From a careful examination of the record before us, we are satisfied that

the order of the trial court appealed from should be affirmed.

The motion to strike appellant Neblett's opening brief from the files is denied; the order appealed from is affirmed.

WASTE, C. J., and EDMONDS, J., being disqualified did not participate in the decision.



24 Cal.App.2d 285

Ex parte BASHAM et al.

Cr. 2003.

District Court of Appeal, First District,
Division 1, California.

Dec. 30, 1937.

1. Habeas corpus ⇨22(1)

One convicted upon information is precluded, in proceeding in habeas corpus, from raising objection that he was not examined or held to answer by magistrate prior to filing of information.

2. Habeas corpus ⇨3

The filing of an information gives superior court jurisdiction to proceed in the case, and exclusive method of trying question of whether information is founded on necessary preliminary examination is by way of statutory motion to set aside information. Pen.Code, § 995.

3. Habeas corpus ⇨3, 22(1)

Petitioners convicted on pleas of guilty to information charging robbery were not entitled to habeas corpus on ground that they were not legally committed by magistrate on particular charge of robbery set forth in information, where no motion to set aside information was made by petitioners and where it appeared that particular charge of robbery set forth in information was same charge to which they had pleaded guilty before committing magistrate. Pen.Code, § 995.

Appeal from Superior Court, Marin County.

Proceeding on the application of Raymond Basham and Flavil L. Basham for a writ of habeas corpus.

Application denied.

Flavil L. Basham and Raymond Basham, in pro. per.

PER CURIAM.

Petitioners were accused jointly by information filed in the superior court of the crime of robbery. They were represented by counsel, and upon arraignment each entered a plea of guilty. The court found it was robbery in the first degree, and petitioners were sentenced to imprisonment in the state prison. They now apply for a writ of habeas corpus, alleging in substance that they were not legally committed by a magistrate on the particular charge of robbery set forth in the information, and to which they pleaded guilty.

[1-3] It is well settled, however, that one convicted upon an information is precluded in a proceeding in habeas corpus from raising the objection that he was not examined or held to answer by a magistrate prior to the filing of such information; that the filing of an information gives the superior court jurisdiction to proceed in the case; and that section 995 of the Penal Code provides the exclusive method of trying the question of whether the information is founded on the necessary preliminary examination, which is by way of motion to set aside the information. *Ex parte McConnell*, 83 Cal. 558, 23 P. 1119; 13 Cal. Jur. 228. Admittedly in the present case no such motion was made by either petitioner. Moreover, and despite the recital in the magistrate's certificate, it appears from the transcript of the proceedings had before the superior court, and from the statements made therein by counsel for petitioners, who had represented them also at the preliminary examination, that the particular charge of robbery set forth in the information, and to which petitioners entered pleas of guilty, was the same charge of robbery to which they had pleaded guilty before the committing magistrate.

The application for the writ is denied.

24 Cal.App.2d 263

SNYDER v. SUPERIOR COURT IN AND FOR AMADOR COUNTY et al.

Civ. 5967.

District Court of Appeal, Third District,
California.

Dec. 28, 1937.

Hearing Denied by Supreme Court
Feb. 24, 1938.**1. Contracts ⇨292½**

The statutes relating to validity of arbitration agreements and stating what agreements may be arbitrated applied to controversies affecting realty arising under terms of written agreements, as well as to other controversies which might arise thereunder. Code Civ.Proc. §§ 1280, 1281.

2. Constitutional law ⇨56

Contracts ⇨292½

The arbitration statute merely recognized right of individuals to agree to submit differences to arbitration, and did not authorize them by agreement to oust superior courts of their jurisdiction to try civil actions involving title to realty in violation of Constitution. Code Civ.Proc. § 1280 et seq.; Const. art. 6, § 5.

3. Contracts ⇨292½

An arbitration proceeding is not deemed to be a trial of a cause before a judicial tribunal, but is merely a summary and expeditious means of attempting to determine controversies out of court pursuant to stipulation of parties in written contract. Code Civ.Proc. § 1280 et seq.

4. Statutes ⇨85(4)

The arbitration statute was general in its application to all contracts in which parties agreed to arbitrate their differences, and it did not violate Constitution by attempting to regulate practice of courts of justice by special laws. Code Civ.Proc. § 1280 et seq.; Const. art. 4, § 25, subd. 3.

5. Constitutional law ⇨46(1)

Mandamus ⇨172

Where order submitting to arbitration controversy under contract relating to realty was made in superior court of county in which realty was situated, it would not be assumed, in mandamus proceeding to compel court to try cause regardless of arbitration clause, that arbitrator's award would be presented for approval or modification to court of another county, and Court of Ap-

peal was not therefore required to pass upon validity of statute authorizing specification of county in which judgment should be entered. Code Civ.Proc. § 1281.

6. Contracts ⇨292½

Where contract stated that differences thereunder were to be submitted to arbitrator for determination, and statute authorizing rendition of final judgment giving effect to arbitrator's award, arbitration clause of contract was not void because of failure to declare that parties were to become bound by award. Code Civ.Proc. § 1292.

7. Mandamus ⇨172

In mandamus proceeding to compel superior court, regardless of arbitration clause, to try action arising out of contract providing for arbitration, where evidence of hearing in which court found that action grew out of contract was not before Court of Appeal, it was required to assume that evidence supported superior court's determination that action arose under contract. Code Civ.Proc. §§ 1282, 1284, 1287, 1291, 1293.

8. Mandamus ⇨172

In mandamus proceeding to compel superior court to try cause of action instead of submitting it to arbitration, Court of Appeal could not assume that superior court had erred in submitting matter to arbitration.

9. Mandamus ⇨4(1)

A writ of mandamus may not be used to serve as a mere writ of error.

10. Mandamus ⇨4(1)

Where judicial action can be reviewed and corrected by appeal, mandamus will not ordinarily lie.

11. Mandamus ⇨3(1), 4(1)

An erroneous court order cannot be reversed or corrected by mandamus, where there is an adequate remedy by appeal or otherwise.

12. Mandamus ⇨4(1)

Where arbitration statute afforded complete remedy by appeal in case of wrongful submission to arbitration of controversy under contract, Court of Appeal, in mandamus proceeding, could not interfere with superior court's determination submitting controversy to arbitration pursuant to provisions of contract. Code Civ.Proc. §§ 1287, 1291, 1293.

13. Mandamus ⇐ 172

In mandamus proceeding to compel superior court to try action instead of submitting controversy to arbitration, Court of Appeal could not assume that superior court would not properly determine effect of arbitrator's award when cause of action was regularly tried. Code Civ.Proc. § 1284.

Mandamus proceeding by William G. Snyder against the Superior Court of the State of California, in and for the County of Amador, and another, to compel the Superior Court to try a cause pending in that court regardless of an arbitration clause contained in contract upon which it was assumed cause was founded.

Writ denied.

Gumpert & Mazzera, of Stockton, and Snyder & Snyder and George F. Snyder, all of San Andreas, for petitioner.

Levinsky & Jones and Jack J. Miller, all of Stockton, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

By means of a writ of mandamus the petitioner seeks to compel the Superior Court of Amador County to proceed to try a cause of action which is pending in that court regardless of an arbitration clause contained in the contract upon which it is assumed the cause is founded.

When the case was set for trial, pursuant to a motion on the part of the defendant to submit the controversy to arbitration, evidence was adduced under the provisions of section 1282 of the Code of Civil Procedure, and the court determined therefrom that the cause arises from the written contract which appears in the answer and thereupon ordered that the trial of the cause be suspended pending arbitration and that the parties to the action proceed to arbitration in accordance with the provisions of the agreement. The plaintiff then filed this petition for a writ of mandamus.

The complaint in the pending action is couched in two counts. It is alleged that both counts grow out of the same transaction. The first count is for money expended by the plaintiff at the instance of the defendant under the terms of the contract. The second cause of action is a suit to quiet title to the real and personal

property involved in the contract. The agreement which was executed April 19, 1933, asserts that the defendant in that suit is the owner of real and personal property in Amador county which is specifically described; that the real estate contains valuable timber and that the property is used for the purpose of conducting a saw-milling enterprise; that the defendant is greatly indebted on account of the operation thereof; that the plaintiff (this petitioner) is to take possession of the property and business and operate the enterprise for the benefit of both parties with a view of acquiring the whole or an undivided one-half interest therein, with an agreement to pay all expenses incident thereto to employ the defendant as superintendent of the business at a salary of \$150 per month, to use his best effort to procure composition with the creditors of the defendant on a basis of 20 per cent. of their asserted claims, and to pay from the proceeds of the business all liens against the property, together with an indebtedness of \$10,000, with accrued interest thereon, due and owing to J. A. Chichizola within three years from the date of the contract. The agreement contains a clause that: "In the event of a dispute between the parties hereto respecting any matters arising under this agreement, such matter shall be referred to J. A. Chichizola for determination." The answer alleges that the property in question was conveyed to the plaintiff in trust to carry out the terms of the contract.

The petitioner in this proceeding asserts that title 10, section 1280 et seq., of the Code of Civil Procedure with relation to arbitration does not apply to the provisions of a contract which affects the title to real property; that if the provisions regarding arbitration are deemed to include contracts affecting the title to real property they are violative of article 6, section 5, of the California Constitution, which confers original jurisdiction on the superior courts to try civil actions and proceedings, particularly because section 1281 of the Code of Civil Procedure authorizes the parties to a contract to agree that the arbitration proceedings may be heard and determined by a court other than the superior court of the county in which the real property or some part thereof is situated, contrary to the provisions of section 392 of the same Code; that the arbitration provisions controvert article 4, section 25, subdivision 3,

of the California Constitution by attempting to regulate the practice of courts of justice by special laws; that a controversy between the parties does not arise under the contract in question; and that the arbitration clause in that contract is void because it fails to recite that the parties shall be bound by the determination of the arbitrator.

[1] We are of the opinion sections 1280 and 1281 of the Code of Civil Procedure do apply to controversies affecting real property which arise under the terms of a written agreement between the parties, and that such issues may thus be submitted by agreement to arbitration pursuant to those sections. In providing for arbitration, these sections of the Code include all controversies which may arise under the contract. There is no intimation, in the language of the Code, that disputes affecting real property are to be excluded from the arbitration provisions. According to modern authority, there is no reason why controversies affecting real property may not be authorized to be submitted to arbitration by written agreements of the parties involved. In 6 Corpus Juris Secundum, page 159, Arbitration and Award, § 11, it is said: "It is now well settled that, in the absence of statutory restrictions, contests or disputes as to the title to, or interests in, real estate may be submitted to arbitration."

[2, 3] Title 10 of the Code of Civil Procedure, with relation to arbitration is not in conflict with article 6, section 5, of the California Constitution. It does not authorize individuals by agreement to oust superior courts of their jurisdiction to try civil actions involving the title to real property. It merely recognizes the right of individuals to enter into binding contracts requiring the submission to arbitration of differences existing between them with respect to the terms of the agreement. Arbitration is authorized as a method of procedure with the object of securing thereby just and satisfactory settlements of controversies without the necessity of litigation. An arbitration proceeding is not deemed to be the trial of a cause before a judicial tribunal. It merely provides a summary and expeditious means of attempting to determine controversies out of court pursuant to a stipulation of the parties in a written contract. Such statutes have been consistently upheld as constitutional.

3 Am.Jur. 836, § 6; 69 A.L.R. 816, note; Berkovitz v. Arbib & Houlberg, 230 N.Y. 261, 130 N.E. 288, 291; Landreth v. South Coast Rock Co., 136 Cal.App. 457, 462, 29 P. 2d 225, 226. In 3 American Jurisprudence, page 836, § 6, it is said: "Statutes recognizing, establishing procedure for, and providing for enforcement of, arbitrations initiated by voluntary agreement of the parties have consistently been upheld against constitutional objections. The statutes have variously been held not to deprive parties of property without due process of law, not unconstitutionally to confer judicial powers on private individuals, not to violate constitutional provisions vesting the judicial power in constituted courts, not to oust courts of their jurisdiction, and not to impair, but rather to strengthen, the obligations of contracts."

In the Landreth Case, *supra*, it is said: "The act in question does not by its terms seem to intend to deprive the superior court of jurisdiction of cases involving contracts with arbitration agreements, but merely to provide a summary means by which the arbitration agreement can be enforced should one of the parties desire to rely upon it."

In the Berkovitz Case, *supra*, Mr. Justice Cardozo, speaking for the court, says: "The Supreme Court does not lose a power inherent in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. For the right to nullify is substituted the duty to enforce. Contending parties have contracted that the merits of their controversy shall be conditioned upon the report of arbitrators, as upon any other extrinsic fact which agreement might prescribe. Whether they have so contracted is a question which the court must still determine for itself. Arbitration Law, § 3. If the contract has not been made or is invalid, the court will proceed, as in any other case, to a determination of the merits. If it has been made and is valid, the court will stay its hand till the extrinsic fact is ascertained, and the condition thus fulfilled. That done, its doors are open for whatever measure of relief the situation may exact. [Citing cases.] The award will be enforced if valid, and for cause will be annulled. 'In common language where no attempt is made at logical accuracy,' it is sometimes said that the con-

tract of arbitration 'ousts the jurisdiction' of the judges. *Wilson v. Glasgow Tramways & O. Co.*, 5 Sess. Cases [Scot.] Fourth Series 981, *supra*. 'In strictness, however, it does not oust the jurisdiction, but merely introduces a new plea into the cause' on which the judge as at common law is under a duty to decide. *Wilson v. Glasgow* etc., *supra*. The situation is the same in substance as when effect is given to a release or to a covenant not to sue. Jurisdiction is not renounced, but the time and manner of its exercise are adapted to the convention of the parties restricting the media of proof. Long before the statute there was a like withholding of relief whenever the subject-matter of arbitration, instead of extending to all differences, was limited to some. [Cases cited.] There was a like refusal to permit the litigation of the merits when the contract, though general, was no longer executory but had ripened into an award. The change resulting from the statute is one of measure and degree.

"We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the state. The ancient rule, with its exceptions and refinements, was criticized by many judges as anomalous and unjust. [Cases cited.] It was followed with frequent protest, in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do. They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions. [Cases cited.] No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation."

[4] The sections of the Code regarding arbitration may not be deemed to constitute special legislation "regulating the practice of courts." They are general in their application to all contracts in which the parties have agreed to arbitrate their differences arising thereunder.

[5] The provisions of section 1281 of the Code of Civil Procedure that the parties may "agree that a judgment of a court of record, specified in writing, shall be rendered upon the award," and that "If the court is thus specified they may also specify the county in which the judgment shall be entered," are not involved in this proceeding. There is no such stipulation in the present case that the approval of the arbitration award may be presented to any court other than the one in the county where the land is situated. The order submitting the matter for arbitration was made in the superior court of the county in which the land is situated. For the purpose of this writ we may not assume that the award of the arbitrator will be presented for approval or modification to a court of any other county. It therefore becomes unnecessary for us to pass upon that provision of the law.

[6] It is contended the arbitration clause contained in the contract is void because it fails to declare that the parties are to become bound by the award. We are of the opinion that omission is not fatal to the contract for arbitration. The statute provides for the procedure which authorizes the rendering of a final binding judgment giving effect to the award of an arbitrator. Section 1292 of the Code of Civil Procedure provides that: "The judgment so entered has the same force and effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in an action." From the language of the contract which agrees to submit controversies arising thereunder to arbitration, we believe that the law implies an agreement to abide by the determination thereof. The language employed in the present case infers that the parties agreed to abide by the decision of the arbitrator. It states that the differences are to be submitted to the arbitrator "for determination." This is a tacit agreement to abide by that determination. There appears to be no other reason for submitting the differences to an arbitrator.

[7] It appears from the answer, which was filed in the suit for money expended at the instance of the defendant and to quiet title to real property, that both counts thereof are involved in the contract which provides for arbitration in the event of a dispute between the parties thereto regarding any matters arising under the agreement. Upon motion of the defendant to re-

quire the controversy to be submitted to arbitration pursuant to the terms of the agreement as a condition precedent to the trial of the cause, evidence was adduced upon that hearing from which the court found that both causes of action grew out of the contract in question, and thereupon ordered the matter to be submitted to arbitration, pending which the trial of the case was suspended. The evidence of that hearing is not before this court. We must assume it adequately supports the court's determination that the action does arise from differences which exist regarding the terms of the contract. That proceeding was in exact accordance with the provisions of section 1282 of the Code of Civil Procedure, which reads in part: "A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition any superior court of the county or city and county where either party resides, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * The court shall hear the parties. * * * If the finding be that a written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

[8-13] Section 1284 of the same Code provides for a stay of the trial of a case pending the arbitration proceedings. Section 1287 of that Code provides for the procedure in the superior court for hearing and passing upon the report and recommendations of the arbitrators. Upon that hearing the court is authorized to adopt, correct, modify, or vacate the arbitrator's award. Section 1291 of the Code of Civil Procedure provides for the rendering of judgment in accordance with the court's findings upon the return of the award. Section 1293 authorizes an appeal from that judgment by either party. It thus appears that if the court has erred in wrongfully construing the arbitration clause of the con-

tract, or in assuming that the litigation grows out of that contract, this petitioner is afforded a complete remedy by appeal from the judgment which may subsequently be rendered upon application to affirm whatever award the arbitrator may make. Upon this petition for a writ of mandamus we may not assume the court has erred in submitting the matter to arbitration. It is a well-known principle that a writ of mandamus may not be used to serve as a mere writ of error. Where judicial action can be reviewed and corrected by appeal a writ of mandamus will not ordinarily lie. The writ will not issue merely to set aside an order which a court has made, even though it may appear to have been made in excess of jurisdiction or by mistake, when there is an adequate remedy by appeal or otherwise. If the order which the court makes is erroneous, it cannot be reversed or corrected by means of the writ of mandamus. *Israel v. Superior Court*, 43 Cal.App. 711, 185 P. 682; *O'Neill v. Reynolds*, 116 Cal. 264, 48 P. 57. In the proceeding to submit the differences which arose in this case under the contract involved in the civil action, the superior court certainly had jurisdiction to hear and determine the question of submitting the controversy for arbitration. With that determination this court may not interfere upon petition for a writ of mandamus. Having ordered the matter to be submitted to arbitration, it became necessary for the court, under the provisions of section 1284 of the Code of Civil Procedure, to stay the trial of the cause until the arbitration is concluded pursuant to law. We may not assume the court will not properly determine the effect of whatever award is made by the arbitrator, when the cause of action is regularly tried. If the court fails to properly determine the effect of the arbitration, either party to the action has his remedy by appeal.

The writ is denied.

We concur: PULLEN, P. J.; PLUMMER, J.

24 Cal.App.2d 258

DE OLAZABAL v. MIX.

Civ. 9814.

District Court of Appeal, Second District,
Division 1, California.

Dec. 28, 1937.

1. Evidence ⇨434(8), 441(1)

Trusts ⇨43(1)

Ordinarily, a contemporaneous oral agreement is not competent to contradict or vary the terms of a written instrument, but it may be admissible to establish fraud or a trust in personalty. Code Civ.Proc. § 1856.

2. Evidence ⇨434(12)

In an action on a series of notes wherein defendant relied in part on fraud, evidence of a contemporaneous oral agreement was admissible to establish such defense. Code Civ.Proc. § 1856.

3. Trusts ⇨17(2)

A trust in personal property need not be in writing or in any set form of words. Civ.Code §§ 2221, 2222.

4. Trusts ⇨43(1)

In an action on a series of notes, oral testimony that the notes were given to payee in trust for the purchasing and furnishing of a home for the minor child of the parties was properly admitted, as such trust could be created, declared, or amended verbally, and be proved by oral evidence. Code Civ. Proc. § 1856; Civ.Code §§ 2221, 2222, 2254.

5. Trusts ⇨257

The statute permitting trustees of an express trust to sue without joining with them the persons for whose benefit the suit is prosecuted applies only to suits by trustees affecting the trust property or the rights under it against strangers. Code Civ.Proc. § 369.

6. Trusts ⇨257

The minor child of divorced parents was a "necessary party" to an action by mother against father on a series of notes wherein father alleged an oral trust in favor of minor child, where partial purpose of action was to determine rights of mother, as trustee, and child, as beneficiary. Code Civ. Proc. §§ 369, 389.

[Ed. Note.—For other definitions of "Necessary Parties," see Words & Phrases.]

7. Trusts ⇨257

Both trustees and beneficiaries are "necessary parties" to an action under a trust in which the relation of the trustees and beneficiaries are involved. Code Civ.Proc. §§ 369, 389.

8. Trusts ⇨257

In an action on a series of notes by wife as payee against divorced husband as maker, where it appeared that a complete determination of the controversy required that the minor daughter of the parties as beneficiary of an alleged trust be made a party, court had duty to bring daughter in as a party even on its own motion. Code Civ. Proc. §§ 369, 389.

9. Appeal and error ⇨1036(3)

In action on a series of notes, failure to bring in the minor daughter of the parties, as beneficiary of a trust allegedly established by oral agreement at time of execution of the notes, was reversible error. Code Civ.Proc. §§ 369, 389.

10. Witnesses ⇨199(2)

When two parties address a lawyer as their common agent, their communications with the lawyer are privileged as far as strangers are concerned, but either can compel the lawyer to testify against the other as to their negotiations.

11. Witnesses ⇨199(2)

In an action on a series of notes by wife as payee against divorced husband as maker, testimony of attorney who was acting for both parties and was present when notes were executed was not inadmissible on ground of privilege.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Victoria De Olazabal against Tom Mix. Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

Haight, Trippet & Syvertson and Lyle C. Newcomer, Jr., all of Los Angeles (John Haven, of Los Angeles, of counsel), for appellant.

Claude I. Parker, Ralph W. Smith, and J. Everett Blum, all of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a judgment in favor of the defendant in an action at law

brought on five promissory notes. Briefly, the facts are that at the time of the execution of the notes in question, the plaintiff and defendant were wife and husband, and the parents of a minor daughter. The parties subsequently divorced, and both have remarried. On July 9, 1928, defendant, Tom Mix, made and executed the five promissory notes, payable at staggered dates, to the order of plaintiff, each in the sum of \$10,000. The notes were presented for payment after the due date which appeared on each of them respectively, and were dishonored by the defendant, resulting in the commencement of this action to enforce collection.

Defendant's amended answer amounted to a general denial of the allegations contained in the complaint, and also set forth separate and affirmative defenses alleging fraud and duress; that the notes in question were executed and delivered to plaintiff in trust for the benefit of the minor daughter of the parties; that the trust is impossible of performance and indefinite in its terms; that the trust is void and unenforceable under the provisions of section 715 of the Civil Code. During the course of the trial, the court permitted defendant to file an amendment to his amended answer to conform to the proof, by which he sought to raise two affirmative defenses based on his oral testimony (1) that at the time the notes were executed it was agreed between the parties thereto that the notes would not be payable until defendant sold all three houses then owned by him; (2) that the notes were given to plaintiff upon an oral understanding that she was to use the proceeds thereof to provide a home for herself, defendant, and their minor daughter; and (3) that plaintiff could not prevail because she sued in her individual name and not in the capacity of trustee.

On the question of fraud and duress the court found in favor of appellant, but sustained the last two mentioned defenses, and based thereon, rendered judgment in favor of respondent.

[1-4] Appellant first assails the judgment on the well-settled rule of law that a contemporaneous oral agreement is not competent to contradict or vary the terms of a written instrument. However, this universally recognized rule is subject to equally recognized exceptions. Section 1856, Code Civ.Proc. Notable among such exceptions to the rule is fraud, as well as trusts in personalty. No citation of authority is nec-

essary for the assertion that such testimony was admissible under the allegations of fraud (which the court found did not exist), and it is equally well settled that a trust in personal property need not be in writing, and that no set form of words is necessary to create a trust, *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 P. 370; Sections 2221 and 2222, Civ. Code); while section 2254 of the Civil Code declares that in an oral trust all declarations of a trustor to his trustee, in relation to the trust, before its acceptance by the trustee, are to be deemed part of the declaration of the trust. The trial court therefore was correct in admitting oral testimony from both appellant and respondent to the effect that the notes were given to plaintiff in trust for the purchasing and furnishing of a home for the minor child of the parties, because trusts in personalty such as the one here in question may be created, declared, or amended verbally, and may be proved by parol evidence. *Leffrooth v. Prentice*, 202 Cal. 215, 227, 259 P. 947, and cases therein cited. See, also, 26 R.C.L. 1194; *Cashion v. Bank of Arizona*, 30 Ariz. 172, 245 P. 360, 363; *Booth v. Oakland Bank of Savings*, supra; *Drinkhouse v. German, etc., Soc.*, 17 Cal.App. 162, 118 P. 953.

[5-9] Appellant's next ground of appeal is that the court erred in holding that it is necessary for the trustee of an express trust to sue "as trustee" rather than individually, which holding forms the basis of the trial court's decision. In this connection, appellant relies strongly upon the provisions of section 369 of the Code of Civil Procedure, which is as follows: "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

While it is true that under this section of the Code of Civil Procedure trustees of an express trust may sue without joining with them the persons for whose benefit the suit is prosecuted, this section only applies to suits by trustees affecting the trust property or rights under it against strangers, and is therefore inapplicable to the case before us. *Lake v. Dowd*, 207 Cal. 290, 277 P. 1047; *Mitau v. Roddan*, 149 Cal. 1, 6, 84 P. 145, 148, 6 L.R.A., N.S., 275. However, a mere reading of the record before us at once in-

dicates that during the trial of this action it developed that the purpose of the same was, among other things, to determine the rights as between the trustee and the beneficiary, and the latter, therefore, should have been brought in as a party. In this connection, the provision of section 389 of the Code of Civil Procedure is mandatory. This necessity of making all persons parties in actions under the trust where the relations of the trustees and beneficiaries are involved is in effect the rule laid down in this state in *McPherson v. Parker*, 30 Cal. 455, 89 Am.Dec. 129, *O'Connor v. Irvine*, 74 Cal. 435, 444, 16 P. 236, and *Mitau v. Roddan*, supra. Where, as in the instant case, it admittedly appeared to the court that it was essential to a full and complete determination of the controversy before it that the minor daughter of the parties, who was the beneficiary under the trust, should be made a party, it was the imperative judicial duty of the court to order her brought in. As was said by our Supreme Court in *Mitau v. Roddan*, supra, "It was not a matter of discretion but of duty for the court, even upon its own motion, to require their presence." Under the facts of this case, the failure of the court to do so is fatal to the judgment. *Mitau v. Roddan*, supra; *Winter v. McMillan*, 87 Cal. 256, 265, 25 P. 407, 22 Am.St.Rep. 243; *O'Connor v. Irvine*, supra; *Pomeroy's Code Remedies*, § 419.

[10,11] This determines the issues involved in this appeal. We have, however, in view of a probable retrial of the cause, examined the record on the merits of the final question presented, wherein appellant urges that the trial court fell into error when it excluded the testimony of the witness Cohen, who, it appears, was acting as attorney for both parties, and was present when the notes here in question were executed by defendant and delivered to plaintiff. When Attorney Cohen was called as a witness by the plaintiff, the defendant raised the question of privilege, and on that ground objections to the attorney's testimony were sustained. In these rulings the court erred, because it is the law, as appellant urges, that "when two parties address a lawyer as their common agent, their communication to the lawyer as far as concerns strangers will be privileged. But as to themselves, they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations." *Piercy v. Piercy*, 18 Cal.App. 751, 760, 124 P. 561, 564, citing *In re Estate of Bauer*, 79 Cal.

304, 312, 21 P. 759; *Murphy v. Waterhouse*, 113 Cal. 467, 45 P. 866, 54 Am.St.Rep. 365; *Harris v. Harris*, 136 Cal. 379, 69 P. 23; 1 *Wharton on Evidence*, § 587; *Greenleaf on Evidence*, § 244; *Hanlon v. Doherty*, 109 Ind. 37, 9 N.E. 782; *Michael v. Foil*, 100 N. C. 178, 6 S.E. 264, 6 Am.St.Rep. 577.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial in conformity with the views herein expressed.

We concur: YORK, P. J.; DORAN, J.



24 Cal.App.2d 116

PEOPLE v. ARRANGOIZ.

Cr. 3041.

District Court of Appeal, Second District,
Division 2, California.

Dec. 16, 1937.

1. Criminal law ⇨1144(13)

On appeal from a conviction, the evidence will be viewed in the light most favorable to the people.

2. Infants ⇨20

Evidence that defendant took a female child of the age of seven to his room, there took off her clothing and placed his hands on her private parts, was sufficient to sustain conviction for violation of statute relating to crimes against children (Pen.Code, § 288, as amended by St.1933, p. 1028).

3. Criminal law ⇨1159(2)

A conviction will not be reversed for alleged insufficiency of the evidence if there is substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact and every other material finding of fact on which the conviction was predicated.

4. Witnesses ⇨243

In prosecution for violation of statute relating to crimes against children, permitting district attorney to ask seven year old prosecuting witness leading questions was not prejudicial error (Pen.Code § 288, as amended by St.1933, p. 1028; Code Civ.Proc. § 2046).

5. Witnesses ⇨240(2)

Leading questions may be allowed in the sound discretion of the trial judge on direct examination of a witness (Code Civ. Proc. § 2046).

6. Infants ⇨20

In prosecution for violation of statute relating to crimes against children, permitting a doctor to testify relative to a pelvic examination of prosecuting witness made approximately a month after commission of alleged acts was not prejudicial error where the time element was before the jury to be considered by it in determining the weight to be given the doctor's testimony (Pen. Code § 288, as amended by St.1933, p. 1028).

7. Criminal law ⇨384

The admissibility of the evidence in the face of an objection that it is too remote should ordinarily be left to the trial judge's sound discretion.

8. Criminal law ⇨1023(10)

An appeal does not lie from a sentence and a purported appeal therefrom will be dismissed.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Andrew Arrangoiz was convicted of violating a statute relating to crimes against children, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb., Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury of violation of section 288 of the Penal Code, as amended by St.1933, p. 1028. This appeal is from the judgment and order denying his motion for a new trial. There is also a purported appeal from the sentence.

[1] Viewing the evidence most favorable to the respondent, the essential facts are:

In June, 1937, defendant took a female child of the age of seven years to his room. He took off her clothing and placed his hand on her private parts.

Defendant relies for reversal of the judgment on the following propositions:

First. The evidence is insufficient to sustain the judgment.

Second. The trial court committed prejudicial error in permitting (a) the district attorney to ask the prosecuting witness leading questions, and (b) a doctor to testify relative to a pelvic examination of the prosecuting witness made approximately a month after defendant had committed the acts above described.

[2,3] Defendant's first proposition is untenable. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact hereinabove mentioned and each and every other material finding of fact upon which the judgment of guilty was predicated. *Thatch v. Livingston*, 13 Cal.App.2d 202, 56 P.2d 549; *People v. Groves*, 9 Cal.App.2d 317, 321, 49 P.2d 888, 50 P.2d 813; *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 245, 128 P. 399.

[4,5] The proposition set forth in paragraph (a) of defendant's second proposition is likewise untenable. It is the law that leading questions may be allowed in the sound discretion of the trial judge on direct examination of a witness. Section 2046, Code Civ.Proc. In the present case there was no indication that the trial judge did not exercise a sound discretion in permitting leading questions to be asked the prosecuting witness.

[6,7] The proposition set forth in paragraph (b) of defendant's second proposition is also without merit. Clearly the pelvic examination made by the doctor of the prosecuting witness was material evidence. It is the law that the admissibility of evidence in the face of an objection that it is too remote should ordinarily be left to the sound discretion of the trial judge. *People v. Boggess*, 194 Cal. 212, 235, 228 P. 448; *Nichols*, Applied Evidence, Vol. 4, 3983, § 1, 1928.

In the present case the doctor's examination was made approximately thirty days after the acts of which complaint was made. Therefore, there is no showing of an abuse of discretion by the trial judge in admitting the evidence. The time element was properly before the jury to be considered by it in connection with the weight to be given to the doctor's testimony.

[8] An appeal does not lie from the sentence. *People v. Richardson*, Cal.App., 73 P.2d 610. Therefore, the purported appeal from the sentence is dismissed.

The judgment and order are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



24 Cal.App.2d 280

PEOPLE v. BECKER.

Cr. 1580.

District Court of Appeal, Third District,
California.

Dec. 29, 1937.

1. Criminal law — 1159(2, 4)

An appellate court cannot weigh or pass on credibility of evidence.

2. Criminal law — 570(1)

Evidence sustained jury's verdict finding defendant sane at time he committed crime of burglary in second degree.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Ed Becker was convicted of burglary in the second degree, and he appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen. and Wilmer E. Morse, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This defendant was accused of the crime of burglary and on arraignment entered pleas of not guilty and not guilty by reason of insanity. On the trial the jury returned a verdict of guilty of burglary in the second degree, and found him sane at the time the offense charged in the information was committed.

The only point presented in appellant's brief is the insufficiency of the evidence

to support the verdict of the jury finding defendant sane.

The prosecution called two well-known alienists, one of whom was Dr. Margaret H. Smythe, for many years connected with the Stockton State Hospital as a physician and surgeon, and as superintendent of that institution for the past 7 years. She testified that at the time she examined the defendant some three or four months after the commission of the offense, in her opinion the defendant was sane.

Dr. E. M. Wilder, a physician of some 35 years' experience in mental and nervous disorders, also testified that he had examined the defendant, and in his opinion the defendant was sane at the time of the commission of the offense. Both alienists stated their reasons in full for their conclusions.

The defendant, in his own behalf, called some six witnesses, being members of his family or personal acquaintances, who testified that in their opinion the defendant was insane and of unsound mind on the day of the commission of the offense and for some time prior thereto.

[1,2] This testimony, however, merely created a conflict in the evidence which had been considered by the jury, and again by the trial court upon its denial of a motion for a new trial, and it is not the province of an appellate court to weigh the evidence and pass upon the credibility of the evidence. *People v. Rameriz*, 1 Cal.2d 559, 36 P.2d 628.

In *People v. Dugger*, 5 Cal.2d 337, 54 P.2d 707, the court said: "In said prosecution, where three doctors, including one called by defendant, testified that he was legally sane and that he knew the nature and character or consequences of his acts, the evidence was ample to support the finding of the jury that he was sane when the offenses were committed, and the weight and credibility to be given to the testimony of the several witnesses was within the exclusive province of the jury."

There being no other point urged for reversal, the orders and the judgment appealed from should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

24 Cal.App.2d 171

In re PARR'S ESTATE.

PARR v. WHITE.

Civ. 2142.

District Court of Appeal, Fourth District,
California.

Dec. 22, 1937.

1. Executors and administrators ⇌ 178

Where controversy between insured's widow and beneficiary named in insured's life policy over right to proceeds was settled by agreement directing insurer to pay insured's funeral expenses and to pay balance to insured's administrator, only amount received by administrator and not amount insurer paid on funeral bill could be considered in determining value of insured's estate for purpose of determining right of widow to have estate set aside on ground that it had value of less than \$2,500.

2. Executors and administrators ⇌ 178

The fact that expenses of administration and of last illness of deceased had not been paid was not sufficient ground for refusing to set aside to widow whole estate valued at less than \$2,500, since order setting aside estate to widow could direct payment of bills which were legal obligations of the estate and those which widow had authorized administrator to pay.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Proceeding in the matter of the estate of Frank A. Parr, deceased, wherein Mamie A. Parr filed petitions against Ben F. White, as administrator of the estate of Frank A. Parr, deceased, to set aside to petitioner as the widow the exempt personal property and to set aside to her the entire estate which had value of less than \$2,500. The two petitions were consolidated and heard together. From orders denying the petitions, the petitioner appeals.

Orders reversed.

Best & Best, of Riverside, for appellant.

Wallace P. Rouse, of Indio, amicus curiae for Gertrude Jones.

MARKS, Justice.

Frank A. Parr died intestate on July 1, 1936. Ben F. White was appointed administrator of his estate on November 2, 1936.

He qualified and is now the duly qualified and acting administrator of the estate.

The inventory and appraisal of the estate was filed on November 28, 1936. It showed the following assets: Cash, \$2,-024.25; automobile, \$150; personal property consisting of gold watch and clothing, \$25; and some shares of stock and participating units, no value. The estate had a total appraised value of \$2,199.25.

Mamie A. Parr is the widow and sole surviving heir at law of deceased. On December 3, 1936, she filed two petitions in the probate proceedings, one to set aside to her the exempt personal property, and the other to set aside to her the entire estate as it had a value of less than \$2,500. The couple had no children and Mrs. Parr had no property except her clothes and personal effects, which were of little value. She was dependent upon charity for her support.

The two petitions were consolidated and heard together and were denied. The orders have come before us on a single record. We will consider first the order refusing to set aside the entire estate to the widow.

It appears that deceased during his lifetime was employed by the Southern Pacific Company which carried a blanket insurance policy on its employees. Premiums on the insurance allotted to each employee were deducted monthly from wages earned and were paid by the company to the insurance carrier. At the time of the death of Mr. Parr the policy had a value of \$2,-420.98, as found by the court.

Some time before his death, deceased had changed the beneficiary in his policy from Mrs. Parr to Gertrude Jones. This was done without the consent of Mrs. Parr, who was living apart from her husband, though there had been no divorce.

A controversy arose between Gertrude Jones and Mrs. Parr over the one entitled to receive the amount due from the insurance carrier. This was settled by a contract dated October 20, 1936, executed by the two women, whereby the insurance carrier was directed to pay the funeral expenses of deceased and to pay the balance to the administrator. The funeral bill of \$396.73 was paid and the balance, \$2,024.-25, was paid to the administrator.

The administrator appeared as a witness at the hearing and testified that the appraised value of the automobile was too low as he had "a tentative offer on it of \$200.00

at the present time." He also testified "that although the mining stock is appraised in the inventory as of no value, in my opinion, it is very possible that it may be worth something on account of the district in which it is situated." It is clear that this last statement is pure speculation and no importance should be attached to it.

The trial judge was of the opinion that the total face value of the insurance policy should be charged as an asset of the estate, which would fix its total value at more than \$2,500. This, with the fact that bills for the last illness of the deceased and the expenses of administration had not been paid, furnished the chief grounds for the order refusing to set aside the whole estate to the widow.

In 14 California Jurisprudence, 585 et seq., we find the following: "The designation of a person as entitled to receive the proceeds of a life policy is conclusive, in the absence of any question as to the rights of creditors. A policy payable to the insured is in effect payable to the personal representative of his estate, who must collect and administer it. Where a policy is to be paid, subject to the will of the insured, and he bequeaths the fund subject to the payment of his debts, the executor is the proper person to recover the money, though in the case of the death of a husband, the court may set insurance money aside for the use of his family, as property exempt from execution. If insurance money is payable to the personal representative of the insured for the benefit of his family, the representative receives the money as agent or trustee for the beneficiaries and is liable for conversion in his individual capacity if he applies the money to the debts of the estate. * * * A policy of insurance upon the life of a married person payable to a stranger is community property if the premiums are paid with community funds. Under this rule, if a policy upon the life of a husband is made payable to a third person without the consent of the wife, and the premiums are paid with community funds, the wife is entitled to one-half of the proceeds, for the reason that, by designating the beneficiary, the husband initiates a gift which is ineffectual as to the wife if she does not give her consent in the manner indicated in the statute."

[1] It would therefore appear from the very meager record before us that money payable on the insurance policy belonged, one-half to Mrs. Parr, and one-half to

Gertrude Jones. Primarily, neither the administrator nor the estate had any interest in it. The only interest the estate acquired in this money was through a gift from Mrs. Parr and Gertrude Jones, which gift has been consummated by paying \$2,024.25 to the administrator. As this was all the money he received he cannot be required to account for more.

The \$396.73 paid by the insurance carrier to the undertaker was under order of Mrs. Parr and Gertrude Jones. It was their money with which they could do as they pleased. Neither the administrator nor the probate court is concerned with this payment and the administrator cannot be required to account for this money as he did not receive it nor had he any claim upon it.

[2] We must next turn to the question of the expenses of administration and of the last illness of deceased which *amicus curiae* urges is sufficient ground upon which to support the challenged order. On December 1, 1936, Mrs. Parr in writing authorized and requested the administrator to pay these bills out of the estate funds in his possession. It is clear that Mrs. Parr had no funds out of which she could have paid these bills.

The question here presented is quite analogous to that involved in the cases of *In re Estate of Mahoney*, 133 Cal. 180, 65 P. 389, 85 Am.St.Rep. 155; *In re Estate of Ross*, 187 Cal. 454, 202 P. 641; *In re Estate of Johnson*, 218 Cal. 501, 23 P.2d 1012; *In re Estate of Hill*, 94 Cal.App. 113, 270 P. 708; and *In re Estate of Cohn*, Cal.App., 67 P. 2d 362.

Section 1024 of the Probate Code provides that, before any decree of distribution be made, all inheritance taxes due from a distributee must be paid. Our courts have affirmed decrees of distribution where inheritance taxes had not yet been paid, when it appeared that there were funds in the estate available for that purpose, and the decree directed the administrator to pay the inheritance taxes prior to the delivery of the property to the distributee. We think a similar rule should be applied here. There were funds in the estate to pay these bills. The widow had no funds with which to pay them. An order setting aside the estate to the widow could direct the payment of such of these bills as are legal obligations of the estate and are specified in the written order of the widow. The balance of the estate could then be given to the widow. This would furnish protection to the preferred

creditors and permit the widow to receive her mite.

Gertrude Jones objects to this procedure on the ground that it would defeat her claim for \$995 which has been presented, allowed, approved, and filed. If, as she claims, this bill is for the expenses of the last illness of deceased, she will not be prejudiced because Mrs. Parr has requested the administrator to pay expenses of the last illness. This question can be settled at another hearing as the record before us is not sufficient for its determination at this time.

If, as suggested by the administrator, any assets of the estate possess value greater than now appears, that fact may be developed at the next hearing of the petitions. The actual value of the estate should be fairly determined.

As the order refusing to set aside the assets of the estate to the widow must be reversed, little further need be said concerning the order refusing to set aside exempt personal property to the widow. It should be sufficient to say that some of the items described in the petition to set aside exempt personal property are of such value and character that the widow should be entitled to them. A full hearing should be had on this petition.

The orders appealed from are reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



24 Cal.App.2d 206

In re JENNINGS' ESTATE.

McPIKE v. HASBROUCK.

Civ. 10649.

District Court of Appeal, First District,
Division 2, California.

Dec. 23, 1937.

1. Executors and administrators ⇨497

An administrator, who personally performed no services in connection with the defense of an action against him by claimant on an alleged oral contract with decedent, was not entitled to compensation as for rendition of "extraordinary services" although the claim was successfully resisted

by administrator's father as attorney. Probate Code, § 902.

[Ed. Note.—For other definitions of "Extraordinary Services," see Words & Phrases.]

2. Executors and administrators ⇨508(1)

An order allowing an administrator's first annual account in part only was not subject to objection that it attempted to charge the administrator or administrator's attorney for interest upon administrator's fees and attorney's fees paid before final settlement because it suspended authority for payment of such fees until final account, in absence of evidence that the administrator had paid any fees to himself or his attorney.

3. Witnesses ⇨391

Attorney of estate and undertaker to whom claimant had asserted that she had no claims against estate became competent witnesses to dispute claimant in any subsequent attempt to assert a claim.

4. Attorney and client ⇨141

An allowance of \$200 as attorney's fees for resisting a claim against an estate was adequate, where the services performed consisted solely of preparing and filing a demurrer and an answer and later obtaining an order permitting a compromise of the suit which had been brought against the administrator on such claim.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Proceeding in the matter of the estate of Margaret A. Jennings, deceased, between H. W. McPike, administrator, and C. H. Hasbrouck, executor of the last will and testament of Kate Sidles, deceased. From an order allowing in part the first annual account filed by the administrator, the administrator appeals.

Affirmed.

H. H. McPike, of San Francisco, for appellant.

Cleveland R. Wright, of San Francisco, for respondent.

STURTEVANT, Justice.

Heretofore H. W. McPike, administrator of the estate of Margaret A. Jennings, deceased, presented to the superior court of the State of California, in and for the city

and county of San Francisco, sitting as a probate court, his first annual account. Thereafter, on the 4th day of November, 1936, the said court made an order allowing the account in part, disallowing certain items, and modifying the amount as to some other items. Later the administrator appealed from certain portions of said order. Other facts will be stated below when the occasion arises.

[1] The administrator states his first point as follows: "Does the statute, Probate Code, § 902, authorize the court to refuse all extraordinary compensation to an administrator who has rendered 'any extraordinary services, such as * * * litigation in regard to the property of the estate' where the whole estate is involved in the litigation and successfully defended by the administrator?" The point as stated may not, under the facts of this case, be answered directly. It assumes that this administrator rendered extraordinary services. The record does not sustain the assumption. Soon after the death of the decedent, H. W. McPike applied for and was granted letters of administration. Immediately thereafter he qualified and at once went to the Hibernia Savings & Loan Society and drew out of that bank \$4,211.28, and put it in his attorney's safe. Said sum of money was the sole item of property coming into the hands of the administrator. A short time after the appellant qualified as administrator, Annie Gillespie made a demand on him that he surrender all of said money to her, claiming that said money was by the decedent orally transferred to her under a contract duly entered into and by the terms of which Annie Gillespie agreed to care for the decedent during the remainder of her life. The administrator refused to surrender the property and thereupon Annie Gillespie commenced an action against him to recover said moneys. Except as noted below, the record discloses that he, personally, performed no services whatever in connection with the defense of said action. However, it does disclose that his father, Mr. H. H. McPike, who is an attorney at law, took charge of and conducted said litigation for him. At one time when Mr. H. H. McPike was ill, the administrator, in company with Mr. James Peck, another attorney at law, went into court, but the record does not disclose that the administrator did anything except to listen to the proceedings had. The record also discloses that he looked up some au-

thorities for and turned the information over to his father. Under these circumstances we think it is clear that the trial court did not err in finding the administrator did not render any extraordinary services and the court did not err in refusing to allow him any extraordinary compensation.

[2] The second point is stated as follows: "Is it proper for the court to charge the administrator or administrator's attorney for interest upon administrator's fees and attorney's fees *paid* before final settlement?" (Italics ours.) Attempting to answer that proposition as directly as the record warrants, there is no evidence that the administrator's fees or attorney's fees *have been paid*. The record does not disclose that the probate court has ever made an order authorizing any payment of the statutory fees to the appellant or to his attorney, but on the other hand, the order appealed from, among other things, contained the following: "* * * statutory fee claimed by administrator retired from the account and reserved until hearing on the final account and petition for final distribution, \$198.45; and the statutory fee claimed for the administrator's attorney, retired from the account and reserved until the hearing on the final account and petition for final distribution in the amount of \$198.45; and so much thereof as ordered, adjudged and decreed that the application for a fee for extraordinary services of the attorney for the administrator be granted in the sum of \$200.00, and the payment of which shall be deferred until the hearing and settlement of the final account; * * *" The appellant testified that he never used any of the money, and from that testimony we assume he never *paid* fees to himself nor to his attorney. It follows that the record does not show that the order appealed from imposed a charge for interest on fees *paid* to the appellant or fees *paid* to his attorney.

[3, 4] Finally, the appellant states: "Is \$200 a reasonable amount to allow the attorney for the whole estate, where more than three-fourths of the estate is saved and without the services of this particular attorney and his special knowledge of the facts, the whole estate would have been lost on a fraudulent claim?" That proposition is predicated on the following facts and no other facts: Soon after the death of the decedent, appellant's attorney, Mr. H. H. McPike, and the undertaker, held a conversation with Annie Gillespie in the pres-

ence of her husband. In that conversation Mr. McPike propounded to her numerous questions regarding any possible claim that she might have against the estate of the decedent. In reply to those questions Annie Gillespie replied that she had no claims whatever. It is clear that Mr. H. H. McPike and the undertaker each became competent witnesses to confront Annie Gillespie if thereafter she attempted to assert any claim to said moneys. After Annie Gillespie commenced the above-mentioned action, Mr. H. H. McPike appeared as appellant's attorney and filed a demurrer. Later he filed an answer. About a year after the death of the decedent the appellant applied to the probate court for, and an order was granted, authorizing him to compromise the litigation by paying Annie Gillespie \$1,000. After that order was made the appellant neglected and refused to proceed further. A citation was issued against him directing him to consummate the compromise. Later an order to that effect was made by the probate court. The appellant applied to this court for a writ of review. This court annulled the order of the probate court. The latter court applied to the Supreme Court and the proceeding was transferred to that court. Later the Supreme Court adopted the opinion theretofore filed by this court and annulled said order. *McPike v. Superior Court*, 220 Cal. 254, 30 P.2d 17. Soon after the remittitur went down the appellant paid the \$1,000 and the action brought by Mrs. Gillespie was terminated. On the hearing of appellant's account it was contended that the services performed by Mr. H. H. McPike in the action brought by Mrs. Gillespie were negligible. There was evidence that maintaining the proceeding entitled *McPike v. Superior Court*, supra, was unnecessary and did not operate to the advantage of the estate of the decedent. Mr. H. H. McPike stated: "It is the duty of the administrator, where he believes and is informed that the claim against an estate is false and fraudulent and blackmail, to use every means to defeat it." That statement the record shows did not satisfy the trial court and it was of the opinion that the appellant should not charge the estate of the decedent for services rendered by his attorney in that litigation. The proposition we are now discussing is therefore reduced to the question: Was the allowance of \$200 so small as to be an abuse of discretion in fixing a fee for the preparation and filing of a demurrer and an answer and obtaining an

order permitting a compromise of the litigation entitled *Gillespie v. McPike*? We may not say it was.

The order appealed from is affirmed.

We concur: **NOURSE, P. J., SPENCE, J.**



24 Cal.App.2d 272

**WESTERN STATES HOLDING CO.
v. VAUGHAN et al.**

Civ. 5924.

**District Court of Appeal, Third District,
California.**

Dec. 28, 1937.

Rehearing Denied Jan. 28, 1938.

Hearing Denied by Supreme Court
Feb. 24, 1938.

1. Pleading $\S$ 36(3)

In ejectment, plaintiff was not bound by admission, in answer to cross-complaint, of allegation of ownership by one defendant, where such answer was amended, on notice to defendants, to deny such allegation of ownership.

2. Vendor and purchaser $\S$ 228(7)

A grantee who took deed with knowledge of prior execution of trust deed by his grantor could not claim title as against purchaser on foreclosure of trust deed.

3. Judgment $\S$ 682(3)

A decree refusing to enjoin foreclosure of trust deed in suit to which mortgagee was a party, which decree was based on finding that mortgagor had title for herself and not as trustee for plaintiffs, was res judicata of issue determined by such finding, in ejectment action by purchaser on foreclosure of trust deed against plaintiffs in injunction suit.

4. Ejectment $\S$ 96

In ejectment action against husband and wife and husband's sister, husband's testimony that he lived on property, that sister lived thereon as his housekeeper, and that another leased apartment house on property from husband, sufficiently established defendants' possession of property to authorize judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by Vera C. Seiler against Arthur C. Vaughan and others, wherein a cross-complaint was filed, and wherein Myron H. Wells, as trustee under a deed of trust, was substituted as plaintiff, and thereafter Western States Holding Company was substituted as plaintiff. From an adverse judgment, defendants appeal.

Affirmed.

Arthur C. Vaughan, Benjamin H. Sheldon, and Reay, Scharf & Reay, all of Los Angeles, for appellants.

Ray R. Rogers and Bernstein & Spizer, all of Huntington Park, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal arose out of an action in ejectment brought by Vera C. Seiler. In November, 1930, Vera C. Seiler purchased the property here in question at a foreclosure sale at which Protective Building & Loan Association sold the property to satisfy a deed of trust by Jessie Vaughan to secure the repayment of a promissory note of some \$30,000. Arthur C. Vaughan and Libbie L. Vaughan, two of the appellants herein, claiming to be the owners of the property, refused to surrender possession to the purchaser, and this action followed.

After the commencement of the action Vera C. Seiler conveyed her interest in the property to Western States Building & Loan Association, and later, by order of the court, respondent Myron H. Wells, as trustee, was substituted as plaintiff, and thereafter Western States Holding Company was substituted as plaintiff. From the testimony, concerning which there is but little dispute, it appears that prior to March, 1925, Carolyn and Harrison Henrich, husband and wife, were the owners of a certain lot in the city of Los Angeles, which was improved with a large apartment house which they agreed to sell to Arthur C. Vaughan. The apartment house was moved from the Henrich property and located on the property here involved, the consideration for the purchase price of the Henrich property being cash and a lease to Henrich on the apartment house. The various papers were placed in escrow, and upon the completion thereof, the grantee named in the deed was Jessie Vaughan, and the trust deed, signed by Jessie Vaughan, was delivered, together with the note secured thereby, to the Building & Loan Association.

Mr. and Mrs. Henrich and Mr. and Mrs. Vaughan occupied apartments in the building after it was moved to the property here involved, until some time in September, 1927, when Libbie L. Vaughan left the apartment and has ever since resided elsewhere. After Libbie L. Vaughan left, the Henrichs furnished an apartment for Vaughan and leased the same to him, and at about the same time Jessie Vaughan, a sister of Arthur C. Vaughan, came to act as housekeeper for him.

It is the contention of appellants that the property in question was at all the times herein mentioned the property of Arthur C. Vaughan and the community property of Arthur C. Vaughan and Libbie L. Vaughan, and that Jessie Vaughan at no time was the owner of the property or in the possession thereof nor did she claim to be the owner or entitled to the possession, but that she held the naked legal title in trust for Arthur C. Vaughan.

It is also claimed by appellants that respondent in his answer to the cross-complaint admitted that Vaughan was the owner of the fee in the property, which was one of the issues in the case, but respondent points out this allegation was amended and this admission was changed to a denial.

Prior to the trial of this action a motion was made by plaintiff for leave to file a supplemental answer to the cross-complaint setting up the prior determination of the issues raised by appellants, and which had by that time been determined in a prior action. Permission was granted, and all the papers including the judgment roll in a former action entitled Vaughan v. Peoples Mortgage Company, reported in 130 Cal.App. 632, 20 P.2d 335, were received in evidence. That was an action filed by Arthur C. Vaughan and Libbie L. Vaughan, as plaintiffs against the Peoples Mortgage Company, and Protective Building & Loan Association et al., to enjoin the foreclosure of certain trust deeds upon the property here in question. In that complaint plaintiffs allege that Arthur C. Vaughan and Libbie L. Vaughan were the owners in fee of the property, and when the property was acquired by them the same was deeded by the grantor to Jessie Vaughan without the knowledge and consent of Libbie L. Vaughan, and that the property was held in trust by Jessie Vaughan for Arthur C. and Libbie L. Vaughan, and that the prop-

erty was the community property of Arthur C. and Libbie L. Vaughan.

It is also therein alleged that Arthur C. Vaughan arranged to borrow from Protective Building & Loan Association the sum of \$25,000, and as evidence thereof Jessie Vaughan made and delivered to Protective Building & Loan Association a promissory note secured by a trust deed upon the property, which deed of trust was signed by Jessie Vaughan at the instance and request of Arthur C. Vaughan and without the knowledge or consent of Libbie L. Vaughan.

The findings of fact and conclusions of law in that action are too long to be here set forth, but in effect they held contrary to the contentions of the Vaughans. The court found that it was not true that Arthur C. Vaughan and Libbie L. Vaughan were the owners in fee simple of the property, nor that at the time the property was acquired the same was deeded by the former owner to Jessie Vaughan without the knowledge and consent of Libbie L. Vaughan, and that it was not true that the property was held by Jessie Vaughan in trust for Arthur C. Vaughan and Libbie L. Vaughan, but on the contrary the property was acquired by Jessie Vaughan with funds received by her as the proceeds of a loan secured upon property, and that the property was not the community property of Arthur C. Vaughan and Libbie L. Vaughan. The court also found that during all the times in question Arthur C. Vaughan represented himself as agent of Jessie Vaughan, and was authorized so to do by a power of attorney and that she subsequently approved and ratified all of his acts in connection with the property.

In the case now before us appellants advanced many of the points contended in the former case, but, according to our opinion, these have been disposed of in that case. *Vaughan v. Peoples' Mortgage Company et al.*, supra.

[1] The first point urged by appellants has to do with the purported admission of plaintiff that Arthur C. Vaughan was the owner in fee simple of the property in question. However, in an amendment to plaintiff's answer to the cross-complaint, of which appellants had notice, this allegation was properly denied, which disposes of that objection.

[2] Appellants contend that by virtue of the grant deed from Jessie Vaughan to Arthur C. Vaughan he thereby became the

owner of the property. However, the record discloses that prior to the execution of this deed Jessie Vaughan had subjected the property to a lien of the deed of trust, and it was by virtue of the foreclosure of this deed of trust that respondent claims title. There is nothing to show that the particular deed from Jessie Vaughan to Arthur C. Vaughan was recorded prior to the deed of trust, but the record does show that Arthur C. Vaughan had knowledge of the existence of the trust deed, inasmuch as he acted as attorney in fact for Jessie L. Vaughan, and he took the property with knowledge of the existence of the trust deed and therefore subject thereto. Any interest, therefore, which Arthur C. Vaughan might have had by reason of the deed was acquired by Vera C. Seiler, who purchased the property and secured the trustees' deed upon the sale.

It should be recalled, too, this being an action in ejectment, it was unnecessary to prove that Arthur C. Vaughan was the owner of the property, it being only necessary to allege and prove that he was in possession thereof.

[3] It is further contended that neither the original plaintiff in this action nor Myron H. Wells, the substituted plaintiff, have shown title or prior possession. This argument is based upon the contention of appellants that Jessie Vaughan had no title to the property but held only the naked title. This point was fully considered in the former case, supra, where it was held that Jessie Vaughan was the owner of the property, which was paid for from the proceeds of a loan thereon made to her.

[4] It was also urged by appellant that it was not shown that defendants were in possession at the time of the commencement of the action, but an examination of the record shows that Arthur C. Vaughan, called as a witness, testified that he resided in an apartment on the property since June, 1925, and that Jessie Vaughan lives upon the premises, acting as housekeeper for him, and that Henrich, as lessee leased the apartment house from him.

Appellants also claim that plaintiff has failed to properly plead estoppel by judgment. Respondents, however, have set forth in the supplemental answer filed herein all the appropriate issues raised in the former case, and an examination of

the supplemental answer shows that all of the information required by law to be set forth was there shown.

Various other points are presented, but we believe sufficient appears from the foregoing that the trial court was correct in reaching its judgment in favor of respondent herein.

The judgment should therefore be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



24 Cal.App.2d 282

IN RE STERN'S ESTATE.

CROCKER v. NATHAN.

Civ. 10646.

District Court of Appeal, First District,
Division 1, California.

Dec. 30, 1937.

Hearing Denied by Supreme Court

Feb. 24, 1938.

1. Executors and administrators Ⓒ507(1)

It is beyond the power of probate court, in settlement of executor's account, to approve or confirm payments previously made by executor to legatees without court authorization.

2. Executors and administrators Ⓒ507(1)

It is only on hearing for distribution, partial or final, that advances on distributive shares can be considered or approved.

3. Executors and administrators Ⓒ315(9)

Where executor made advances to legatee pursuant to prior decree of partial distribution, subsequent decree approving advances was valid and executor could not be held responsible to legatee's judgment creditor for advances made prior to levy of execution on legatee's interest in estate.

4. Executors and administrators Ⓒ315(9)

Decree rendered as decree of partial distribution based on petition asking only for such decree, at a time when no disposition had been made of realty belonging to estate, could not be attacked as ineffective decree of final distribution because there had been no settlement of final account.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Philip Stern, deceased. From an order settling the account of Henry S. Nathan, executor over exceptions of Ernestina Crocker, and from an order granting executor's petition for partial or ratable distribution over objections of Ernestina Crocker, Ernestina Crocker appeals.

Affirmed.

H. W. Hutton, of San Francisco, for appellant.

Livingston & Livingston, and Richard Wagner, all of San Francisco, for respondent.

KNIGHT, Justice.

This is an appeal from two decrees rendered in the matter of the estate of Philip Stern, deceased; one settling the executor's account and the other granting his petition for partial or ratable distribution.

The controversy arises out of the following facts: In March, 1935, the appellant, Ernestina Crocker, brought an action against Fannie S. Nathan and her husband, Henry S. Nathan, to recover the sum of \$1,999.33 due on a promissory note; and on March 22, 1935, she caused a writ of attachment to be levied on Mrs. Nathan's interest in the estate of her father, Philip Stern, deceased. In April, 1935, appellant brought a second action against the same parties to recover a sum in excess of \$2,000 due on a promissory note, and on August 26, 1935, after obtaining judgment in the action, she caused an execution to be levied on Mrs. Nathan's interest in said estate. The assets of the estate consisted of real and personal property, and by the terms of decedent's will Mrs. Nathan was bequeathed one-fourth of the residue. Isaac Frohman and Mrs. Nathan's husband were appointed executors, but Frohman died a year or more subsequent to the issuance of the letters testamentary, and thereafter Henry S. Nathan acted as sole executor.

On February 24, 1936, said executor filed an account setting forth in detail the items of receipt and disbursement, and it appears therefrom that out of the cash receipts he paid as the occasion demanded and as the money was available the administration expenses, taxes, insurance, and upkeep of the real property, and all of the specific cash legacies; and the residue was paid in equal

shares to the four residuary legatees, one of whom was Mrs. Nathan. Said payments were made to the legatees in installments as the money was received monthly by the executor from the income of the property, so that on March 22, 1935, the date on which the writ of attachment was levied, the only assets remaining in the hands of the executor consisted of about \$3 in cash and the real property. The payment so made to Mrs. Nathan prior to the levy amounted to \$1,031. Subsequent to the levy and up to the time of the filing of the account approximately \$436 was received by the executor, but no part of it was paid to Mrs. Nathan. Admittedly, however, all of such advances were made to the legatees by the executor without first having obtained any court authorization therefor; consequently, for the purpose of securing court approval thereof the executor filed also a petition for partial or ratable distribution. Appellant filed exceptions to the account and objections to the petition, but the same were disallowed and overruled, and at the hearing the account was settled and the petition granted.

[1, 2] At the time the opening brief was filed, counsel for appellant assumed that no decree of partial or ratable distribution had ever been given or made (page 5, appellant's opening brief), and that the court approval of the advances so made by the executor to said legatees rested alone on the order settling the account. Consequently the single point urged by appellant in her opening brief, in support of the appeal, was based upon the legal proposition, which is not disputed, that it is beyond the power of the probate court in the settlement of the executor's account to approve or confirm payments previously made by him to the legatees without court authorization. In re Estate of Willey, 140 Cal. 238, 73 P. 998; Elizalde v. Murphy, 4 Cal.App. 114, 87 P. 245; In re Estate of Elizalde, 182 Cal. 427, 188 P. 560. As held in the cases cited and in a later decision (In re Estate of Guglielmi, 138 Cal.App. 80, 31 P.2d 1078), it is only upon hearing for distribution, partial or final, that advances on distributive shares can be considered or approved. See, also, 12 Cal.Jur. 181.

[3] Subsequently, however, it was ascertained that a decree of partial or ratable distribution had been rendered and filed, but through inadvertence had been omitted from the transcript on appeal; and on stipulation it was made part of the record here-

in. Therefore, since the advances so made to Mrs. Nathan have received court approval in conformity with the requirement declared in the cases above cited, the decree of approval made in that behalf is valid, and the executor cannot be held responsible to appellant for any such advances made prior to the levy of said writ.

[4] Appellant makes the additional point in her reply brief that the decree in question is in effect a decree of final distribution, and consequently is invalid because there has been no settlement of a final account. The decree cannot be so construed. It was rendered and entered as a decree of partial or ratable distribution and is based on a petition asking only for such a decree. Furthermore, it is admitted that no disposition has ever been made of the real property belonging to the estate.

The orders appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.



23 Cal.App.2d 669

WALLACE v. RILEY et al. (WALLACE, Intervener).
Civ. 10561.

District Court of Appeal, First District,
Division 2, California.

Nov. 29, 1937.

Hearing Denied by Supreme Court
Jan. 27, 1938.

1. Joint tenancy ⇨3

A written agreement between depositors and bank that moneys deposited in certain account and interest and dividends thereon should be paid to depositors or either of them or survivor, without reference to original ownership of moneys deposited, though not using term "joint tenancy," created statutory deposit in joint tenancy (St.1929, p. 444, § 15a).

2. Joint tenancy ⇨3

Presumption is that written instrument creating joint tenancy in bank deposit deliberately executed, expresses intention of parties (St.1929, p. 444, § 15a).

3. Joint tenancy ⇨3

Creation of bank account substantially in form prescribed by statute authorizing

joint tenancy deposits raises a presumption at once that interest of depositors is that of joint tenants (St.1929, p. 444, § 15a).

4. Joint tenancy ⇨6

On death of either depositor in joint bank account in absence of fraud or undue influence, presumption of sole and exclusive ownership in survivor becomes conclusive in respect of any moneys then left in account, but continues to be rebuttable as to moneys previously withdrawn (St.1929, p. 444, § 15a).

5. Joint tenancy ⇨3

In controversies arising during joint lives of depositors, the form of deposit is not conclusive on subject of ownership in joint tenancy, but proof is admissible that tenancy created was something different from character of joint tenancy according to its legal definition (St.1929, p. 444, § 15a).

6. Joint tenancy ⇨3

Until otherwise proved, presumption continues in favor of conjoint ownership of entire fund by codepositors in equal shares with all incidents of joint tenancy, where deposit is in form prescribed by statute relating to joint tenancy (St.1929, p. 444, § 15a).

7. Joint tenancy ⇨6, 8

For purposes of tenure and survivorship, each joint tenant in bank deposit acquires ownership of joint interest in whole fund at time of creation of joint tenancy, and, on death of either, entire amount to credit of account in absence of fraud or undue influence remains conclusively exclusive property of survivor without regard to original ownership (St.1929, p. 444, § 15a).

8. Joint tenancy ⇨10

During lifetime of both of depositors in joint tenancy bank account, either one has right to establish real fact with reference to account, and title to deposit, and to bring action in respect thereto (St.1929, p. 444, § 15a).

9. Joint tenancy ⇨3

When money is taken from a joint tenancy bank account during joint lives of depositors, property acquired with money so withdrawn or another account into which money is traced retains its character as property held in joint tenancy, unless change in character thereof has been effected by agreement between parties (St.1929, p. 444, § 15a).

10. Trusts ⇨359(2)

Where joint tenancy bank deposit was transferred to new joint tenancy account in names of one of original depositors and son of other depositor under son's oral agreement with mother that, if mother recovered from illness, he would hold in trust for her his interest in account and would transfer to mother his interest in such account on mother's request, there being no consideration passing from son to mother for transfer, parol trust created was enforceable in equity, and mother, as beneficiary of trust, had interest in subsequent litigation involving deposit (St.1929, p. 444, § 15a).

11. Joint tenancy ⇨8

General rule is that joint tenants are presumed to have equal interests as between themselves.

12. Joint tenancy ⇨8

In statutory tenancies in bank deposits, if there is clear and convincing proof of agreement concerning respective interests of designated joint tenants, or if there is evidence overcoming presumption that tenants have equal interests in deposit, such fact may be asserted as defense against tenant claiming interest in deposit (St.1929, p. 444, § 15a).

13. Joint tenancy ⇨10

Complaint in intervention alleging creation of joint tenancy bank account between one defendant and intervener, that, owing to intervener's critical illness, account was transferred to new joint tenancy account in names of such defendant and plaintiff, who was intervener's son, as trustee for intervener, and that subsequently, without knowledge of intervener or her son, defendant caused money to be withdrawn and deposited in other accounts as specified, and that parties made joint tenants in such new accounts with defendant knew facts, held sufficient as against general and special demurrers (St.1929, p. 444, § 15a).

14. Pleading ⇨67

Complaint in intervention in suit involving interest in joint tenancy bank deposit was not required to anticipate possible defenses (St.1929, p. 444, § 15a).

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Harvey E. Wallace against Charlotte M. Riley and others, in which

Minnie Wallace intervened. From a judgment based on an order sustaining, without leave to amend, demurrers to intervenor's amended complaint, intervenor appeals.

Reversed, with directions.

John L. Talt and Pierre A. Fontaine, of Oakland, for appellant.

Fred B. Mellman, of Oakland, for respondents Riley et al.

Harold Huovinen, of Oakland, for respondent Wallace.

JOHNSON, Justice pro tem.

This case is a companion to the case of Harvey E. Wallace v. Charlotte M. Riley and American Trust Company (No. 10560) 74 P.2d 807, in which Minnie Wallace, as intervenor, appealed from a judgment entered against her upon an order sustaining demurrers to her second amended complaint in intervention. Decision of this court in that appeal reversing the judgment against said intervenor, based on an order sustaining demurrers to her complaint, has been filed this day.

This appeal, like the appeal in case No. 10560, brings to the court for consideration rival claims of living depositors, named as joint tenants of certain bank accounts created in joint tenancy under section 15a of the Bank Act, St.1909, p. 87, added by St.1921, p. 1367, as amended by St.1929, p. 444.

As in the companion case, this appeal is by the intervenor, Minnie Wallace; and is taken from a judgment based on orders sustaining, without leave to amend, demurrers to the intervenor's first amended complaint, which had been interposed, one by the plaintiff, Harvey E. Wallace, the other by the defendants Charlotte M. Riley, Gladys G. Grabill and Curtis E. Riley, Sr.

The complaint in intervention, which is in two counts, states facts differing in some respects from those stated in the companion case. The controlling principles of law, however, are the same in both cases, and therefore may advantageously be discussed here with less fullness than in the other case.

The intervenor alleges in both counts of her complaint that on August 10, 1933, Harvey E. Wallace, as plaintiff, instituted an action against Charlotte M. Riley, Gladys G. Grabill, Curtis E. Riley, Sr.,

and Central Bank of Oakland, seeking to have a trust declared for said plaintiff's benefit in one-half of the funds on deposit in said bank in account No. 15781 in the names of Charlotte M. Riley and Curtis Ellerslie Riley, and also in account No. 15780 in the names of Charlotte M. Riley and Gladys G. Grabill.

Parenthetically, it may be stated that the Central Bank of Oakland is the successor of the former Central Savings Bank of Oakland, and that the bank is in the position of a mere stakeholder and refrains from entering into any controversy with any of the other parties.

[1,2] Proceeding with the first count of her complaint, the intervenor alleges that on April 20, 1923, by a written agreement set forth in full, she and the defendant Charlotte M. Riley agreed between themselves and the bank, then known as Central Savings Bank of Oakland, that all moneys then or at any time deposited by said individuals or either of them in an account, numbered 25951, should be so deposited by them, and received by the bank, upon such terms and conditions of repayment that the amount on deposit and all dividends thereon should be paid to said depositors or either of them, or to the survivor of them, or the executors, administrators, and assigns of such survivor, and without reference to the original ownership of the moneys deposited.

While this agreement did not use the term "joint tenancy," it is nevertheless in the form authorizing the money on deposit to be paid to either depositor or the survivor of them. Hence under the statute it became a deposit in joint tenancy, subject to the provisions of section 15a, which is to be read as part of the contract, and the presumption is that a written instrument deliberately executed expresses the intention of the parties. *Kayser v. Gorman*, 3 Cal.2d 478, 486, 44 P.2d 1041.

According to the complaint, the account was opened with a deposit of \$1,029.62, and by further deposits made by Charlotte M. Riley and the intervenor, together with additions of interest, the account of the codepositors had to its credit on January 10, 1931, the sum of \$6,385.90. In the meantime, however, the number of the account was, on July, 1926, changed by the bank to No. 2065; but the account continued to be maintained under the agreement of the codepositors dated April 20, 1923.

On January 10, 1931, the amount of \$6,385.90, then on deposit in account numbered 2065, was transferred to a new account in the same bank, numbered 13490, which was opened by Charlotte M. Riley and Harvey E. Wallace, the son of the intervener, pursuant to a written agreement between said depositors, set forth in full, in the same terms as the agreement which had been made on April 20, 1923, by Charlotte M. Riley and the intervener.

The reason for that change, as stated by the intervener, was that she had been so seriously ill that she had been informed by her physicians that she might die; and desiring, in case of her death, to preserve for her children her interest in said fund on deposit in account No. 2065, she consented to the transfer of said amount on deposit in that account to the new account numbered 13490, opened in the joint names of Charlotte M. Riley and Harvey E. Wallace pursuant to their agreement of January 10, 1931.

No consideration was rendered to the intervener by her son for her interest in the account in which the intervener had been a codepositor with Charlotte M. Wallace; but it is alleged that the son, Harvey E. Wallace, agreed orally with his mother that, if she should recover from her illness, he would hold as trustee for her his interest in all funds with which the new account, numbered 13490, should be credited, and would transfer to his mother his interest in that account upon her request.

The amount to the credit of account 13490 had increased by April 1, 1933, to \$7,198.69; and on that day as alleged, Charlotte M. Riley, without the knowledge or consent of Harvey E. Wallace or the intervener, withdrew from the account and appropriated to her own use the entire amount of \$7,198.69, and caused said sum to be transferred to a new account in the same bank, opened in the names of Charlotte M. Riley, Gladys G. Grabill and Curtis E. Riley, Sr. This apparently was not a joint tenancy account.

Thereafter on the same day one-half of the funds transferred to that new account was transferred to a distinct joint tenancy account in said bank, numbered 15781, opened in the names of Curtis E. Riley (sued herein as Curtis E. Riley, Sr.) and Charlotte M. Riley, as joint tenants; and the remaining one-half was transferred to another joint tenancy account, No.

15780, in the names of Charlotte M. Riley and Gladys G. Grabill as joint tenants.

The intervener alleges in addition that no consideration was paid to her or to Harvey E. Wallace by Gladys G. Grabill or Curtis E. Riley, Sr., for such transfers; and on information and belief alleged that no consideration was paid by said persons to Charlotte M. Riley, and that whatever interest said persons respectively have in said accounts 15781 and 15780 was received with full knowledge of the ownership of the interest of said Harvey E. Wallace and the intervener in the funds so transferred.

The second count of the complaint in intervention is more closely tied to the intervener's complaint in the companion case, No. 10560. In conformity with the intervener's complaint in that case, it alleged here in the second count that on August 5, 1924, a joint tenancy account, numbered 4006, was opened in the names of Charlotte M. Riley and the intervener in the bank now known as American Trust Company, but at that time named Mercantile Trust Company. The account was established under a written agreement, set forth in full, whereby said depositors agreed between themselves and the bank that all moneys then or thereafter deposited by said individuals, or either of them, should be deposited, and received and held by the bank, together with all interest, dividends, and accumulations, as property of both said individuals as joint tenants, without consideration of its previous ownership, and should be payable to, and collectible by, either of said individuals during their joint lives; and after the death of either should belong to, and be the property of, the survivors.

The account was so opened with a deposit of \$1,064.99, and by subsequent additions the amount to the credit of the account had increased by January 10, 1931, to \$3,120.55. At that time, by reason of serious illness of the intervener, as alleged in the first count of her complaint in this action, the said amount to the credit of said account 4006 was transferred with the intervener's consent to a new joint tenancy account numbered 8302, opened in the same bank under a written joint tenancy agreement, set forth in full, which was executed by said Charlotte Riley and the intervener's son, Harvey E. Wallace. That agreement was in the

same form as the joint tenancy agreement between Charlotte M. Riley and the intervener in relation to their joint tenancy account 4006. No consideration was paid by Harvey E. Wallace to his mother for her interest in account 4006, and the transfer was made on the son's oral agreement that, if his mother should recover from her illness, he would hold in trust for her his interest in all funds in the new account 8302, and would transfer to her all such interest upon her request.

By April 1, 1933, the amount to the credit of that account was \$3,365.32; and it is alleged that at that time Charlotte M. Riley, without the knowledge or consent of said Harvey E. Wallace or the intervener, withdrew from that joint tenancy account \$2,182.97, and on April 4, 1933, the further sum of \$182.33. After such withdrawals, there remained in account 8302 a balance of \$1,002.02, which is the subject of controversy in the companion case, No. 10560.

The intervener further avers that of said amounts so withdrawn by Charlotte M. Riley, aggregating \$2,365.30, one half was deposited in the Central Savings Bank of Oakland, now known as Central Bank of Oakland, in account No. 15781, to the credit of Charlotte M. Riley and Curtis Ellerslie Riley, Sr., as joint tenants, and the remaining half in account No. 15780 in that same bank to the credit of Charlotte M. Riley and Gladys G. Grabill as joint tenants.

The intervener states, as in the first count, that no consideration was paid by Gladys G. Grabill or Curtis E. Riley, Sr., to either Harvey E. Wallace or the intervener or to Charlotte M. Riley, for their interests in the funds so withdrawn from account No. 8302 in the American Trust Company, and that Gladys G. Grabill and Curtis E. Riley, Sr., had full knowledge of the ownership of Harvey E. Wallace and the intervener in said funds. She repeats also the statement that Harvey E. Wallace has refused, upon her demand, to comply with his oral agreement in respect of the funds to be held by him in trust and delivered to her upon her request.

The prayer of the intervener is that it be declared that Charlotte M. Riley, Gladys G. Grabill, and Curtis E. Riley, Sr., and the Central Bank of Oakland hold in trust for the plaintiff, Harvey E. Wallace, one-half of the funds transferred from the

aforesaid joint tenancy accounts, and held on deposit in said accounts 15781 and 15780 in said bank; and that said parties named as depositors in said accounts be required to deliver to said Harvey E. Wallace one-half of the funds on deposit therein together with any accruals of interest thereon; and that said Harvey E. Wallace, as trustee for the intervener, be required to deliver such moneys to her.

Charlotte M. Riley, Gladys G. Grabill, and Curtis E. Riley, Sr., joined in a demurrer both general and special to each count of the complaint in intervention. The special demurrer is substantially the same as the special demurrer of Charlotte M. Riley in the companion case, No. 10560, and the specifications need not be detailed here.

Harvey E. Wallace filed only a general demurrer to the intervener's complaint.

Section 15a of our Bank Act as adopted in 1921 was copied from provisions of the New York Bank Act then and still in force, Laws 1914, c. 369, § 249, Consol. Laws, N.Y. c. 2. Section 15a provides that, when a deposit shall be made by any person in the names of such depositor and another person and in form to be paid to either or the survivor of them, such deposit, and any additions thereto made by either of such persons, "shall become the property of such persons as joint tenants, and the deposit together with all dividends or interest thereon, shall be held for the exclusive use of such persons and may be paid to any of them during their lifetime or to the survivor or survivors after the death of one or more of them. * * * The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors."

[3-6] Under the construction given to these provisions both in New York and in California, the intentional creation by the depositors of a bank account, substantially in the form prescribed, raises a presumption at once that the interest of the depositors is that of joint tenants in the sense commonly attributed in law to that term. Upon the death of either depositor, then, in the absence of fraud or undue influence, the presumption of sole and

exclusive ownership in the survivor becomes conclusive, or irrebuttable, in respect of any moneys then left in the account, but continues to be a rebuttable presumption as to any moneys previously withdrawn. In like manner in controversies arising during the joint lives of the depositors, the form of the deposit is not conclusive on the subject of ownership in joint tenancy, and the door is open to proof that the tenancy created was in truth something different from the character of a joint tenancy according to its legal definition. Until otherwise proved, however, the presumption continues in favor of conjoint ownership of the entire fund by the codepositors in equal shares, with all the incidents of joint tenancy.

Such are the rules in New York as declared in *Moskowitz v. Marrow*, 251 N.Y. 380, 167 N.E. 506, 66 A.L.R. 870; *Marrow v. Moskowitz*, 255 N.Y. 219, 174 N.E. 460; *Estate of Porianda*, 256 N.Y. 423, 425, 176 N.E. 826; *Clary v. Fitzgerald*, 155 App. Div. 659, 140 N.Y.S. 536. Quotations from decisions in those cases are embodied in our opinion in the companion case (No. 10560).

[7] Most of the cases which have received judicial consideration by our courts under the section of our Bank Act have dealt with the rights of the survivor after the death of the designated codepositor, and citations will be found in the opinion in the companion case. Under the decisions in this state, it is the established rule that, for purposes of tenure and survivorship, each joint tenant acquires ownership of a joint interest in the whole fund at the time of creation of the joint tenancy, and, on the death of either, the entire amount to the credit of the account, in the absence of fraud or undue influence, remains conclusively as the exclusive property of the survivor, without regard to the original ownership.

[8] That same conclusiveness does not prevail, however, in a controversy raising an issue as to the rights of the depositors during their joint lives. Thus in *Hill v. Badelgy*, 107 Cal.App. 598, 604, 290 P. 637, 639, the court said: "During the lifetime of both of the depositors either one would have the right to establish the real fact, whatever it might be, with reference to the account, and would have the right to bring an action in respect thereto." See, also, *Spear v. Farwell*, 5 Cal.App.2d 111, 113, 114, 42 P.2d 391.

No question of a survivor's right is drawn into this case. The complaint in intervention rests primarily in its first count, on the creation of an account in joint tenancy on April 20, 1923, between Charlotte M. Riley and the intervener in the bank now known as Central Bank of Oakland. Owing to critical illness of the intervener, the sum of \$6,358.90 in that account, then bearing the number 2065, was transferred with the intervener's consent to a new joint tenancy account (No. 13490) in the same bank in the names of Charlotte M. Riley and the intervener's son, Harvey E. Wallace, he serving as a trustee for his mother. Then on April 1, 1933, without the knowledge or consent of either the intervener or her son, Charlotte M. Riley caused the money in the joint tenancy account in the sum of \$7,198.69 to be withdrawn and deposited in the same bank, one half in a joint tenancy account (No. 15781) opened in the names of said Charlotte M. Riley and Curtis Ellerslie Riley (sued here as Curtis E. Riley, Sr.) as joint tenants, and the other half in an additional joint tenancy account (No. 15780) opened in the names of said Charlotte M. Riley and Gladys G. Grabill as joint tenants. These transfers, according to the allegations, were made with full knowledge on the part of Curtis E. Riley, Sr., and Gladys G. Grabill of the rights and interests of Harvey E. Wallace and the intervener.

The funds originally deposited in the names of Charlotte M. Riley and the intervener, together with the accumulations, are thus traced into the two final joint tenancy accounts numbered 15781 and 15780, in which Charlotte M. Riley is, in the one, a joint tenant with Curtis E. Riley, Sr., and, in the other, a joint tenant with Gladys G. Grabill.

[9] Contrary to the canon of the common law, our courts have established the rule that, when money is taken from a joint tenancy account during the joint lives of the depositors, property acquired by the money so withdrawn, or another account into which the money is traced, will retain its character as property held in joint tenancy like the original fund, unless a change in the character has been effected by some agreement between the parties. *Estate of R. T. Harris*, 169 Cal. 725, 728, 147 P. 967; *Estate of Maria L. Harris*, Cal.Sup., 72 P.2d 873; *Estate of McCoin*, 9 Cal.App.2d 480, 482, 50 P.

2d 114; *Lagar v. Erickson*, 13 Cal.App.2d 365, 370, 56 P.2d 1287; *In re Kessler*, 217 Cal. 32, 34, 17 P.2d 117; *Young v. Young*, 126 Cal.App. 306, 312, 313, 14 P. 2d 580; *Chamberlain v. Chamberlain*, 2 Cal.App.2d 684, 688, 38 P.2d 790.

Under the allegations of the second count of the intervener's complaint, Charlotte M. Riley did not withdraw all of the funds in the joint tenancy account No. 8302, held by her and Harvey E. Wallace, in the American Trust Company, to which had been transferred the funds in joint tenancy account No. 4006, originally established in said bank in the names of Charlotte M. Riley and the intervener as joint tenants. Out of the deposit of \$3,365.32 to the credit of account No. 8302, Charlotte M. Riley withdrew a total of \$2,365.30, which she caused to be deposited in the Central Bank of Oakland, and apportioned one-half thereof to the joint tenancy account No. 15781 in that bank in the names of herself and Curtis E. Riley, Sr., and the other one-half to the joint tenancy account No. 15780 in the names of herself and Gladys G. Grabill.

With the exception of \$1,000.02 left in joint tenancy account No. 8302 in the American Trust Company, Charlotte M. Riley caused to be withdrawn all the moneys to the credit of that joint tenancy account, and all the moneys to the credit of the joint tenancy account No. 13490 in the Central Bank of Oakland, both such accounts being in the names of Charlotte M. Riley and Harvey E. Wallace as joint tenants. The moneys so withdrawn were then employed to create the joint tenancy accounts Nos. 15781 and 15780 in the Central Bank of Oakland.

[10-12] Harvey E. Wallace began this action as plaintiff to have an adjudication of his rights and interests in those last-mentioned accounts. By his general demurrer to the complaint in intervention, he admits that the moneys held in the original accounts in which his mother was named as a joint tenant, were transferred to the accounts in which he was named as a joint tenant with Charlotte M. Riley; and that such transfers were made pursuant to an oral agreement on his part to act as trustee for his mother in respect of the moneys so transferred. Such a parol trust, as stated in the companion case, is enforceable in equity; and the intervener, a beneficiary of the trust, has a definite

interest in the matters in litigation and in the success of her son as the plaintiff in the action. Under the general rule, joint tenants are presumed to have equal interests as between themselves; but in respect of these joint tenancies created under the Bank Act, if there should be clear and convincing proof of some different agreement concerning the interests of the designated joint tenants now litigating rival claims, or if there should be circumstances sufficient to overcome the presumption inherent in the provisions of the statute, such facts may be asserted by way of defense against the claims made by the intervener in her complaint.

[13] In view of the terms of the joint tenancy agreements of the respective parties and the presumptions flowing from the statute, in addition to the averments of the intervener's complaint, we are of the opinion that the complaint shows adequate grounds for intervention, and that it is sufficient to state, first, a prima facie case of joint tenancy in equal shares in the accounts in the Central Bank of Oakland and the American Trust Company opened in the names of Charlotte M. Riley and the intervener; and secondly, by reason of the transfer of funds from those accounts to the respective joint tenancy accounts in those same banks, in the names of Charlotte M. Riley and Harvey E. Wallace, as joint tenants, the complaint is sufficient to state a prima facie case of joint tenancy in equal shares between those parties, with Harvey E. Wallace holding his share or interests in said accounts as trustee for the intervener; and, thirdly, by reason of the circumstances attending the creation by Charlotte M. Wallace of said accounts Nos. 15781 and 15780 in the Central Bank of Oakland with moneys withdrawn from the joint tenancy accounts between herself and Harvey E. Wallace, we are of the opinion that the complaint in intervention is sufficient to entitle the intervener, Minnie Wallace, to join with the plaintiff, as her trustee, in the relief sought by his complaint against the defendants Charlotte M. Riley, Gladys G. Grabill, and Curtis E. Riley, Sr.

Accordingly, the complaint in intervention has, in our opinion, sufficient strength to resist the attack of the general demurrers interposed.

[14] The special demurrer of the defendants, Charlotte M. Riley, Gladys G.

Grabill, and Curtis E. Riley, Sr., is directed at several statements of alleged uncertainty. In view of what has been said, we deem it unnecessary to discuss the specifications in detail. Evidence concerning the matters so specified might be admissible at a trial in so far as they might tend to overcome the legal presumption of equality of ownership; but the intervener was not required to anticipate possible defenses.

Taking the complaint in intervention as it reads, we conclude that it was not vulnerable to either general or special demurrer.

The judgment and the order sustaining the demurrers are therefore reversed, with directions to the trial court to enter an order overruling the demurrers, and allow reasonable time for answer to the intervener's first amended complaint.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.



23 Cal.App.2d 654

**WALLACE v. RILEY et al. (WALLACE,
Intervener).**
Civ. 10560.

District Court of Appeal, First District,
Division 2, California.

Nov. 29, 1937.

Hearing Denied by Supreme Court
Jan. 27, 1938.

1. Joint tenancy ⇐3

Under Bank Act, opening of a joint bank account by depositors with right of survivorship immediately creates estate in joint tenancy without necessity of delivery and without resort to any trust theory (St.1929, p. 444, § 15a; Civ.Code, § 1147).

2. Joint tenancy ⇐6

Purpose of statute providing that, in absence of fraud or undue influence, making bank deposit in form of joint tenancy shall be conclusive evidence of intention of depositors to vest title to deposit and additions thereto in surviving depositor on death of other depositor is to protect banks by giving them a statutory acquittance on payment of funds in such account to survivor and to fix ownership, in absence of any contrary agreement (St.1929, p. 444, § 15a).

3. Joint tenancy ⇐8

Though, in controversy involving right of depositors during their joint lives in joint tenancy deposit under statute, their interests and shares are presumed to be equal, nevertheless, if there is proof of special agreement between them at variance with legal presumption of equality, their rights and interests will be fixed in accordance with agreement (St.1929, p. 444, § 15a).

4. Joint tenancy ⇐8

When a joint tenancy bank account is created substantially if not precisely in statutory form, a presumption of conjoint ownership of entire fund in equal shares arises (St.1929, p. 444, § 15a).

5. Joint tenancy ⇐6

In absence of fraud or undue influence, amount on deposit in joint tenancy account on death of either joint tenant belongs exclusively to survivor unless, after death of depositor who was original owner of fund, there shall be proof that account was opened without his knowledge and consent, express or implied (St.1929, p. 444, § 15a).

6. Joint tenancy ⇐8

During lifetime of both depositors in joint tenancy account, proof is admissible that tenancy created was different from character of tenancy defined by legal presumption of equal ownership of entire fund, and relative rights of parties are then dependent on realities of ownership (St.1929, p. 444, § 15a).

7. Joint tenancy ⇐3

Where joint tenancy bank account was transferred to new account in name of one of original depositors and son of other depositor because of her serious illness, under oral agreement between such depositor and her son that he would hold his interest in deposit in trust for mother, trustee's interest and right in joint tenancy account were protected by same presumptions and incidents as attached to original account (St.1929, p. 444, § 15a).

8. Joint tenancy ⇐3

When money is taken from a joint tenancy bank account during joint lives of depositors, property acquired with money so withdrawn or another account into which money is traced retains its character as property held in joint tenancy unless change in character thereof has been effected by agreement between parties (St.1929, p. 444, § 15a).

9. Joint tenancy Ⓒ3

A written contract between depositors and bank that all moneys deposited in certain account, together with interest and dividends thereon, should be property of both of depositors as joint tenants, regardless of its previous ownership, and should be payable to either during their joint lives, and after death of either should belong to and be property of survivor, created joint tenancy account with right of survivorship under statute (St.1929, p. 444, § 15a).

10. Trusts Ⓒ359(2)

Grantee's repudiation of parol trust in realty is deemed fraud cognizable in equity where appropriate relief will be afforded, and like rule applies to parol trust to have joint tenancy funds distributed to specified persons after trustor's death.

11. Trusts Ⓒ159

There is nothing in law to disqualify a joint tenant from trusteeship of his interest in joint property.

12. Trusts Ⓒ159

Generally, whoever is capable of taking legal title or beneficial interest in property may take it as trustee for another.

13. Joint tenancy Ⓒ10

Complaint in intervention alleging that intervener's son commenced action to quiet title to undivided half interest as joint tenant in certain bank account in names of defendant and plaintiff, that such account constituted proceeds of previous joint account between intervener and defendant, which was transferred to new account because of intervener's illness under parol agreement between intervener and her son that son would hold it in trust for intervener, and that intervener had recovered from her illness and demanded delivery of funds held by son in said account as trustee for her, and that demand had been refused, *held* sufficient as against general and special demurrers (St.1929, p. 444, § 15a).

14. Contracts Ⓒ99(1)

Presumption is that written instrument deliberately executed expresses parties' intention.

15. Joint tenancy Ⓒ8

Under general rules appertaining to joint tenancy, whether in personalty or realty, parties without use of other words are presumed to have equal rights as between themselves.

16. Joint tenancy Ⓒ8

If, in contradiction of legal presumption that depositors own equal interests in joint tenancy bank deposit, some different agreement concerning interest of joint tenant, or circumstances sufficient to overcome presumption by clear and convincing proof, such facts furnished defensive matter against claim of equality of ownership (St.1929, p. 444, § 15a).

17. Pleading Ⓒ67

Complaint in intervention in suit involving interest in joint tenancy bank deposit was not required to anticipate possible defenses (St.1929, p. 444, § 15a).

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Harvey E. Wallace against Charlotte M. Riley and others, in which Minnie Wallace intervened. From a judgment based on an order sustaining without leave to amend, demurrers to intervener's second amended complaint, intervener appeals.

Reversed, with directions.

John L. Talt and Pierre A. Fontaine, of Oakland, for appellant.

Fred B. Mellman, of Oakland, for respondent Riley.

Harold Huovinen, of Oakland, for respondent Wallace.

JOHNSON, Justice pro tem.

This appeal presents a controversy between living depositors asserting conflicting claims as joint tenants named in a bank account in joint tenancy, created under section 15a of the Bank Act 1909, p. 87, added by St.1921, p. 1367, as amended by St.1929, p. 444.

The appeal is by the intervener, Minnie Wallace, from a judgment based upon orders sustaining, without leave to amend, demurrers to the intervener's second amended complaint, which had been interposed by the plaintiff, Harvey E. Wallace, and the defendant Charlotte M. Riley.

The complaint in intervention alleges that on August 10, 1933, the plaintiff, Harvey E. Wallace, began his action against the defendant Charlotte M. Riley, seeking to quiet title to an undivided one-half interest as a joint tenant in a certain account, No. 8302, in the American Trust Company, formerly known as Mercantile Trust Com-

pany, in the names of Charlotte Riley and Harvey E. Wallace.

In respect of the claims of the intervener, it is then averred that upon August 5, 1924, by a written contract set forth in full, which was made by the intervener and Charlotte M. Riley, they agreed with each other and with the bank that all moneys then or thereafter deposited by said individuals or either of them, in an account numbered 4006, should be deposited, and received and held by the bank, together with all interest, dividends, and accumulations, as property of both of said individuals as joint tenants, without consideration of its previous ownership, and should be payable to, and collectible by, either of said individuals during their joint lives; and, after the death of either, should belong to, and be the property of, the survivor.

The amount so deposited in said account at the time of the agreement was \$1,064.99. Subsequently, as is alleged, such further deposits were made that on January 10, 1931, the amount to the credit of said account was \$3,120.55. At that time a new joint tenancy account, numbered 8302, was opened in the same bank by Charlotte Riley and Harvey E. Wallace under a written agreement between them, set forth in full, in the same form as the agreement between the intervener and Charlotte M. Riley respecting the account numbered 4006. Thereupon the balance of \$3,120.55 in account 4006 was transferred to the new joint tenancy account 8302, established in the names of Charlotte Riley and Harvey E. Wallace.

Harvey E. Wallace is the son of the intervener, Minnie Wallace; and, in explanation of the creation of the new joint tenancy account, the intervener states that for some time prior thereto she had been so seriously ill that she had been informed by her physician that she might die; and desiring, in case of her death, to preserve for her children her interest in the fund on deposit in the joint tenancy account 4006, she consented to the transfer of the amount held in that account to the new joint tenancy account 8302, opened in the names of Charlotte Riley and the intervener's son, Harvey E. Wallace. No consideration was rendered to the intervener by her son for her interest in the original account; but it is averred that the son orally agreed with his mother that, if she should recover from her illness, he would hold, as trustee for her, his interest in all funds with which the new joint tenancy account 8302 should be credited, and would transfer to his

mother his interest in that account upon her request.

On April 1, 1933, the new joint tenancy account had grown to \$3,365.32; and on that day, according to the averments, the defendant, Charlotte M. Riley, without the knowledge or consent of either Harvey E. Wallace or the intervener, withdrew from the account, and appropriated to said defendant's own use, \$2,182.97; and on April 4, 1933, the further sum of \$182.33. By such withdrawals the balance to the credit of said account was reduced to \$1,000.02; and that amount with accruals of interest is the subject of controversy between the parties to this action. The two amounts withdrawn by Charlotte M. Riley, aggregating \$2,365.30, are the subject of appeal in a companion case decided this day. 74 P.2d 800.

The intervener asserts that she has recovered from her illness, and has demanded of her son the delivery of the funds held by him in said account as trustee for her, but that the demand has been refused.

The prayer of the complaint in intervention is that all adverse claims be determined by the court; that Harvey E. Wallace be declared to be the owner of an undivided one-half interest in the joint tenancy account 8302, and adjudged accountable therefor to the intervener as trustee thereof for her benefit.

In some respects the complaint is not a model of impeccable pleading, and we are not at this time especially concerned with the form of the prayer. The essential question is whether the intervener has stated a cause showing an interest in the matter in litigation, or in the success of either of the parties, or an interest against both.

To the intervener's complaint, Harvey E. Wallace, the plaintiff in the action, interposed a general demurrer; and the defendant, Charlotte M. Riley, a demurrer both general and special. The special demurrer alleged in varied forms uncertainty, ambiguity, and unintelligibility, in that the intervener omitted to state the ownership of the money at the time of creation of the original joint tenancy account 4006, or of the contributions, made either originally or by further deposits by the individuals designated as joint tenants; omitted also to make known the intentions of the respective parties concerning a present or future gift or otherwise; omitted further to state whether any consideration moved from the intervener, and, if not, what the agreement

between the parties was, and whether the intervener based her claims on the form of the deposit, or upon title or ownership in any of the funds before the deposit or at any other time.

We will address ourselves chiefly to the fundamental inquiry prompted by the general demurrers. This leads to consideration of the meaning and effect of section 15a of our Bank Act. The act as originally adopted in 1909, St.1909, pp. 87, 90, embodied in section 16 provisions which had been added in 1907 to the New York Bank Act (N.Y.Laws 1907, c. 247, p. 456). The section, as copied from the New York statute, provided among other things that a deposit made by a person in the name of such depositor and another person "in form to be paid to either or the survivor or survivors of them" should become the property of such persons as joint tenants. This section of our act was repealed in 1919, St.1919, p. 623; but in 1921 section 15a was added to the Bank Act, re-enacting former section 16, St.1921, p. 1367, and incorporating also an amendment adopted in New York in 1914 N.Y.Laws 1914, c. 369, § 249, Consol.Laws N.Y. c. 2, p. 1392. This clause forms the last sentence of section 15a, reading as follows: "The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor."

In 1929 the language of the section was broadened so as to apply to deposits in the names of more than two persons with right of survivorship, St.1929, p. 444; but this amendment does not otherwise change the sense of the previous reading.

As the provisions relating to accounts in joint tenancy were borrowed from New York, where their scope has been elucidated by judicial study, the precedents so afforded will be helpful, in addition to those of our own state, in the determination of the present case.

There has been considerable puzzlement on the part of courts respecting the development of a legalistic formula for upholding the interest of a survivor in a voluntary joint tenancy account, maintained without the concomitant of a delivery. Some courts, in fact the majority, adopt, in the absence of a statute, the theory of a gift

where such intent is shown. Others sustain the interest of a survivor on the theory of the creation of a trust. Whichever theory is accepted, the general tendency is to take a liberal view of the transaction and to devise a way of effectuating the intent without scrupulous insistence on technical correctness.

Under the rule imposed by section 1147 of the Civil Code, our courts have been restrained from adopting the theory of a gift. Prior to the adoption of the Bank Act, they were driven to the theory that a trust was created by the proprietary depositor as to such amount as might remain at the depositor's death, and the bank became a trustee for the surviving beneficiary. Thus the trust theory was applied in cases such as the following: *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 P. 370; *Sprague v. Walton*, 145 Cal. 228, 78 P. 645; *Carr v. Carr*, 15 Cal.App. 480, 115 P. 261; *Drinkhouse v. German S. & L. Soc.*, 17 Cal. App. 162, 118 P. 953.

[1] The provisions of the Bank Act, now contained in section 15a, serve to overcome the obstacle of section 1147 of the Civil Code; and by the opening of an account pursuant to the Bank Act an estate in joint tenancy is at once created without the necessity of any delivery and without resort to any trust theory.

[2] The provisions of the Bank Act were designed for a double purpose: One, to protect the banks by giving them a statutory acquittance upon payment of funds in a joint tenancy account to the survivor; the other, to fix ownership of the deposit in the absence of any agreement to the contrary. In *re Rehfeld's Estate*, 198 Mich. 249, 253, 164 N.W. 372.

In the present case no question of survivorship is before us. In considering the general demurrers, we are confronted merely with the necessity of determining whether in legal effect the statute, in the absence of a private agreement to the contrary, vests the title to the account in the parties named as joint tenants, and subjects the account to all the incidents of joint tenancy.

In construing the section of the New York statute, the court in *Clary v. Fitzgerald*, 155 App.Div. 659, 664, 140 N.Y.S. 536, 540, affirmed in memo. 213 N.Y. 696, 107 N.E. 1075, spoke as follows: "We think, therefore, that the necessary effect of this provision of the statute is that the single fact, unexplained by other competent evidence, that a deposit in a savings bank

in the form in which this deposit was made fixes the respective rights of the depositors named as joint owners of the property with all the incidents attaching to such ownership. It may be true that the depositors, or their representatives, as between themselves may be permitted to show by other competent evidence that title as joint owners was not intended to be established nor in fact conferred. Inasmuch as the actual agreement as to the title would be one between the named depositors themselves, the bank would not be a party to that agreement as to the ownership of the fund; and such an agreement might doubtless be proved even by parol evidence in a controversy between the parties to fix their relative rights to the fund."

In *Moskowitz v. Marrow*, 251 N.Y. 380, 167 N.E. 506, 511, 66 A.L.R. 870, the subject received elaborate and illuminative treatment at the hands of Judge Kellogg and Chief Judge Cardozo in separate opinions, in both of which all the five other members of the court concurred. The effect of the statute is summarized by Judge Cardozo thus:

"The case hinges upon the meaning of a section of the Banking Law (section 249, subd. 3), which, though often considered in other courts, has not yet been construed by this court in an authoritative way.

"The statute, as I view it, does not mean that between the persons named as depositors a joint tenancy ensues at once and automatically, as an irrebuttable presumption, with the result that neither will be permitted even during the joint lives to prove against the other that the deposit was made with a contrary intention. For the bank which has paid, the form of the account is, indeed, an absolute protection, unless written notice has been given by either one of the depositors (cf. Banking Law, §§ 149, 198) 'not to pay such deposit in accordance with the terms thereof.' For the depositors themselves, the form is not conclusive in any contest during their joint lives as to the title to the moneys, nor conclusive after the death of either as to moneys then withdrawn.

"The final sentence of the section added by amendment in 1914, is a gloss upon its meaning. 'The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such savings bank or the surviving depositor is a party, of the intention of both

depositors to vest title to such deposit and the additions thereto in such survivor.' The sentence is as significant for what it omits as for what it says. There is no statement that the form is to be taken as conclusive evidence in any action or proceeding to which either depositor is a party. It is to be conclusive evidence only in an action or proceeding in which the bank or the surviving depositor is a party. Even then it is to be conclusive in favor of the survivor, not in respect of any moneys withdrawn by either during life, but as to succession by survivorship in respect of any moneys forming part of the deposit after one of them is dead. The plain implication is that as between the depositors themselves, the form of the deposit gives rise to a presumption and nothing more, but that after the death of either leaving a deposit then subsisting, the presumption becomes conclusive as to the title of the survivor.

"A reading of the statute that would make the presumption irrebuttable except within these limits would do violence to intention and foster litigation. It would do violence to intention, for those who open such accounts have seldom any thought of restricting their enjoyment of the fund, their right to draw and spend, by the shackles of a formula. Cf. *Beaver v. Beaver*, 117 N.Y. 421, 22 N.E. 940, 6 L.R.A. 403, 15 Am.St.Rep. 531. It would foster litigation, for each of the two depositors, the one opening the deposit as fully as the other, would be subject to an accounting for moneys afterwards withdrawn, and forced to make division on the footing of equality. An irrebuttable presumption would close the door to testimony, direct or circumstantial, that in opening the deposit the incidents of a joint tenancy had been varied by agreement. Many a family settlement, made in the informal fashion to be expected among relatives, would be opened up for scrutiny after years of acquiescence."

And in the allied case of *Marrow v. Moskowitz*, 255 N.Y. 219, 174 N.E. 460, Judge Cardozo for greater certainty restated the rule concisely in these words: "When a bank account is opened in the form prescribed by statute (Banking Law, § 249, subd. 3), a presumption at once arises that the interest of the depositors is that of joint tenants. Upon the death of one of the depositors, this presumption becomes conclusive in favor of the survivor in respect of any moneys then left in the account. It

continues to be a mere presumption in respect of any moneys previously withdrawn."

To the same effect is *Estate of Porianda*, 256 N.Y. 423, 425, 176 N.E. 826. What is said, however, concerning conclusiveness of the presumption in favor of the survivor presupposes, in case the fund originally deposited was at the time the property of only one of the depositors, that the establishment of the joint tenancy account was in such event effected with the knowledge and consent, express or implied, of the owner of the fund. See *In re Buchanan's Estate*, 184 App.Div. 237, 171 N.Y.S. 708; *Heiner v. Greenwich Savings Bank*, 118 Misc. 326, 193 N.Y.S. 291; *McDonald v. Sargent*, 121 Misc. 437, 201 N.Y.S. 129; *Havens v. Havens*, 126 Misc. 155, 213 N.Y.S. 230. Upon this point compare *Waters v. Nevis*, 31 Cal.App. 511, 160 P. 1081, and *Henry v. Hibernia S. & L. Society*, 5 Cal.App. 2d 141, 143, 42 P.2d 395.

In California most of the reported cases have been concerned with the rights of the survivor after the death of the designated codepositor.

Those cases adhere consistently to the rule that, for purposes of tenure and survivorship, each joint tenant acquires an ownership in the whole fund at the time of the creation of the estate, or in the ancient phrase becomes an order per my et per tout. Each, in the theory of the law, having an undivided moiety of the whole rather than the whole of an undivided moiety, the death of one joint tenant causes the previous concurrent interest of the survivor to ripen, without anything more, into his sole ownership of the whole, not by descent, but by the fact of survivorship and in virtue of the very acts knowingly and intentionally done in creating the joint tenancy. Hence, no change of title occurs on the death of the codepositor, but the whole fund, of which theretofore the survivor was a joint tenant, remains to him as his sole and exclusive property, without regard to the original ownership. Under the Bank Act, the agreement of the parties, made in the prescribed form, is declared to be, in the absence of fraud or undue influence, conclusive evidence of the survivor's right; and neither the terms nor the legal effect of the agreement then may be changed or defeated by parol evidence.

Among the cases so in effect declaring are the following: *Estate of Gurnsey*, 177 Cal. 211, 215, 216, 170 P. 402; *Kennedy v. McMurray*, 169 Cal. 287, 146 P. 647, Ann.

Cas.1916D, 515; *Estate of Harris*, 169 Cal. 725-728, 147 P. 967; *McDougald v. Boyd*, 172 Cal. 753, 756, 159 P. 168; *Crowley v. Savings Union Bank & Trust Co.*, 30 Cal. App. 144, 150, 157 P. 516; *McCarthy v. Holland*, 30 Cal.App. 495, 498, 158 P. 1045; *Conneally v. San Francisco S. & L. Soc.*, 70 Cal.App. 180, 182, 183, 232 P. 755; *Estate of Nelson*, 104 Cal.App. 613, 619, 286 P. 439; *Reilly v. Filben*, 107 Cal.App. 722, 726, 727, 291 P. 454; *Estate of Fritz*, 130 Cal.App. 725, 729, 730, 20 P.2d 361; *Henry v. Bank of America*, 8 Cal.App.2d 353, 355, 356, 47 P.2d 1068.

[3] While such conclusiveness prevails in aid of the survivor, that same rule does not obtain in a controversy involving the rights of the depositors during their joint lives. Though their interests and shares are presumed to be equal, nevertheless, if there is proof of some special agreement between them at variance with the legal presumption of equality their rights and interests will then be fixed in accordance with their own agreement.

In recognition of this exception as between the joint tenants themselves, the court in *Hill v. Badelgy*, 107 Cal.App. 598, 604, 290 P. 637, 639, said: "During the lifetime of both of the depositors either one would have the right to establish the real fact, whatever it might be, with reference to the account, and would have the right to bring an action in respect thereto." This passage is quoted with approval, and the principle so announced was applied, in *Spear v. Farwell*, 5 Cal.App.2d 111, 113, 114, 42 P.2d 391.

In *Hill v. Badelgy*, supra, which was a controversy between the administrator of the deceased depositor who was the original owner of the fund, and the surviving joint tenant, the court, at page 606 of 107 Cal.App., 290 P. 637, expressed the view that, even in an action between the designated depositors during the lifetime of both, parol evidence is not admissible to change the terms or the legal effect of their written agreement of joint tenancy. No controversy between living depositors being before the court in that case, the expression was obiter dictum, and is not deemed pertinent in the case in hand. Furthermore in *Spear v. Farwell*, supra, where a joint tenancy account had been opened by Mr. and Mrs. Farwell with funds belonging to the wife, parol evidence was held to have been properly admitted to show Mrs. Farwell's superior claim upon the fund as against a

levy by the plaintiff as a judgment creditor of Mr. Farwell. In that case a petition for hearing in the Supreme Court was denied.

[4-6] From a study of the legal precedents, we conclude that, when a joint tenancy account is created substantially, if not precisely, in the statutory form, a presumption of conjoint ownership of the entire fund in equal shares arises. The existence of such account, when unexplained by other competent evidence, serves to fix the respective rights of the joint depositors with all the incidents of joint tenancy; and, in the absence of fraud or undue influence, the amount on hand upon the death of either joint tenant belongs exclusively to the survivor, unless, after death of a depositor who was the original owner of the fund, there shall be proof that the account was opened without his knowledge and consent, express or implied. During the lifetime of both of the designated depositors, however, the door is open to proof that the tenancy created was in truth something different from the character of the tenancy defined by the legal presumption. The relative rights of the parties are then dependent on the realities of the ownership.

[7] Such then would have been the situation here, if the original joint tenancy account in the names of Charlotte M. Riley and the intervenor had remained intact. According, however, to the complaint and the admissions implied in the demurrers, the entire amount of \$3,120.55 in that account was withdrawn on January 10, 1931 and deposited at once in a new joint tenancy account in the same bank in the names of Charlotte Riley and Harvey E. Wallace, the intervenor's son. At that time the intervenor was seriously ill, and the transfer to the new account appears to have had her consent, subject to the oral agreement between herself and her son relative to his trusteeship. Subsequently there was withdrawn by Charlotte Riley, and appropriated to her own use, all but \$1,000.02, remaining in that new account on April 4, 1933.

Under the allegations of the intervenor's complaint, the intervenor had an interest in the new account in the capacity of a beneficiary represented by her son as her trustee. That trustee's interest and rights in the joint tenancy account of Charlotte Riley and himself were fortified and protected by the same presumptions and incidents as had attached to the original ac-

count of Charlotte M. Riley and the intervenor.

[8] Contrary to the rule of the common law (which was applied in New York to a joint tenancy account in *Estate of Suter*, 258 N.Y. 104, 179 N.E. 310), it has become the established principle in California that, if money is taken from a joint tenancy account during the joint lives of the depositors, property acquired by the money so withdrawn, or another account into which the money is traced, will retain its character as property held in joint tenancy like the original fund, unless there has been a change in the character by some agreement between the parties. This departure from the rule of the common law was first announced in *Estate of R. T. Harris*, 169 Cal. 725, 728, 147 P. 967, and, in determination of questions recently arising in the estate of his widow, was reaffirmed in *Estate of Maria L. Harris* (Cal. Sup.) 72 P.2d 873. See, also, *Estate of McCoin*, 9 Cal.App.2d 480, 482, 50 P.2d 114; *Lagar v. Erickson*, 13 Cal.App.2d 365, 370, 56 P.2d 1287; *Re Kessler*, 217 Cal. 32, 17 P.2d 117; *Young v. Young*, 126 Cal.App. 306, 312, 313, 14 P.2d 580; *Chamberlain v. Chamberlain*, 2 Cal.App.2d 684, 688, 38 P. 2d 790.

[9] As between Charlotte Riley and the plaintiff, Harvey E. Wallace, the form of their agreement indicates an intent to create a joint tenancy with right of survivorship, and the presumption imminent in the statute applies, unless properly rebutted. The intervenor has therefore an interest in the matter in litigation and in the success of the plaintiff as her trustee.

The general demurrer of Harvey E. Wallace admits the averments of the complaint that he verbally agreed with his mother that, if she should recover from her illness, he would, as trustee for her, hold for her benefit his interest as a joint tenant in all the funds in the new account, and would transfer his interest to her upon her request. It is further alleged in substance that he now repudiates the trust. This circumstance gives additional support to the complaint in intervention.

[10] In case of a grant of real estate to one who receives it on a parol trust, repudiation of the trust is treated as a fraud cognizable in equity where appropriate relief will be afforded. *Cooney v. Glynn*, 157 Cal. 583, 587, 108 P. 506, and cases there cited; *Bradley Company v. Bradley*, 165

Cal. 237, 131 P. 750; *Alaniz v. Casenave*, 91 Cal. 41, 27 P. 521; *Broder v. Conklin*, 77 Cal. 330, 19 P. 513.

A like rule is applicable in the case of a parol trust for the purpose of having joint tenancy funds distributed to specified persons after the death of the trustor. *Logan v. Ryan*, 68 Cal.App. 448, 455, 456, 229 P. 993.

[11, 12] There is nothing in the law to disqualify a joint tenant from trusteeship of his interest in the joint property; and in general whoever is capable of taking legal title, or a beneficial interest, in property may take it as trustee for another. 1 *Perry on Trusts*, § 39; 3 *Pomeroy's Equity Jur.* (4th Ed.) p. 2145.

[13] We conclude, therefore, that the intervenor's complaint stated a cause of intervention, and that she was entitled to have the plaintiff's general demurrer to her complaint overruled.

The demurrer of the defendant Charlotte M. Riley was both general and special. The brief filed in her behalf treats lightly the presumptions of law flowing from the statute, and assumes that the intervenor contributed nothing to the joint account.

[14] Both of the joint tenancy agreements were in writing, and in the form prescribed by section 15a of the Bank Act, which is to be deemed a part of each contract. The presumption is that a written instrument deliberately executed expresses the intention of the parties. *Kayser v. Gorman*, 3 Cal.2d 478, 486, 44 P.2d 1041. The agreement made by the joint tenants in each of the accounts expressly provided that the funds on deposit "shall be the property of both of us as joint tenants"; and the statute declares that funds so deposited and any additions, "shall become the property of such persons as joint tenants, and * * * shall be held for the exclusive use of such persons"; subject to payment to either during the lifetime of both or to the survivor after the death of one of them.

In *Moskowitz v. Marrow*, 251 N.Y. 380, 167 N.E. 506, 509, 66 A.L.R. 870, Judge Kellogg, after referring at page 380 to the original provisions in the New York act of 1909 in the words just quoted from our section 15a, said in relation thereto: "When the Legislature has used a term having a well-defined legal meaning, such as the term 'joint tenants,' we must assume that it has advisedly employed it to express the meaning commonly attributed thereto."

And at page 390 of 251 N.Y., 167 N.E. 506, 509, 66 A.L.R. 870, he adds: "Not merely did the Legislature use the term 'joint tenants'; it provided that after the creation of the deposit, the funds deposited, together with all dividends thereon, should be held for the exclusive use of the joint depositors. It could not better have indicated that the term 'joint tenants,' as used by it, was intended to possess that technical meaning which is accorded to it by the legal profession."

Then at page 396 of 251 N.Y., 167 N.E. 506, 511, 66 A.L.R. 870, speaking of these earlier provisions of the New York act and the addition made thereto in 1914, which became part of our section 15a, Judge Kellogg marks a distinction, saying: "The other [that is, the earlier] provisions may be regarded as creating a rebuttable presumption of the making of a transfer; the added provision as creating an irrebuttable presumption, or 'conclusive evidence,' as the provision itself states, of an effective transfer, in cases of survivorship only. By so interpreting the section all its parts would be given force and effect. We think that is the interpretation properly to be given."

[15] Under the general rules appertaining to joint tenancy, whether in personality or realty, the parties, without use of other words, are presumed to have equal rights as between themselves. *Schouler on Personal Property* (5th Ed.), p. 223; 7 C.J. 640; 1 *Tiffany on Real Property* (2d Ed.) § 191; 1 *Washburn on Real Property* (6th Ed.), p. 528; 33 C.J. 909.

[16] If, in contravention of the presumption of law, there was, in respect of the joint tenancies here under consideration, some different agreement concerning the interests of the joint tenant, or if there should be circumstances sufficient to overcome the presumption by clear and convincing proof, such facts would furnish defensive matter against the claim of equality of ownership, which the intervenor asserts in her complaint.

In view of the terms of the joint tenancy agreements of the respective parties and the presumption inherent in the statute, in addition to the averments of the intervenor's complaint as a whole, we are of the opinion that the complaint shows adequate grounds for intervention; and that it is sufficient in its allegations to state, first, a prima facie case of joint tenancy in equal shares between Charlotte M. Riley and the intervenor in account 4006; and, secondly,

by reason of transfer of the funds from that account to account 8302, sufficient to state a prima facie case of joint tenancy in equal shares in Charlotte Riley and Harvey E. Wallace, with the latter holding his share or interest in the capacity of trustee for the intervener. In this aspect the complaint is not vulnerable to either of the general demurrers interposed.

[17] The special demurrer of Charlotte M. Riley pointed to several items of alleged uncertainty in the intervener's complaint. Evidence concerning the matters so specified might be admissible at a trial in so far as they might tend to overcome the legal presumption of equality of ownership; but the intervener was not required to anticipate possible defenses.

Taking the complaint in intervention as it reads, we conclude that it was not obnoxious to either general or special demurrer.

The judgment and the order sustaining the demurrers are therefore reversed, with directions to the trial court to enter an order overruling the demurrers and allow reasonable time for answer to the intervener's second amended complaint.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.



24 Cal.App.2d 213

EVERTS v. WILL S. FAWCETT CO.

SAME v. FAWCETT.

Civ. 2010, 2011.

District Court of Appeal, Fourth District,
California.

Dec. 23, 1937.

Hearing Denied by Supreme Court
Feb. 21, 1938.

1. Assignments ⇨24(3)

Execution ⇨47

Causes of action, pending in trial court, for unliquidated damages for fraud were "things in action" within meaning of statutes defining "thing in action," making it assignable, and designating it as "personal property," and hence were assignable and subject to sale on execution under another statute making all "property" not exempt by law subject to execution, and providing

for method of levy on property not capable of manual delivery. Civ.Code, §§ 953, 954; Code Civ.Proc. § 17, as amended by St.1933, p. 1804; §§ 542, 688.

[Ed. Note.—For other definitions of "Personal Property," "Property" and "Things," see Words & Phrases.]

2. Execution ⇨47

A judgment creditor could proceed by execution against debtors' causes of action, pending in trial court, for unliquidated damages for fraud, notwithstanding that such claims might also have been reached and controlled on proceedings supplementary to execution. Civ.Code, §§ 953, 954; Code Civ. Proc. § 17, as amended by St.1933, p. 1804; §§ 542, 688.

3. Execution ⇨222(3)

Notices of execution sale, describing debtors' properties as all causes of action in certain action pending in certain court, giving number of action, name of plaintiff, and name of one defendant, and stating that there were other defendants, and that, for further description, reference was made to papers filed under certain number in office of court clerk, sufficiently described properties to make sale valid as against debtors.

4. Execution ⇨250

Where judgment debtors had actual notice of execution sale of causes of action pending in trial court well in advance thereof, but did not attend sale, pleadings in pending actions were offered for inspection at sale, and it did not otherwise appear that debtors were prejudiced by any alleged insufficiency in description of properties to be sold in notices of sale, they could not complain of alleged insufficiency.

5. Execution ⇨250

The execution sale for \$5,000, \$5,000, \$10,000 and \$20,000, respectively, of causes of action wherein plaintiffs sought \$169,360, \$968,680, \$468,428.20, and \$1,521,903.89, would not be set aside for inadequacy of price, where first two actions were dismissed for lack of diligence in prosecution, and the others were pending approximately two years before execution sale, and especially in absence of showing that any irregularity in sale affected price, or that any higher price would have been received under any circumstances.

Appeal from Superior Court, Imperial County; Benjamin F. Warmer, Judge.

Actions by H. W. Everts against Will S. Fawcett Company and against Will S. Fawcett, wherein cross-complaints were filed. From adverse orders, plaintiff appeals.

Reversed.

Louis Ferrari, of San Francisco, Edmund Nelson and A. S. Goldflam, both of Los Angeles, Hickcox & Trude, of El Centro, and Cullinan, Hickey & Sweigert and Cushing & Cushing, all of San Francisco, for appellant.

Jud R. Rush, of Los Angeles, and Don C. Bitler, of El Centro, for respondents.

BARNARD, Presiding Justice.

The appellant has appealed from two orders setting aside two execution sales and canceling the certificates of sale. The orders were made in two separate actions but the appeals have been consolidated and presented on one set of briefs; the material facts in each case being exactly similar and the questions of law being identical.

The appellant, as assignee for collection of the Bank of America N. T. & S. A., had recovered judgments against these respondents in two actions in the superior court of Imperial county, based upon money loaned, and both judgments had become final. Executions were issued and four claims or causes of action, then pending in the superior court of Los Angeles county, were sold by the sheriff at execution sales and were purchased by the appellant. Two of the causes of action thus sold were brought by the respondent Fawcett Company against the Bank of America, its associated corporations and certain corporation officials, and the other two were brought by the respondent Fawcett against the same defendants. All four of these actions were based upon unliquidated claims for damages for fraud; it being alleged in two of them that Fawcett Company and Fawcett had been induced through fraudulent representations to purchase certain shares of stock in Transamerica Corporation, and in the other two that the same plaintiffs had been thus induced to refrain from selling certain shares in that corporation.

It appears that statutory notice of these sales was given, that the respective plaintiffs in the Los Angeles county actions had actual notice of the sales well in advance of the time set, that they did not appear at the sales, and that immediately after

the sales they were notified that the same had taken place. More than six months later these respondents moved for an order annulling the execution sales on the grounds that a cause of action sounding in tort for unliquidated damages resulting from fraud and deceit is not subject to sale on execution, that the description in the notices of sale and at the sales of the property was insufficient, and that the prices paid were grossly inadequate. These motions were granted and these appeals followed.

[1] The main question presented is whether these causes of action pending in Los Angeles county were subject to sale on execution. Section 688 of the Code of Civil Procedure provides that all goods, chattels, money, and other property of the judgment debtor not exempt by law are liable to execution. A cause of action for unliquidated damages is a thing in action, Civ.Code, § 953 and a thing in action is personal property, Code Civ.Proc. § 17, as amended by St.1933, p. 1804, which is not capable of manual delivery. Under settled rules the four causes of action which were sold at execution sale were things in action and were assignable. Civ. Code, §§ 953 and 954; *Wikstrom v. Yolo Fliers Club*, 206 Cal. 461, 274 P. 959; *Rued v. Cooper*, 109 Cal. 682, 34 P. 98, 101. In these two cases the general rule is thus quoted from a New York case, *Meech v. Stoner*, 19 N.Y. 26: "Assignability of things in action is now the rule; nonassignability, the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage." We think it conclusively appears that these four causes of action which were sold on execution were personal property of a kind which has not been specifically made exempt from execution and which is not capable of manual delivery. Under section 688 of the Code of Civil Procedure all "other" property which is not exempt is made liable to execution and that section further provides that property not capable of manual delivery may be levied upon in the manner in which property of that nature may be attached. Section 542 of the Code of Civil Procedure provides how such property may be attached; namely, by leaving a copy of the writ and a notice with the person having such property in his possession or under his control. While the

plaintiff in such an action as those with which we are here concerned cannot be said to have the property represented by the action in his possession he certainly has the same under his control. The procedure outlined by the above sections was followed in this case and copies of the writs and notices were served on the respective plaintiffs in the four actions.

In *Meserve v. Superior Court*, 2 Cal. App.(2d) 468, 38 P.2d 453, the court concluded that a cause of action somewhat similar to those here involved was subject to sale under execution. The respondents here contend that the portions of the opinion in that case which lead to that conclusion are mere dicta. Be that as it may, we are satisfied with the reasoning therein used, which is applicable here. While that case involved a cause of action which arose from a breach of a contract, we are unable to see any reason why the same rule should not apply where a cause of action was based upon a tort. The case of *Wikstrom v. Yolo Fliers Club*, supra, involved such a cause of action which was held to be a thing in action which arose out of a violation of a right of property, and which was by statute expressly made assignable and declared to survive the death of the owner. Such a cause of action is property not capable of manual delivery and the pertinent statutes make no distinction with reference to whether the cause of action which gives rise to the property right is based upon contract or upon tort.

The respondents argue that "claims for damages in tort are not even subject to attachment (garnishment),—much the less levy and sale upon execution," and cite *Arp v. Blake*, 63 Cal.App. 362, 218 P. 773. In that case it was held that unliquidated claims for damages in tort could not be reached through the garnishment process, which involves serving notice on the person owing the debt. This is far from holding that causes of action of that nature may not be reached through other statutory provisions providing for the serving of notice on the person to whom the debt is supposedly owed and who has the property under his control, namely, the plaintiff in the action. It is further argued that "after tort claims have been liquidated, reduced to judgment, the judgment is not even amenable to sale upon execution," the respondents citing *McBride v. Fallon*, 65 Cal. 301, 4 P. 17; *Dore v. Dougherty*, 72 Cal. 232, 13 P. 621, 1 Am.

St.Rep. 48; *Latham v. Blake*, 77 Cal. 646, 18 P. 150, 20 P. 417; *Hoxie v. Bryant*, 131 Cal. 85, 63 P. 153, and *Crandall v. Blen*, 13 Cal. 15. So far as material here, these cases merely hold that a judgment in such an action is but the evidence of the liability and cannot be sold on execution in the particular manner in which personal property capable of manual delivery may be sold. A different manner of attaching and levying execution upon personal property which is not capable of manual delivery is particularly set forth in the statutes, and of course the procedure thus provided must be followed.

[2] The respondents also contend that a tort claim which has not been reduced to judgment may be reached and controlled upon proceedings supplementary to execution, and that this was the proper remedy in this case. Conceding that such a remedy also existed, it does not appear that it was an exclusive remedy and the appellant had a right to proceed by execution if we are correct in our holding that such a right existed.

We are cited to no cases in this state which support the contention that these causes of action could not be sold at execution sale under our statutes. The respondents argue that to permit such causes of action to be thus sold would lead to the conversion of valuable choses in action into collusive suits and would "enable powerful banking organizations to acquire and assert legitimate claims presented in good faith by litigants who own and honestly assert tort causes of action." If any such evils arise they may be expected to receive proper legislative consideration, and in the meantime we are governed by the statutes now in force. We conclude from these statutes that the causes of action in question were subject to sale under execution.

[3,4] The respondents seek to support the order vacating these sales upon two other grounds. It is first contended that the sales were void because the notices of sale contained insufficient descriptions of the properties to be sold and that because of the manner in which it was conducted "the sale bordered upon the clandestine." The description in each notice of sale was quite lengthy but in effect the property was described as all causes of action against the defendants in a certain action pending in the superior court of Los Angeles county, giving the number of the

action, naming the plaintiff, naming one of the defendants, stating that there were other defendants, and stating that for a further description reference was made to the pleadings and other documents on file in said action under the number given, which were to be found in the office of the clerk of said court. Not only was this description sufficient to identify the property which was to be sold, but it fully appears that the plaintiffs in the Los Angeles actions received actual notice well in advance of the sale, that they did not attend the sale, that at the time of the sale the pleadings in the respective actions were exhibited with the announcement that any one desiring to do so might examine them, and that no one asked to look at them or made any inquiry with respect thereto or with respect to the nature, amount, or status of the causes of action which were being sold. Not only was the description of the property sufficient in so far as appears from anything now before us, but there is no showing of any prejudice or injury arising from any possible incompleteness in the description. *Mitchell v. Alpha Hardware, etc., Co.*, 7 Cal.App. 2d 52, 45 P.2d 442.

[5] It is also urged that these sales were void because of the inadequacy of the price paid for these causes of action. The total price paid for all four causes of action was \$40,000, which amount was credited upon the judgments held by the appellant herein. The two causes of action which alleged fraud in connection with the sale of stock were sold for \$5,000 each, while the respective prayers therein were for \$169,360 and \$968,680. It is significant that each of those actions was dismissed by the superior court of Los Angeles county by reason of the failure of the plaintiff therein to return the summons within three years. The other two actions, alleging fraud in inducing the plaintiffs to refrain from selling certain stock, prayed for \$468,428.20 and \$1,521,903.89, respectively. The first of those actions sold for \$10,000 and the second for \$20,000. The claims of fraud set forth in these four actions had originally been set up by cross-complaint in the original actions which resulted in the judgments held by this appellant. Those cross-complaints were withdrawn when these respondents failed to obtain a continuance of the trial after an unreasonable delay on their part in securing evidence upon which they relied. See *Everts v. Will*

S. Fawcett Company, 3 Cal.App.2d 261, 38 P.2d 868. Not only have two of the actions in Los Angeles county been dismissed for lack of diligence in the prosecution thereof, but it appears that the other two actions had been pending for about two years before the date of the sale here in question. There would appear to be considerable merit in appellant's contention that the only value possessed by these four causes of action which were sold was their nuisance value. In any event, a substantial price was paid, the parties had ample notice and opportunity to protect their interests, and the sales cannot be set aside on this ground alone. *Bock v. Losekamp*, 179 Cal. 674, 179 P. 516; *Sargent v. Shumaker*, 193 Cal. 122, 223 P. 464; *McAlvay v. Consumers' Salt Co.*, 112 Cal.App. 383, 297 P. 135. There is no showing that any irregularity in connection with the sale had anything to do with the amount paid or that any larger price would have been received under any circumstances. See *Hudepohl v. Liberty Hill W., etc., Co.*, 94 Cal. 588, 29 P. 1025, 28 Am.St.Rep. 149; *Meux v. Trezevant*, 132 Cal. 487, 64 P. 848; *Sargent v. Shumaker*, supra.

For the reasons given, the orders appealed from are reversed.

We concur: MARKS, J.; JENNINGS, J.



24 Cal.App.2d 132

Ex parte GODDARD.

Cr. 2061.

District Court of Appeal, Second District,
Division 1, California.

Dec. 21, 1937.

1. Gaming ⚠63

The Horse Racing Act, providing for 100 racing days in first class counties and racing board of three members, appointed by Governor without Senate's approval, rather than act bearing same title, previously approved by Governor, providing for 66 racing days in such counties and board of five members appointed by Governor and approved by Senate, is state law on subject thereof, though both acts became effective on same day (St.1933, pp. 2050, 2053).

2. Statutes ⇨207

All provisions of statute must be given effect, if apparently conflicting provisions can be harmonized by proper construction of language used in different sections.

3. Statutes ⇨181(1)

It is court's first duty in construing statute to determine Legislature's intent, if possible, from words of statute.

4. Constitutional law ⇨70(1)

The court has no power to rewrite statute so as to conform to presumed intention not expressed, but is limited to interpreting statute on basis of language used.

5. Statutes ⇨205, 225

A statute must be read and construed as whole in harmony with other statutes relating to same general subject.

6. Statutes ⇨228

An exception to statute general in its terms must be specific to be effectual.

7. Statutes ⇨231

Code provisions must be construed with relation to each other, as though all Codes were passed at same moment and parts of same statute.

8. Statutes ⇨228

An express exception in statute cannot be extended beyond fair import of its terms and should be strictly construed.

9. Statutes ⇨184

The language of statute must be so construed as to promote, rather than defeat, Legislature's obvious purposes, when reasonably possible.

10. Statutes ⇨184

A court must construe statute, not clearly and definitely expressing suggested alternatives, with reference to purposes sought to be served thereby and public policy underlying legislation.

11. Gaming ⇨63

The people's approval of Horse Racing Act by adopting constitutional amendment ratifying its provisions must be assumed to have been in accord with state's policy of condemning commercial gambling, in view of argument, submitted for their consideration, that wagering on horse racing would be confined to licensed race track enclosures, thus aiding in elimination of pool rooms and such other undesirable places (St.1933, p. 2046; p. 2054, § 19; Const. art. 4, § 25a, as adopted in 1933).

12. Gaming ⇨63(2)

Neither Horse Racing Act of 1933, nor 1935 amendment thereof, providing that wager made inside race track enclosure for principal not within enclosure shall be considered made within enclosure, indicates Legislature's intention to depart from state's public policy condemning commercial gambling (St.1933, pp. 2046, 2047; St.1935, p. 1943, § 3).

13. Statutes ⇨161(1)

For a law to repeal or supersede earlier statute, later law must constitute revision of entire subject, so that court may say that it was intended as substitute for first law.

14. Statutes ⇨158

The presumption is against implied repeal of statute by later act, especially where prior act has been generally understood and acted upon.

15. Statutes ⇨159

To overcome presumption against implied repeal of statute by later act, the two acts must be irreconcilable, clearly repugnant, and so inconsistent that both cannot operate concurrently.

16. Statutes ⇨158

An implied repeal of statute by later act will not be presumed, where modification thereof will suffice.

17. Gaming ⇨63(3)

The amendment of Horse Racing Act by addition of provision that wager made inside race track enclosure for principal not within enclosure shall be considered wager made within enclosure, did not impliedly repeal anti-gambling statute and other provisions of Horse Racing Act (St.1935, p. 1943, § 3; Pen.Code, § 337a; St.1933, p. 2046).

18. Criminal law ⇨304(2)

It is matter of common knowledge that all money deposited with pari mutuel machines by wagering public at horse races, less commissions provided by law, is divided among purchasers of tickets on winning horses.

19. Gaming ⇨63

The act amending Horse Racing Act by adding provision that wager made inside race track enclosure for principal not within enclosure shall be considered wager made within enclosure does not contemplate agent as well as principal, nor add revenue-producing plan to purposes of act to encourage

agriculture and horse breeding (St.1935, p. 1943, § 3; St.1933, pp. 2046, 2047).

20. Gaming ☞73

The Horse Racing Act amendment, providing that wager made inside race track enclosure for principal not within enclosure shall be considered wager made within enclosure, affords no defense to one charged with maintaining and operating establishment outside track enclosure for purpose of aiding, soliciting, encouraging, and promoting commercialized gambling on results of races at which neither he nor his principals are spectators (St.1935, p. 1943, § 3).

Proceeding by T. Goddard for a writ of habeas corpus.

Writ discharged, and petitioner remanded to the custody of the sheriff of Los Angeles County.

William M. Rains, of Los Angeles, for petitioner.

PER CURIAM.

It is contended that petitioner was committed by the committing magistrate on a criminal charge without reasonable or probable cause. Section 1487, Pen.Code.

The petition sets forth, in part, that petitioner was charged with a violation of subdivisions 1, 2, 3, 4, and 6 of section 337a of the Penal Code. It is further alleged in the petition that the evidence adduced at the preliminary examination, a copy of which is attached to the petition and made a part thereof, discloses the following facts to be true, and which the petitioner herein admits to be true, to wit:

"That on or about the 9th day of December, 1937 the defendant went to the City of Arcadia with the intention and for the purpose of opening and conducting therein a place of business for the purpose of accepting wagers, for a commission, and then having said wagers placed by an employee of petitioner inside the enclosure at the pari-mutuel windows of the Tanforan Track at the City of San Bruno, County of San Mateo, State of California.

"That for the purpose of conducting said business said petitioner herein rented a store room at 124 East Huntington Drive, Arcadia, California, and placed thereon a large sign setting forth his character of business, a true and correct copy of which sign is set forth in the preliminary proceedings record. That the said petitioner then

and there purchased advertising in the Pasadena Independent to advertise publicly his conduct of said business. The receipt for said advertisement was introduced in evidence in the said preliminary hearing proceedings.

"That the said petitioner at the time of the commencement and opening of his place of business, until the time of arrest, kept said business open during the racing at said Tanforan Track, and accepted wagers as agent and for a commission of 10% for various persons, and during said time persons did so make said wagers, which were accepted by the defendant in the conducting of his said business. That it was the custom and practice of petitioner to, and he did accept all wagers taken by him, a sufficient time prior to the running of the race at said Tanforan race track, for the petitioner to, and he did telephone to his representative who was then and there located in the near vicinity of said track, as to the amount, nature and character of said wagers, and thereupon the said representative would and did immediately go inside the enclosure at said Tanforan race track and buy pari-mutuel tickets, said purchase being made inside the enclosure,—for each and every one of said bets. That said petitioner would and did get a report of said race and races and the results thereof and would and did immediately pay to the bettors at his place of business their winnings from money which said petitioner had at his said place of business. That said winnings were paid within a few minutes after the ending of each race. That thereafter the said representative inside said enclosure would and did cash the winning pari-mutuel tickets so purchased and it was the intention to forward the proceeds thereof to petitioner.

"In the conduct of said business, your petitioner, as to each and every wager taken by him, at said place of business, charged a commission of 10%, and no other cost, expense or service charge. That while the petitioner was conducting a place of business such as above described, the complaining witness entered said place of business on the 10th day of December, 1937, at about the hour of 1:46 o'clock p. m., and shortly thereafter paid to defendant the sum of \$4.40 and instructed defendant to deduct therefrom 40c as commission (being 10% of the amount to be bet) and that the balance thereof was a wager to be transmitted to the Tanforan track and to be wagered as follows: \$2.00 for a show ticket on the horse known as 'Naseby' in the third race

on the program on said day, and \$2.00 likewise for a show ticket on the horse known as 'Pan Full' in the same race. That the petitioner in the course of the business being conducted by him as aforesaid, accepted said money for said purposes and then and there did deduct said commissions above set forth, and telephoned from said place of business to the representative of petitioner who, at the time of said telephoning was located near the said Tanforan track at San Bruno, San Mateo County, California. That said telephone call from your petitioner to his said representative was made prior to the running of said race upon which said wagers were made. That with money then in his possession the said representative of petitioner immediately went inside the enclosure of the Tanforan race track and purchased two separate pari mutuel tickets, one in the sum of \$2.00 being a show-bet upon the horse known as 'Naseby' in the third race on said date, and the other likewise being a show bet ticket in the amount of \$2.00 upon the horse known as 'Pan Full' in the same race.

"That both of said tickets for said wagers were made within said enclosure at pari mutuel betting windows of said track prior to the running of said race.

"That immediately following the running of said race the results thereof were obtained by petitioner, and said results showed that the said complaining witness had won upon the show ticket wagered upon the horse known as 'Naseby' and that said ticket paid the sum of \$2.80. Thereupon your petitioner, out of moneys at his place of business, paid immediately the said winnings in the sum of \$2.80 to the complaining witness.

"That upon the evidence summarized above (and more particularly set forth in the transcript of the proceedings attached hereto and made a part hereof) the said Arden D. Boller, Judge of the City Court, at said preliminary hearing found against the contentions raised by the defendant and ordered the said defendant committed, a copy of which said commitment is attached hereto, made a part hereof and marked 'Exhibit B'. That by reason of such proceedings, and the findings and commitment at said preliminary hearing by the said Arcadia City Court, the defendant is now imprisoned, confined and restrained of his liberty, all as heretofore alleged."

It was also established at the preliminary hearing that petitioner entered a record of

said bets in a book kept for such purpose and also furnished a ticket or receipt to each customer as evidence of each bet made as hereinbefore recited.

[1] The decisive question involves the construction and interpretation of chapter 769, Statutes of 1933, page 2046, which is, as the title of the act in part recites, "An act to provide for the regulation and licensing of horse racing, horse race meetings, and the wagering on the results thereof"; approved by the Governor June 5, 1933, in effect June 27, 1933, commonly known and hereafter referred to as the "Horse Racing Act." At the outset, and in order to avoid confusion, it should be noted that another act, to wit, chapter 436, Statutes of 1933, page 1127, bearing the identical title, was approved by the Governor May 18, 1933, in effect June 27, 1933. Said chapter 436 is identical with chapter 769, except in the following particulars: Chapter 436 provides for 66 racing days in counties of the first class, and provides for a racing board of five members, to be appointed by the Governor and approved by the Senate, whereas chapter 769 provides for 100 racing days in counties of the first class and for a horse racing board of three members, to be appointed by the Governor, with no approval by the Senate required. Without going into detail, it is sufficient to state that an examination of the legislative history of these two acts will reveal that chapter 769 is the effective chapter of the two and may be regarded as the law of the state on the subject-matter thereof.

The Horse Racing Act creates and establishes the "California Horse Racing Board" and fixes the powers and duties of such board. Among other things, the act provides that: "Said board shall make rules governing, permitting and regulating mutual wagering on horse races under the system known as pari mutuel method of wagering, which shall be conducted only by such licensee and only within the enclosure and only on the dates for which such horse racing has been licensed by the board. All other forms of wagering or betting on the result of a horse race shall be and remain illegal and any and all wagering or betting on horse races outside the enclosure where such horse races shall have been licensed by the board shall be and remain illegal." St. 1933, p. 2047, § 3. By the terms of the act horse racing and the wagering on the results thereof can be lawfully conducted only by a licensee of the board at a place and on

the dates specified in the license. Moreover, the act provides that: "There shall be no wagering on the results of any such horse race or horse races except under the pari mutuel or mutual method of wagering," as therein provided. St.1933, p. 2050, § 8. Said act further provides that: "Any licensee conducting a horse race meeting shall provide a place or places in the race meeting grounds or enclosure at which such licensee may conduct, operate and supervise the pari mutuel or mutual method of wagering upon the results of said races so conducted and within its enclosure; and said **system of wagering** shall be operated only by the installation and use of the totalisator or such mechanical equipment as may be approved by the board, but such board shall not require any particular make of mechanical equipment; provided, that such wagering shall not be held or construed to be unlawful, any other statute of the State of California to the contrary notwithstanding. No other method of betting, pool making or wagering shall be permitted or used by such licensee, and said mutual method of wagering shall be carried on and conducted in the manner aforesaid and not outside of the track or enclosure of a licensee," St.1933, p. 2053, § 14, and the act provides, also, that: "*Any person wagering upon the results of a horse race, except in the pari mutuel or mutual method of wagering, when the same is conducted by a licensee and upon the grounds or enclosure of said licensee, shall be punishable as provided in the Penal Code.*" St.1933, p. 2053, § 15.

The Horse Racing Act, by its terms, is declared to be for the purpose of the encouragement of agriculture and the breeding of horses in the state of California, and provides for a percentage of the money of every purse won by an animal bred in the state of California to be paid to the breeder of such animal.

Section 3 of the Horse Racing Act, St. 1933, p. 2047, was amended by the Legislature in 1935, St.1935, p. 1943, by the addition of one sentence. Section 3 now reads as follows (the sentence added by said amendment is in italics): "Said racing board shall have full power to prescribe rules, regulations and conditions consistent with the provisions of this act under which all horse races, upon the results of which there shall be wagering, shall be conducted within the State of California. Said board shall make rules governing, permitting and regulating mutual wagering on horse races under the system known as pari-mutuel

method of wagering, which shall be conducted only by such licensee and only within the enclosure and only on the dates for which such horse racing has been licensed by the board. *A wager made inside an enclosure under the pari-mutuel system for a principal who is not within the enclosure shall be considered a wager made within the enclosure for the purpose of this act and any activity of the principal in connection with such wager shall not be considered a wager made outside the enclosure.* All other forms of wagering or betting on the result of a horse race shall be and remain illegal and any and all wagering or betting on horse races outside the enclosure where such horse races shall have been licensed by the board shall be and remain illegal."

It is contended by petitioner that section 3 of the act, as amended, repeals by implication section 337a of the Penal Code, and that therefore the business as conducted by petitioner, as well as the acts alleged to be a violation of section 337a of the Penal Code, are lawful and constitute no violation of said section 337a. It is further contended that the amendment, although it refers only to the conduct of a "principal," necessarily incorporates in its contemplation an agent as well. Furthermore, it is contended that the amendment adds, for the benefit of the state, a revenue-producing plan to the purpose of the act.

[2-5] The ultimate determination of these questions depends upon the meaning to be given to the sentence added by the amendment hereinbefore quoted, which meaning manifestly can be determined only by a consideration and application of certain well-known and long-established rules of construction and interpretation. In that connection, it is well settled that: "It is a cardinal rule in the interpretation of a statute that all its provisions shall be given effect, if possible, and if, by proper construction of the language used in different sections, provisions which are apparently conflicting can be harmonized, it is the duty of courts to so interpret the statute that all its provisions will be allowed to stand. It is not to be assumed that the legislature intended by the same statute to enact two inconsistent provisions." *Hale v. McGettigan*, 114 Cal. 112, at page 117, 45 P. 1049, 1051. See also, *Lucchesi v. State Board of Equalization*, 137 Cal.App. 478, 482, 31 P.2d 800. Fundamentally it is the court's first duty to determine the intention of the Legislature, if possible, and that intention must be gathered from the words of the statute.

As the Supreme Court has asserted: "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This court is limited to interpreting the statute, and such interpretation must be based on the language used. By the express provisions of section 1858 of the Code of Civil Procedure, 'in the construction of a statute * * * the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted.' It is elementary that there can be no intent in a statute not expressed in its words; that the intention of the Legislature must be determined from the language of the statute. [Citing cases.] As stated in *City of Eureka v. Diaz*, 89 Cal. 467, at page 469, 26 P. 961, 962: 'It is a cardinal rule in the construction of statutes that the intent of the legislator should be followed, but this is subject to the imperative and paramount rule that the court cannot depart from the meaning of language which is free from ambiguity, although the consequence would be to defeat the object of the act.'" *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, 365, 5 P.2d 882, 884. And, as further declared by the Supreme Court: "The statute, of course, must be read and construed as a whole in harmony with other statutes relating to the same general subject [citing cases]." In *re Marquez*, 3 Cal. 2d 625, 628, 45 P.2d 342, 343.

[6-8] The rule, that an exception to a statute general in its terms, to be effectual must be specific, is approved in *Los Angeles Railway Corp. v. Flood Control Dist.*, 78 Cal.App. 173, 182, 248 P. 532, 535, wherein it is affirmed that: "It is unnecessary to cite authorities to the rule that when a statute is general in its terms any exemption or exception from its operation must be specific." And again, in *Rothschild v. Superior Court*, 109 Cal.App. 345, at page 348, 293 P. 106, 108, it is said: "We cannot overlook the well-settled principle that when the Legislature has made exceptions to a general rule it must be deemed to have included in its exceptions all that it intended to except." It should be noted here, as has been often declared, that "The provisions of the Code—indeed of all the Codes—are to be construed with relation to each other 'as though all such codes had been passed at the same moment of time and were parts of the same statute.' [Citing cases.] That is to say, the Codes must be construed as a single statute. *McKay v. McKay*, 125 Cal.

65, 57 P. 677. Hence the rule of statutory construction that an express exception is not to be extended beyond the fair import of its terms [citing cases]," and, "that an exception should be strictly construed." *Merchants Nat. Bank v. Continental Nat. Bank*, 98 Cal.App. 523, 532, 277 P. 354, 358.

[9, 10] With respect to the purpose of a statute, the courts have uniformly held that: "The language of the statute is to be so construed, when it reasonably can be, as to promote, rather than defeat the obvious purposes of the legislature." *People v. Arthur*, 1 Cal.App.2d 768, 771, 32 P.2d 1002, 1003. And on the same subject the Supreme Court, in phraseology singularly applicable to the case at bar, declared: "Since it is apparent that the section of the act under consideration is not clear and definite in expressing any of the above-suggested alternatives, it becomes the duty of this court to construe the same with reference to the purposes sought to be served and the public policy underlying the legislation." *Golden Gate Ferry Co. v. Railroad Comm.*, 204 Cal. 305, 312, 268 P. 355, 358.

[11-16] The policy of the state toward commercial gambling is clear and unequivocal. A mere superficial reference to the Penal Code reveals that commercial gambling in all of its phases has been uniformly condemned for many years. Indeed, this well-established policy of the state is reflected, in a measure, in connection with the manner of adoption of the Horse Racing Act. After adopting the measure, it was provided that it should not become the law until approved by the people, according to the terms of the act, in the following manner, to wit: "Sec. 19. This act shall take effect upon the adoption of a constitutional amendment ratifying its provisions." St. 1933, p. 2054.

The policy of the state in this connection is again reflected in the argument in favor of the adoption of the Horse Racing Act, which was contained in the official copy of the proposed amendments and arguments distributed by the secretary of state, according to law, preceding the election by which said act was approved by the people. The argument in part was as follows: "Wagering will be confined to licensed race track enclosures—thus aiding in the elimination of pool rooms and such other undesirable places." The people approved the Horse Racing Act, as proposed by the Legislature, at a special election by adopting section 25a of article 4 of the Constitution. See Stats.

1933, p. 3160. Manifestly, the approval by the people was in accord with the above-mentioned policy of the state, and must be assumed to have been so, in the light of the argument submitted for their consideration to the effect that wagering on horse racing would be confined to licensed race track enclosures, "thus aiding in the elimination of pool rooms and such other undesirable places." There is nothing in the Horse Racing Act indicating the slightest intention to depart from the public policy of the state condemning commercial gambling. To the contrary, a determination to adhere to such policy is obvious. For example, the Horse Racing Act repeatedly declares that wagering on horse races shall be limited to the so-called "pari-mutuel method of wagering"; that such wagering shall take place only at the track; and that any other form of wagering or any wagering taking place elsewhere than at the track (outside the enclosure) "shall be and remain illegal." The declared purpose of the act, as heretofore noted, is for the purpose of "the encouragement of agriculture and the breeding of horses in the State of California." Although it was not declared in so many words, a parallel purpose to preserve the public policy of the state against commercial gambling is clearly evident from the terms of the act. There is nothing in the language of the 1935 amendment to section 3 of the act that literally indicates an intention to depart from this policy. If any such intention was contemplated by the Legislature, it was effectively concealed. In order to give section 3, as amended, a meaning and interpretation that in effect would repeal by implication section 337a of the Penal Code as well as repeal by implication the other provisions of the Horse Racing Act, it would be necessary to add words to the amendment which such amendment does not contain. This the court is without the power to do. As the Supreme Court has recently declared: "In order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first. The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon. To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand to-

gether. Where a modification will suffice, a repeal will not be presumed. [Citing cases.]" *Penzinger v. West American Finance Company*, Cal.Sup., 74 P.2d 252, 260.

Division 2 of the District Court of Appeal for the Second Appellate District and the District Court of Appeal for the Fourth Appellate District have apparently reached the same conclusion, although the identical question was not raised in the cases therein decided. In *re William A. McKelvey and Ray Hawley for Writs of Habeas Corpus*, Cal.App., 64 P.2d 1002, and *People v. Torrey*, 16 Cal.App.2d 470, 60 P.2d 900.

[17] To conclude, in the light of the foregoing, that section 3 of the Horse Racing Act, as amended, is intended to repeal section 337a of the Penal Code and to repeal the other provisions of the Horse Racing Act above referred to, would be to attribute to the Legislature a degree of perfidy of which even those most prejudiced would disapprove.

[18] The argument that there is no difference in principle between the act of placing a bet in a pool room or with a bookmaker and placing a bet in a pari mutuel machine at the races is without merit. It is a matter of common knowledge (and obviously the reason for the adoption in the act of such method of wagering) that all of the money deposited with the pari mutuel machines by the wagering public at the races is divided, less the commissions provided by law, among those who happen to purchase tickets on the winning horses. Those who wager under the pari mutuel system are not contending with each other, or with some one else. Moreover, it is quite evident, and was doubtless contemplated at the time the Horse Racing Act was approved by the people, that horse racing, as conducted under and according to the terms of the act, is quite different in many respects from mere gambling, as such. Horse racing is regarded as a form of recreation and sport. Its social phases and many other phases, industrial and economical, were doubtless taken into account by the people at the time the act received the official approval of the electorate. Betting on the outcome of a horse race at an establishment such as conducted and maintained by the petitioner herein is unquestionably commercial gambling and bears no resemblance whatever to the wagering on horse racing by a spectator attending the races, within

the enclosure of a licensed track as contemplated by the Horse Racing Act. *

[19] The foregoing reasoning, which disposes of petitioner's contention that the amended act repeals by implication section 337a of the Penal Code, applies with equal force to the two further contentions; namely, that although the act refers only to the conduct of a "principal," it necessarily contemplates an "agent"; and that the amendment adds a revenue-producing plan to the purpose of the act.

[20] Section 3 of the Horse Racing Act, as amended, affords no defense for one who maintains and operates, as petitioner herein maintained and operated, an establishment outside the track enclosure for the purpose of aiding, soliciting, encouraging, and promoting commercialized gambling upon the results of races at which neither he nor his so-called "principal" are spectators. The claim, therefore, that such conduct and acts are within the purview of the Horse Racing Act is a mere subterfuge and an attempt to circumvent the established policy of the state against commercial gambling, and is without legal sanction either in the Horse Racing Act as originally adopted or as subsequently amended.

It follows from the foregoing reasoning that the writ of habeas corpus heretofore issued in this cause should be, and it is, discharged, and the petitioner is remanded to the custody of the sheriff of Los Angeles county.



23 Cal.App.2d 703

CLARK v. TALMADGE.

Civ. 1667.

District Court of Appeal, Fourth District,
California.

Dec. 1, 1937.

1. Landlord and tenant ⇨157(4)

In lease providing that lessee should bear cost of repairing buildings on ranch, that on termination such improvements should revert to lessor, that new buildings constructed during term should be lessee's property removable on termination, and that improvements which could be placed on ranch by lessee might include fox kennels

and fencing, improvements in last clause were included in new buildings removable on termination of lease and not in improvements which should revert to lessor. Civ.Code, § 1069.

2. Landlord and tenant ⇨157(4)

In action involving ownership of fox pens and fencing placed on ranch by lessee as between lessor and defendant to whom lessee sold pens and fencing, evidence that pens and fencing had been attached in connection with lessor's effort to collect rent and that lessor agreed that lessee should give a bill of sale to defendant supported finding that parties at all times treated pens and fencing as personality.

3. Fixtures ⇨14

Buildings or equipment which are so attached to realty by tenant as to become fixtures may not be removed by tenant at expiration or termination of lease, but a different result obtains where parties have by express agreement provided that tenant may remove such improvements.

4. Landlord and tenant ⇨157(4)

Under lease permitting lessee to construct improvements, including fox pens and fencing, subject to removal on termination of lease and evidence that lessor had attached pens and fencing placed on property by lessee in effort to collect rent and that after regaining possession of property lessor agreed that lessee should give his assignee a bill of sale to pens and fencing, trial court was justified in holding that lessee or his assignee could remove pens and fencing within a reasonable time.

5. Landlord and tenant ⇨157(5)

What is a reasonable time within which a lessee may remove improvements from premises after termination of lease permitting removal depends upon facts in particular case.

6. Appeal and error ⇨1010(1)

Whether buyer of improvements which had been placed on ranch by lessee attempted to remove them within a reasonable time after termination of lease, so as to be entitled to them as against lessor, was for trial court under evidence that improvements had been under attachment and that thereafter ranch was inaccessible because of heavy snowfall.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Emma Clark against Will Talmadge. From a judgment for defendant, plaintiff appeals.

Affirmed.

Charles J. O'Connor and Donald S. Gillespie, both of Colton, for appellant.

William Guthrie and Guthrie & Curtis, all of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action for declaratory relief to determine the ownership of certain fox pens and certain fencing. The plaintiff was the owner of a mountain ranch consisting of twenty-two acres, which was occupied and used as a fur farm by a corporation under a lease which expired on April 20, 1936. On March 3, 1933, the plaintiff served a notice on the lessee to pay certain rent or quit the premises. The rent was not paid and an action in unlawful detainer was filed on May 3, 1933. Judgment by default was entered and a writ of restitution was issued under which the plaintiff was placed in possession of the leased premises on September 15, 1933. At that time certain fencing and fox kennels or pens which had been placed on the property by the lessee were still there. On November 23, 1933, the lessee executed and delivered a bill of sale conveying to the defendant all of said fox kennels and fencing. When the defendant attempted to remove the pens and fencing during the next March or April the plaintiff refused to permit him to do so and brought this action. From a judgment in favor of the defendant, the plaintiff has appealed.

[1,2] The first point raised is that a finding that the parties at all times treated this property as personal property is without support in the record. There is no dispute as to the fact that the fencing was attached to the real property in such a manner as to make it a part thereof in the absence of any agreement to the contrary. The appellant maintains, however, that the evidence is insufficient to support a finding that the fox kennels or pens were built entirely on the surface of the ground and were not affixed thereto. While this point is immaterial, the evidence, although conflicting, supports that finding.

Aside from conflicting evidence, appellant's contention is largely based upon her interpretation of a contract provision contained in the lease. Article 2 of that instrument provides that the lessee will do the following things:

"(1) Enter upon the demised premises immediately upon the execution of this lease and proceed to repair the present buildings, which they are to occupy during the term of this lease.

"(2) The lessees further agree that they will bear all cost of labor and materials used in such repairing of buildings now standing upon the property, and at the termination of the lease, said improvements are to revert to the lessor.

"(3) Any new buildings constructed upon said property subsequent to the date hereof or prior to the termination of the lease are to be the property of the lessees and are subject to removal at the termination of the lease.

"(4) Said improvements which may be placed upon said property by the lessees may consist of fox kennels, fencing, etc."

Appellant contends that the word "improvements" in clause (4) refers to the improvements which are mentioned in clause (2), and that it follows that these kennels and fencing were, under clause (2), to revert to the lessor. We think the plain meaning of these provisions is that the improvements mentioned in clause (2) are the repairs on the buildings which were originally on the leased property and which were to be occupied by the lessee and that the improvements mentioned in clause (4), consisting of fox kennels and fencing, are included in the new buildings mentioned in clause (3) to be constructed on the property after the execution of the lease and which are made subject to removal. If there is any ambiguity in the terms of the lease the trial court correctly construed the same in favor of the lessee. *Churchill v. More*, 4 Cal.App. 219, 88 P. 290; Civ.Code, § 1069.

The complaint in this action alleges that the fences were constructed "on" the real property and the pens "within" the fences, and then alleges that they were "abandoned" to the appellant. There was evidence that while the action in unlawful detainer was pending the appellant attached these pens and the fencing in connection with her effort to collect certain rent and that the judgment which she secured was paid through the sale of other property belonging to the lessee, thus releasing the attachment. There was also evidence that on September 15, 1933, at the time possession of the real property was delivered to the appellant by the constable the president of the lessee corporation informed the appellant that he wanted the respondent to have the pens and fence

as the corporation owed him money, that she refused to permit the respondent to have the pens until he could show a "paper," that she was then advised by the president that he would give a bill of sale to the respondent and she agreed that this should be done, and that the bill of sale was later given to the respondent. The finding complained of finds complete support in the record.

It is next urged that the decision of the court and its finding and conclusions of law, to the effect that the respondent is the owner of this property, are against law and contrary to the evidence. The argument under this head is based upon the contention made throughout that there was no agreement for the removal of this property, that this property was not within the exception relating to trade fixtures and, under general laws relating to landlord and tenant, became a part of the real property, and that, in any event, it was not removed within a reasonable time after the termination of the lease.

[3, 4] With certain exceptions, the general rule is that buildings or equipment which are attached to real property in such a manner as to become what is known as fixtures, may not be removed by a tenant at the expiration or termination of his lease. It is well settled, however, that a different result obtains where the parties have by express agreement provided that the tenant may remove the improvements. *Earle v. Kelly*, 21 Cal.App. 480, 132 P. 262; *Stewart v. Leasure*, 12 Cal.App.2d 652, 55 P.2d 917; *Churchill v. More*, supra; *Clawson v. Harris*, 10 Cal.App.2d 521, 52 P.2d 496; *R. Barcroft & Sons Co. v. Cullen*, 217 Cal. 708, 20 P.2d 665. It has also been held that a tenant who has an express agreement permitting him to remove fixtures has a larger right as to the time within which they must be removed than is the case where no such agreement exists, and that he may remove them within a reasonable time after the expiration of his term. *Earle v. Kelly*, supra. It is here contended that the right to remove the property after the termination of the lease, even under such an agreement, does not apply where the lease is ended before its expiration date because of a failure to pay rent. In support of this contention the appellant cites the early case of *Whipley v. Dewey*, 8 Cal. 36, where the court said that in agreeing to allow the removal of erections "after expiration of the lease" the intention of the parties was confined to the legal expiration thereof by the terms of the limitation itself. The case before us in-

volves a very different agreement, a different intention appears both from the language of the lease and the conduct of the parties, and the fact that the property here in question was to remain personal property which could be attached as the property of the lessee and which could be removed was recognized by the appellant after the covenant for rent was broken, after she had elected to terminate the lease, and even after she had regained possession. We take it that the right of removal after failure to pay rent and a resulting termination of the lease still exists if it is so agreed by the parties. That is the situation here, where the agreement that the added improvements are to remain the property of the lessee specifically makes them subject to removal at the termination of the lease rather than at the expiration thereof. This interpretation of the lease has been accepted and acquiesced in by the appellant as shown by her conduct and this furnishes the best evidence of the intention of the parties. By attaching the property after the covenant for the payment of rent was broken and after she had taken steps to terminate the lease she recognized not only that the property in question was personal property but that it belonged to the lessee. After regaining possession of the real property, upon being told of the intention of the lessee to turn the personal property over to the respondent the only objection she made was that she would not allow him to remove it until he could show a paper, in other words, an evidence of title. When told that she would be furnished such evidence she agreed that this should be done. Under the circumstances here appearing we think the court was justified in holding that the lessee, or his assignee, then had the right to remove the property within a reasonable time.

[5, 6] The remaining question is whether the evidence is sufficient to support the implied finding of the court that it was removed within a reasonable time. What is a reasonable time depends upon the facts in a particular case. The property was under attachment until September 15, 1933, and could not have been removed prior to that time. Disregarding conflicting evidence, relied upon by the appellant, there is evidence that there was an exceptionally heavy fall of snow in the vicinity of this ranch in the winter of 1933-34, which started in October and stayed until May, and that during that time the ranch was inaccessible. The question was one for the trial court and, under

such circumstances, we are unable to say that it abused its discretion in holding that this delay was not unreasonable.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



24 Cal.App.2d 238

LOS ANGELES COUNTY v. RANSOHOFF
et al.

Civ. 9950.

District Court of Appeal, First District,
Division 1, California.

Dec. 27, 1937.

Hearing Denied by Supreme Court
Feb. 24, 1938.

1. Counties ⇨194

An application for reduction of assessment of personal property tax levied for county purposes, to which was attached an exhibit setting forth amount of assessment placed on each class of assessable property, actual value of such property, and valuation that taxpayers considered proper, and which sought reduction on ground of "unequal value," was legally sufficient as basis for contesting assessment on same ground in action to collect the tax. Pol.Code, §§ 3673, 3674.

2. Counties ⇨193

An assessment of partnership's merchandise, for personal property tax levied for county purposes, at 60 per cent. of book value, and of fixtures and equipment at over 100 per cent. of book value, in disregard of uniform rule pursued with respect to other mercantile establishments of assessing merchandise at 40 per cent. of cost and fixtures and equipment at 30 per cent. of book value, was so grossly discriminatory and excessive as to amount to constructive fraud, and illegal. Pol.Code, §§ 3617, 3627; Const. art. 13, § 1.

3. Counties ⇨193

The statute requiring verified application for reduction of assessment by county board of equalization does not require use of any special form or following of technical rules of pleading, but mere informalities should receive liberal indulgence in considering legal sufficiency of application, and pur-

pose of statute is served if board may know or have reasonable means of ascertaining from application what the claim is. Pol.Code, §§ 3673, 3674.

4. Counties ⇨193

A grossly inequitable and palpably excessive valuation of property for taxation for county purposes may amount to constructive fraud, and court relief may be obtained against it without express showing of fraud or bad faith of assessor. Pol.Code, §§ 3673, 3674.

5. Counties ⇨194

In action to collect personal property tax levied for county purposes, defended on ground of excessiveness of assessment, answer which in effect, though not in exact language approved by court in previous opinion, offered to pay amount of taxes due under what taxpayers considered a fair assessment, was sufficient. Pol.Code, §§ 3673, 3674.

6. Counties ⇨194

In action to collect personal property tax levied for county purposes, county could not object for first time on appeal to sufficiency of offer in taxpayers' answer to pay reasonable amount of tax, where county did not demur, move to strike part of answer, nor object to taxpayers' evidence of tender. Pol.Code, § 3674.

7. Counties ⇨194

On appeal from judgment for taxpayers in action to collect personal property tax levied for county purposes, wherein taxpayers contended that their answer substantially alleged offer to pay what court should find to be equitable and just, taxpayers could not urge that court lacked authority to ascertain just amount of taxes, and reviewing court would find taxes due from valuation agreed upon by parties as basis for equitable assessment. Code Civ.Proc. § 956a.

8. Counties ⇨193

A taxpayer, appealing to court for equitable relief from tax levied for county purposes on allegedly illegal assessment, must offer in his answer to pay what court shall find to be equitable and just. Pol.Code, §§ 3673, 3674.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the County of Los Angeles against Robert Ransohoff and others, do-

ing business as Ransohoff's, and Ransohoff's, a copartnership. From a judgment for defendants, plaintiff appeals.

Reversed, with directions.

For prior opinion, see 65 P.2d 815.

Everett W. Mattoon, County Counsel, and Beach Vasey, Deputy County Counsel, both of Los Angeles, for appellant.

Livingston & Livingston and Richard Wagner, all of San Francisco, for respondents.

Holbrook & Tarr and W. Sumner Holbrook, Jr., all of Los Angeles, amici curiæ, for respondents.

KNIGHT, Justice.

The County of Los Angeles brought this action to collect an unsecured personal property tax amounting with penalties to \$1,608.67, levied on defendants' property for county purposes for the year 1933-34. The defendants challenged the validity of the tax upon the ground that the assessment upon which it was based was arbitrary, excessive, and fraudulent, and was fixed pursuant to an illegal method. The trial court in effect so found, and entered judgment in favor of defendants, from which the county appeals.

Summarized, the points urged for reversal are: First, that the application filed by defendants with the county board of equalization for a reduction of said assessment was legally insufficient in its statement of facts to meet the requirements of section 3674 of the Political Code, and that therefore defendants were precluded in the present action from attacking the legality of the assessment, *Mahoney v. City of San Diego*, 198 Cal. 388, 245 P. 189; *Luce v. City of San Diego*, 198 Cal. 405, 245 P. 196; secondly, that the allegations of defendants' answer to the complaint herein, with respect to their offer to pay the amount of any tax found to be due on a fair assessment, were legally insufficient to conform to the rule stated in *County of Los Angeles v. Ballerino*, 99 Cal. 593, 32 P. 581, 583, 34 P. 329, and that consequently defendants were not entitled to any relief; thirdly, that in any event the county was entitled to a judgment for the amount of taxes found to be due on an equitable assessment. *County of Los Angeles v. Ballerino*, supra.

The defendants in answer to the first point contend that the application filed by them with the board of equalization for an

assessment reduction was not defective, much less void; furthermore, that the county is barred by the rule of waiver from raising the question of the sufficiency of said application for the reason that, as shown by the undisputed evidence, it was made out on a form prepared and printed by the county and supplied by it to all taxpayers seeking assessment reductions; that said board received and filed the same, and heard the evidence produced in support thereof, without making any objection whatever to the form or substance of the application, or the character of the evidence defendants produced; and that thereafter the board determined the issue of fact raised thereby. Defendants cite no case in point from this jurisdiction to support their latter contention, but they seek to invoke the doctrine of waiver universally applied by the courts of the state of New York in like cases.

[1,2] We need give no further consideration, however, to the question of waiver, because we are convinced that the county's attack upon the legal sufficiency of said application cannot be sustained. Stated briefly, the transactions leading up to the denial of said application were as follows: For several years defendants, as copartners, owned and operated a retail merchandise store in Los Angeles, which they closed on May 30, 1933. At the beginning of the assessment year 1933-34 the assessor of said county, in order to obtain uniformity and equality in the assessment of stocks of merchandise, fixtures, and other equipment of all mercantile establishments doing business in said county and to make due allowances for depreciation, etc., adopted and pursued the following rule: He assessed all merchandise at 40 per cent. of the cost price as shown by the owner's books, and the fixtures, factory, and office equipment at 30 per cent. of their book value. But admittedly, in assessing defendants' property he willfully disregarded his rule of uniformity, and arbitrarily assessed their merchandise at 60 per cent. of the book value, and the fixtures and equipment at over 100 per cent. of the book value. Manifestly, therefore, the assessment so made was not only wholly without any basis of equality in comparison with the assessment of like property of other merchants doing business in the same county, but was so grossly discriminatory and excessive as to amount to a constructive fraud. *Birch v. County of Orange*, 186

Cal. 736, 200 P. 647; *Mahoney v. City of San Diego*, supra. Within the time allowed by law defendants filed with the county board of equalization their verified application for a reduction of said assessment; but following a hearing it was denied.

[3] For obvious reasons said section 3674 of the Political Code does not prescribe any special form of application a taxpayer must file with the board of equalization in order to obtain a fair adjustment of the assessment of his property; nor do any of the provisions of said section demand that the allegations of such an application follow any technical rules of pleading. All that the section requires is that the party affected or his agent shall file a verified application "showing the facts upon which it is claimed such reduction should be made." And in this connection it is held that in considering the legal sufficiency of such an application, mere informalities should receive a liberal indulgence, and that the purpose of the statutory requirement is served if the board may know from said application "or have some reasonable means of ascertaining" therefrom what the claim of the applicant is, to the end that such claims may be investigated by the assessing authorities prior to the hearing. *Rittersbacher v. Board of Supervisors*, 220 Cal. 535, 32 P.2d 135, 137.

The application in the present case was, as stated, made out on the printed form supplied by the county. It alleged, among other things, "that the full cash value of said property is as stated below," and asked "that the valuation on said property be reduced from the amount fixed by the assessor to the amount hereinafter stated as the full cash value of said property"; and in an exhibit attached to and made part of the application defendants set forth the name of the property owner, the location of the store, and definitely specified the different classes of the assessable property the firm owned, the amount of assessment placed on each class by the assessor, and the respective amounts to which the assessment thereon should be reduced, to wit, they asked that the assessment on the store fixtures which was set by the assessor at \$6,750 be reduced to \$1,000; that the amount of the factory equipment fixed by the assessor at \$750 be reduced to \$250; that the assessment of merchandise fixed by the assessor at \$24,750 be reduced to \$8,000; and that the assessment of office

equipment fixed by the assessor at \$1,650 be reduced to \$500. And finally, it was alleged therein "that the grounds upon which such change is asked and should be made are as follows, to-wit: Unequal Value."

As defined by Webster's Dictionary, the word "unequal" means "not uniform"; and the word "uniform" as defined by the same dictionary means "conforming to one rule or mode." Furthermore, in dealing with the meaning of the word "equalization," which like the word "unequal" is a derivative of the word "equal," the Supreme Court in the case of *Wells, Fargo & Co. v. State Board of Equalization*, 56 Cal. 194, said: "To equalize is to make equal, to cause to correspond, or be like in amount or degree, as compared with something." Here, admittedly, the willful act of the assessor in applying to defendants' property a rule or mode of assessment vastly different from the one used by him in assessing the property of others, of the same class and character and in the same county, resulted in placing on defendants' property an assessment of "unequal value" as compared with the assessment of other like properties. It is apparent, therefore, that when the term "unequal value" as employed by defendants in stating the ground of their application, is construed in the light of the above definitions, and the facts and data set out in the exhibit attached to the application, it is peculiarly appropriate to describe the condition of disparity of assessment about which defendants were complaining. Moreover, all parties at the hearing before the board doubtless so construed the meaning of said term because the evidence there adduced was directed to the point of establishing the existence of the rule of uniformity adopted and followed by the assessor in assessing the personal property of merchants, and the disparity of assessment in the defendants' case brought about by the assessor's willful and intentional disregard of such rule. Clearly, therefore, in the face of the facts and circumstances stated, there could be no justification for holding, as the county contends we should, that the form of application filed by the defendants was not legally sufficient to confer jurisdiction upon said board to grant the relief sought thereby.

Furthermore, the county in its opening brief has quoted in full, in parallel columns, a copy of the application filed in the case of *Rittersbacher v. Board of Supervisors*, supra, and a copy of the one filed by de-

defendants in the present case; and as claimed by the county the applications are in all material respects identical in form. There, as here, it was alleged "that the grounds upon which such change is asked and should be made are as follows, to-wit: unequal value"; furthermore, the prayer of both applications was "that the reduction be granted as prayed." The only difference between the two documents is that in the Rittersbacher application the description of the property, and the assessed and the cash values thereof, were set out in the body of the application; whereas in the present case those facts were set out in greater detail in an exhibit attached to and made part of the application. And in that case the Supreme Court held that under the form of application there filed the complainant was entitled (upon sufficient evidentiary showing) to have her property placed "on the same basis of valuation as that applied to other property of like character and similarly situated." Manifestly, therefore, a like construction must be placed upon the form of application filed in the present case, namely, that it was sufficient to entitle defendants to have their property placed on the same basis as that applied to other property of like character and similarly situated.

True, in the Rittersbacher Case the Supreme Court sustained the board's denial of the application. But the court did not do so, as the county seems to contend, upon the ground that the form of application filed with the board was insufficient to warrant the granting of a reduction upon the ground urged therein, to wit, "unequal value." In deciding this point the court placed its decision squarely upon the premise that the evidence before the board completely disproved the claim urged by the application that there was a disparity between the assessment of the complainant's property and that placed on like property similarly situated. Here, however, the undisputed evidence before the board proved conclusively that there was a disparity between the assessment of defendants' property and that placed on like property similarly situated. Nevertheless, the application was denied.

It is true, also, that in the Rittersbacher Case, among the reasons given by the Supreme Court for its affirmance of the trial court's judgment dismissing the action therein (which was in mandamus, by a taxpayer, to compel the cancellation of an alleged illegal assessment) was that the action

was not maintainable. But the foundation for such ruling was that the petition for the writ of mandate was based on a ground entirely foreign to the one relied on by the complainant in her application before the board of equalization. In other words, as pointed out by the court, the petition for the writ was based solely upon the ground that in assessing all property in the county in proportion to its value to be ascertained as provided by law, Const. art. 13, § 1; Pol. Code, §§ 3617, 3627, the assessor had adopted and applied a greater percentage of value in assessing all real estate and improvements than he did in assessing certain classes of personal property. And the court held that in applying to the courts for relief from the unjust burdens of an illegal assessment, an aggrieved party is restricted to the same ground of complaint as that urged by him before the board of equalization, notwithstanding that there was uncontradicted evidence before the board establishing the ground of complaint urged in applying for court relief. In so holding the court went on to say that the effect of granting the writ in that case upon the ground alleged in the petition therefor would be to invalidate the entire assessment of the county or would require the board to raise or lower the entire assessment roll, a power not possessed by the board. Pol. Code, § 3673.

We have no such situation here. The defendants attacked the validity of the assessment in the court action upon precisely the same ground that was urged by them in their application before the board of equalization for an assessment reduction; and admittedly the granting of court relief herein will affect no other property assessment than defendants. From the foregoing it will be seen that the portion of the decision in the Rittersbacher Case dealing with the matter of the dismissal of the proceeding therein is not applicable here.

[4] Nor is there any merit in the suggestion made by the county in its reply brief to the effect that the facts shown by the evidence and found by the trial court failed to establish an illegal assessment. As said in the case of *Birch v. County of Orange*, supra, a grossly inequitable and palpably excessive valuation of property for taxation may be held to amount to a constructive fraud; and as held in *Mahoney v. City of San Diego*, supra, it is not essential to the obtaining of court relief that fraud or bad faith on the part of the assessor shall be expressly shown; those elements, says the

court, may arise by implication from the fact that the assessment when taken as a whole and viewed with respect to the assessable values of other taxable properties, discloses such a degree of discrimination between the properties of the same class as to clearly evince a wilful disregard of the statute governing and limiting the exercise of the assessor's discretionary powers.

[5,6] Likewise without merit is the county's contention that the allegations of the answer are legally insufficient to meet the requirement of the rule that a taxpayer, seeking to defend against the collection of a tax upon the ground of an alleged fraudulent assessment, must allege in his answer that he has offered to pay the amount of taxes which would have been due if his property had been assessed at what he considered would have been a fair valuation, and that he is then willing to pay whatever amount the court should find to be equitable and just. *County of Los Angeles v. Ballerino*, supra. It may be conceded that defendants did not plead their offer in the language of the decision in the *Ballerino* Case, but taking the allegations as a whole, they are sufficient, in our opinion, to bring the answer within the scope of the above rule. Moreover, the county did not demur to the answer, move to strike any portion thereof, make any objection to the evidence introduced by defendants in support of its allegations of tender, nor move for judgment on the pleadings; nor, in the bill of exceptions upon which the appeal was taken is there any exception noted to the sufficiency of the answer. It would seem, therefore, that, as defendants contend, it is too late to make such claim of infirmity for the first time in presenting the appeal. *Mauck v. Northwestern National Ins. Co.*, 102 Cal.App. 510, 283 P. 338; *Kurokawa v. Saroyan*, 95 Cal.App. 772, 273 P. 613.

[7,8] We are also of the opinion, however, that the county was entitled to a judgment against defendants for the amount of taxes found to be due on an equitable assessment. *County of Los Angeles v. Ballerino*, supra. As held in the case just cited, in appealing to a court for equitable relief from the imposition of a tax based on an illegal assessment, the aggrieved party must offer in his answer "to pay what the court shall find to be equitable and just"; and since defendants have insisted that their answer in substance so alleges and that hence they are entitled to equi-

table relief, they are not in a position at the same time to urge that the trial court was without legal authority to ascertain the just amount to be paid. In this regard the county and defendants agree that the store inventories submitted to the assessor's deputies by defendants' general manager about March 1, 1933, should be used as the basis for the fixing of an equitable assessment, and that applying thereto the rule of assessment adopted by the assessor in 1933-34, the assessment should be fixed as follows: Merchandise, \$16,635.96; money, \$100; fixtures, \$2,361.09; total, \$19,097.05. The tax rate for that year was \$4.25 on each \$100 of assessed value, so that the just amount of taxes due is \$811.62; and this court so finds. Code Civ.Proc. § 956a.

Accordingly, it is ordered that the judgment be reversed, with directions to the trial court to enter judgment in favor of the county and against the respondents for the sum of \$811.62, together with the amount of such statutory delinquencies and penalties thereon as the trial court ascertains will accrue up to the date of the entry of judgment. Respondents will recover their costs.

We concur: TYLER, P. J.; CASHIN, J.



24 Cal.App.2d 231

WELCH v. SINK.

Civ. 11454.

District Court of Appeal, Second District,
Division 1, California.

Dec. 24, 1937.

Hearing Denied by Supreme Court
Feb. 21, 1938.

1. Automobiles ⇐245(72)

In action for injuries to pedestrian struck by defendant's automobile at complicated intersection of three streets, whether pedestrian was contributorily negligent in traversing 30 feet of pedestrian crossing under existent condition of traffic signals held for jury.

2. Automobiles ⇐245(72)

The contributory negligence of pedestrian struck by automobile is generally a law question for court, where pedestrian fails to look at all, or looks straight ahead with-

out glancing to either side, or is in position where he cannot see, but is generally a fact question for jury where pedestrian looks but does not see approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he can avoid injury to himself.

3. Automobiles ⇨245(6, 44)

In action for injuries to pedestrian struck by defendant's automobile at complicated intersection of three streets, defendant's negligence with respect to failure to stop when traffic signals changed while he was only part way through intersection, and with respect to speed, lookout, and keeping windshield clean, *held* for jury.

4. Automobiles ⇨160(3), 168(1)

A motorist, though strictly within law, remains bound to anticipate that he may meet persons at any point on street, and must keep proper lookout for them and keep automobile under such control as will enable him to avoid collision with another person using proper care, and, if situation requires, must slow down and stop.

5. Automobiles ⇨244(6, 35)

Evidence sustained pedestrian's recovery against motorist for injuries sustained when struck by automobile at complicated intersection of three streets, in view of showing made as to motorist's negligence with respect to not stopping when traffic signals changed while he was only part way through intersection, and with respect to speed, lookout, and keeping windshield clean.

6. Appeal and error ⇨786

A motion to dismiss an appeal on the ground that the questions involved were unsubstantial and that the appeal was frivolous because based on a conflict of evidence was denied where substantial questions involving contributory negligence of plaintiff and negligence of defendant were raised.

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Alfred Welch, also known as Jack Bond, against Fenton H. Sink. From a judgment for plaintiff and an order denying defendant's motion for judgment notwithstanding the verdict, defendant appeals, plaintiff moving for an order dismissing the appeal or affirming the judgment.

Motion to dismiss denied, and judgment and order affirmed.

Hugh B. Rotchford, W. C. Smith, and Everett H. Smith, all of Los Angeles, for appellant.

Delamere F. McCloskey, and Russell D. Hardy, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by defendant from the judgment entered pursuant to the verdict of the jury for the sum of \$2,213.50 in favor of plaintiff, and an appeal from an order denying defendant's motion for judgment notwithstanding the verdict; plaintiff has also moved this court for an order dismissing the appeal or affirming the judgment.

Plaintiff's said motion to dismiss or affirm is made upon the ground that the questions involved in the appeal are so unsubstantial as not to need further argument and that the appeal is frivolous because based on a conflict of evidence.

As grounds for his appeal from the judgment, defendant claims (1) that plaintiff was guilty of contributory negligence; (2) that there is no evidence of any negligence on the part of defendant; (3) that the evidence is insufficient to support the verdict and judgment against defendant; (4) that the court erred in giving, and refusing to give, certain instructions to the jury.

The plaintiff, a professional dancer, at 8 o'clock in the evening of July 9, 1936, while walking in a pedestrian crossing across Vermont avenue from west to east at its intersection with Hollywood boulevard, was struck by defendant's automobile and thereby suffered injuries to the extent of a fractured left leg, six fractured ribs, an injury to his left elbow, contusions and abrasions of the right cheek and of both knees, as well as injuries to his chest.

From a licensed surveyor's map, which was used during the trial and was made a part of the record herein, it appears that at the intersection in question, Vermont avenue runs north and south and is intersected at an angle to the southeast by Hollywood boulevard, the southerly line of Hollywood boulevard curving around the easterly boundary of Barnsdall park and joining Vermont avenue on the southwest side thereof. Said map shows a well-marked pedestrian zone or crossing which was also

plainly marked on the surface of the roadway at the time of the accident. This pedestrian crossing, which was the path within which plaintiff was walking at the time he was struck, starts at the southwest corner of the intersection, runs in a northeasterly direction for about 30 feet, and then, turning abruptly, runs in a southeasterly direction across Vermont avenue to the southeast corner of said intersection, to which latter point plaintiff was proceeding.

By reason of the fact that Prospect avenue and Hollywood boulevard intersect and merge at Vermont avenue, a small triangular safety island (also shown on said map) is formed within the north half of Hollywood boulevard, west of Vermont avenue and near the northwest corner of said intersection. This safety island is surrounded by traffic buttons and upon it is located a traffic signal. The record shows that there are seven traffic signals and one stop sign at this complicated intersection, and that one of these traffic signals is located on a loading zone in the southerly half of Hollywood boulevard, west of Vermont avenue, adjacent to the car tracks which traverse Hollywood boulevard.

Defendant testified that he was driving south on Vermont avenue in the middle lane of traffic at a point approximately 80 feet north of the northwest corner of said intersection when the signal light directing north-south traffic on Vermont avenue turned green; that the signal changed when he was partly through the intersection, to wit: the first bell rang and the light showed red when he reached a point just north of the street-car tracks on Hollywood boulevard and the second bell rang when he reached the northerly edge of the pedestrian crossing in which plaintiff was walking; that it had been raining a little and the right-hand side of his windshield had a few drops of rain on it; that he did not see plaintiff until he struck him; and that plaintiff was inside the pedestrian crossing.

The witness Carmack, who was driving north on Vermont avenue at the time, testified that, as he approached the intersection at the south line of Hollywood boulevard, the signal for north-south traffic on Vermont avenue turned to red; that just as he stopped he saw defendant's automobile coming south through the intersection opposite the safety island, hereinbefore described, at a point about 20 feet

north of the prolongation of the northerly curb line of Hollywood boulevard; that five seconds later he heard a crash and "the man (referring to plaintiff) flew right by my left shoulder."

Plaintiff testified that he was crossing Vermont avenue from west to east and that he had reached a point slightly west of the center line thereof, and that he was within the pedestrian crossing, as marked on the street and as shown on the map, when the collision occurred; that he saw defendant's automobile twice when it was north of the pedestrian crossing, within the lines of which he was walking, and again just before it struck him; that it was traveling at a speed of 35 or 40 miles an hour. Plaintiff also testified that, when he left the curb and proceeded northeasterly over the first 30 feet of the pedestrian crossing, the signal on the loading zone in Hollywood boulevard directing east-west traffic was red, and the signals with respect to north-south traffic on Vermont were green; that when he reached the end of the 30 feet and started to walk southeasterly in the pedestrian crossing across Vermont avenue proper, the bell rang and the signal for east-west traffic showed green; and that the signals for north-south traffic on Vermont avenue were red.

Appellant urges that plaintiff was guilty of contributory negligence in not looking for automobiles coming south in Vermont avenue even though the signals were in his favor, and that "the accident would not have occurred had plaintiff remained on the sidewalk in accordance with the Code and Ordinance." Further, that appellant was guilty of negligence per se because he started from the curb and traversed a large part, if not all, of the first 30 feet of the pedestrian crossing while the east-west traffic signal was red.

[1, 2] The first 30 feet of the said pedestrian crossing running northeasterly from the southwest corner of the intersection lies wholly within the south one-half of Hollywood boulevard and is directly in the path of traffic on that boulevard as such traffic approaches Vermont avenue from the west, while it is entirely free from traffic traveling south on the west side of Vermont avenue. Under these circumstances, and taking into consideration the complicated design of the intersection, it was a question of fact for the jury to determine whether or not plaintiff was guilty of negligence when he traversed the said 30 feet at a time

when east-west traffic was stopped on Hollywood boulevard. Owing to the fact that the said 30-foot strip lies wholly within the north half of Hollywood boulevard and connects with and forms a part of the pedestrian zone across Hollywood boulevard running northerly parallel with the westerly side of Vermont avenue, and also joins with and actually constitutes a part of the pedestrian crossing across Vermont avenue, the jury must have believed that plaintiff was not negligent when he traversed the said 30 feet while the east-west traffic signal was red. This is further strengthened by the evidence that plaintiff was not struck until he reached a point near the center line of Vermont avenue at a time when it is conclusively shown that the signals governing north-south traffic on that street were red. Plaintiff testified that he was looking to the north, as well as to the south, as he crossed Vermont avenue with the signal in his favor, and that he saw defendant's automobile three times before it finally struck him. "There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or in other words, where he takes no precaution at all for his safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury." 2 Cal.Jur.Supp. 379; Shaw v. Robertson, 8 Cal.App.2d 520, 522, 48 P.2d 128; Wickman v. Lowenstein, 136 Cal.App. 279, 283, 28 P.2d 681; Rapp v. Southern Service Co., 116 Cal.App. 699, 4 P.2d 195; White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086. Therefore, the questions here presented being questions of fact, the decision of the jury thereon is final.

[3,4] On the question of defendant's negligence, he admitted that the north-south traffic signals showed red when he was only part way through the intersection, the exact point being in conflict. If, as witness Carmack testified, defendant was opposite the safety island near the north-west corner of the intersection when the signal changed to red, he could have stop-

ped there and waited for traffic to clear in his favor. The evidence as to the speed at which defendant was operating his automobile is also in conflict, but it is shown that the right-hand corner of his windshield had a few drops of water on it. "Even though the operator of an automobile may be rigidly within the law, he still remains bound to anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop." Brush v. Kurstin, 11 Cal.App. 2d 258, at page 261, 53 P.2d 777, 779, citing Rush v. Lagomarsino, 196 Cal. 308, 317, 237 P. 1066; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125.

[5] As to appellant's third point, we are convinced that the evidence was sufficient to support the verdict and the judgment against defendant, and that there was no error on the part of the trial court when it denied his motions for new trial and for judgment notwithstanding the verdict.

Appellant finally complains of error by the court in the giving of certain instructions to the jury and in refusing to give certain requested instructions. Taking all of the instructions given and considering each as a part of the whole, it is apparent that the jury was fully and fairly instructed as to the law applicable to the facts in issue, and also that the instructions which were requested and refused by the court were properly covered by the instructions which were given.

[6] The motion to dismiss is denied. The judgment and order are affirmed.

I concur: WHITE, J.

DORAN, Justice (dissenting).

I dissent for the reason that in my opinion there is no evidence whatsoever of any negligence on the part of the defendant. He was operating his automobile at a lawful rate of speed. He had entered and proceeded into the intersection some distance before the signal changed against him. Under such circumstances it was lawful for him to continue through. His automobile was stopped within a car's length of the point of impact.

If the complicated character of the intersection imposed a greater degree of care,

it applied equally to the plaintiff and to the defendant. Plaintiff testified that he saw defendant's car three times as it approached him, before he was struck. Assuming, for the sake of argument, but not conceding, that defendant was guilty of negligence even to a small degree, plaintiff's conduct under the circumstances amounted to contributory negligence.

Defendant's motion for judgment notwithstanding the verdict should have been granted.



24 Cal.App.2d 253

TRIGUEIRO et al. v. SKOW et al.

Civ. 10523.

District Court of Appeal, First District,
Division 2, California.

Dec. 28, 1937.

1. New trial ⇐26

Where a witness testifies without having been sworn, verdict will be set aside if error is not discovered until after verdict, but where witness is permitted to testify without having been previously sworn and such fact is known at the time, the defect must be taken advantage of at once, and failure to do so is such acquiescence in testimony as will preclude objection after verdict. Code Civ.Proc. § 1846.

2. Appeal and error ⇐206(2)

The alleged error in failure to administer oath to five year old witness who was the only eyewitness to accident, where witness answered, in response to court's inquiries, that witness knew what truth was, that he would tell nothing but truth, that he knew guardian angel runs away from boys who do not tell truth, gave intelligent, corroborative testimony, and defendant made no objection to his testifying although several opportunities for making objection arose, could not be raised for first time on appeal, since failure to object in trial court constituted waiver of alleged error. Code Civ. Proc. §§ 1846, 1880.

3. Damages ⇐130(2)

\$3,000, reduced from \$5,000, held not excessive damages, where five year old boy suffered fractured femur and abdominal in-

juries, was in hospital a month, and leg was in cast two months, after which he used crutches and had to learn to walk all over again.



Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Actions by Josephine Trigueiro and Francis Trigueiro, a minor, by his guardian ad litem, Josephine Trigueiro, against Stanley Skow, the Richmond Farm Creamery, a copartnership, Soren P. Skow, Ellis Skow, Lester Skow, Wilbur Skow, Edwin Kamb, and George Lehmkuhe, doing business as Richmond Farm Creamery, John Doe and Richard Roe Company, a corporation. Verdicts and judgments for plaintiffs, and defendants appeal.

Affirmed.

James F. Hoey, of Concord (Hoey, Hamilton & Turner, of Concord, of counsel), for appellants.

Carlson & Collins, of Richmond, Jesse E. Nichols, of Oakland, and Leo G. Marcollo, of Richmond, for respondents.

GOODELL, Justice pro tem.

The respondent Francis Trigueiro sued, through his guardian ad litem, for injuries inflicted by a motor truck driven by the appellant Stanley Skow and owned by the other appellants. Josephine Trigueiro, his mother, sought special damages for surgical, nursing, and hospital expenses incurred for her son's care. A verdict of \$5,000 for the son was reduced to \$3,000 on motion for new trial. The mother's verdict was for \$898.31.

Francis, a boy of five, was injured while playing with Ernest Caswell, then aged four, outside the Caswell home in El Cerrito. Ernest corroborated Francis' testimony as to the occurrence and was the only other eyewitness. Ernest, however, was not sworn and that omission presents the first point on this appeal.

The appellants contend that a witness can be heard only upon oath or affirmation. Code Civ.Proc. § 1846. The respondents, of course, do not question this general rule, but they claim that objection was waived. When Ernest was called to the stand the judge asked him the preliminary questions usually put to children. When asked if he went to school, he answered that he went to kindergarten at Stege, and named his teacher. He told the court that he was then

five, lived with his mother, father, brother, and sister at 5748 School street; also that he attended Sunday school. It should be borne in mind that no objection was made that the boy was incapable of receiving just impressions of the facts, or of relating them truly, Code Civ.Proc., § 1880, subd. 2, or that the judge had not examined him thoroughly enough; nor did counsel seek to supplement the judge's inquiry, as might have been done, *People v. Delaney*, 52 Cal.App. 765, 773, 199 P. 896, 898, and no point is now made in any of those respects. The judge satisfied himself that the lad had the requisite intelligence, and then questioned him as follows:

"Q. And do you know what it means to tell the truth? A. Yes.

"Q. You know what that means? A. Yes.

"Q. Do you know what happens to little boys that don't tell the truth? A. Their guardian angel runs away.

"Q. And you think you always tell the truth, do you, Ernest? A. Yes.

"Q. Well, I guess we can swear him or I guess he better testify without swearing him. * * * it is a pretty good answer that the guardian angel runs away."

Thereupon respondents' counsel inquired, "Will you stipulate he may testify without being sworn? I don't know what the rule is, your Honor," and appellants' counsel replied, "I think it is a matter within the discretion of the court. I think he is pretty young to put under oath," to which respondents' counsel assented. The court then said, "It is in the discretion of the court whether he be permitted to testify or not," and expressed doubt whether, if allowed to testify, he should be sworn, and continued, "I don't know whether that means as much as his answer that if he doesn't tell the truth that the guardian angel will run away. You want him put under oath?" to which appellants' counsel replied, "Your Honor may ask him." The court's examination continued:

"Q. You know what an oath is? Did you ever hear of an oath? A. No.

"Q. He wouldn't know that. You know what it is to tell the truth because you just told me you know what happens to little boys who don't tell the truth. A. Yes.

"Q. Now will you tell the truth here and nothing but the truth? A. Yes, sir.

"Q. If we ask some questions or if these men ask you some questions you will

tell us absolutely the truth and nothing else? A. Yes, sir.

"Q. And if you don't know what they ask you, you will tell us, won't you? A. Yes.

"Q. I think we will let him testify. Proceed."

Thereupon Ernest was questioned respecting the accident and gave clear, responsive, and intelligent answers.

When respondents' counsel asked for a stipulation waiving the oath, his adversary had an opportunity to object. In the face of such objection the judge might have instructed the lad as to the meaning of an oath, and then have had him sworn, or he might have withdrawn him from the stand. But no such objection was forthcoming. Instead, appellants' counsel indicated that it was discretionary, thereby inviting the very action of which appellants now complain. Counsel's remark, "I think he is pretty young to put under oath" was not sufficiently unequivocal to amount to an objection either to nonage or to unsworn testimony. Still further opportunity was given for objection when the judge commented upon the "guardian angel" sanction, which was the lad's own idea. The judge's pointed inquiry, "You want him put under oath?" instead of eliciting an unequivocal "yes," which could have been treated as objection, or a "no," which would have been an express waiver, brought only the reply, "Your Honor may ask him," which again invited the exercise of the court's discretion. The judge twice thereafter asked the boy if he would tell the truth and nothing but the truth, and twice the boy answered, "Yes, sir." When the judge finally announced that he would permit him to testify counsel had a fourth opportunity to object, and at the conclusion of his examination, a fifth.

[1] At Ann.Cas.1912D, 570, 572, under the case of *State v. Morrow*, 63 Wash. 297, 115 P. 161, the prevailing rule is thus stated: "It is generally held that where a witness testifies without having been sworn, the verdict will be set aside if the error is not discovered until after the verdict. * * * Where, however, a witness is permitted to testify without having been previously sworn, and that fact is known at the time, the defect must be taken advantage of at once, and a failure to do so is such acquiescence in the testimony as will preclude objection after verdict."

In *People v. Duffy*, 110 Cal.App. 631, 635, 294 P. 496, a robbery case, this rule was followed, where the court, after quoting the above, cites the following additional authorities as being in point: *Rhodes v. State*, 122 Ga. 568, 50 S.E. 361; *State v. Melancon*, 163 La. 435, 112 So. 37; *Karakutza v. State*, 163 Wis. 293, 156 N.W. 965; *Moore v. State*, 96 Tenn. 209, 33 S.W. 1046; *Barnes v. State*, 61 Tex.Cr.R. 37, 133 S.W. 887, all felony cases and three of them homicide cases.

Appellants do not attempt to distinguish these cases or to show that the rule does not apply, nor do they cite any civil case where such a waiver has not been held effectual. They simply say there should be "a more positive waiver than a mere failure to object. * * * Counsel for defendants simply left it to the court to apply the rule; the court did not do so, and counsel *did not object*." (Italics ours.)

[2] We are satisfied that the circumstances of this particular case, objection being made for the first time on appeal, clearly call for the application of the rule, and that any error in permitting the unsworn testimony was waived.

People v. Ewing, 71 Cal.App. 138, 234 P. 917, relied upon by appellants, is not in point for there the child had been held incompetent by the trial judge under Code Civ.Proc. § 1880, subd. 2; nor is *People v. Watrous*, 7 Cal.App.2d 7, 45 P.2d 380, for there the two children were sworn and testified *over objection*. In *People v. Portlock*, 118 Cal.App. 566, 5 P.2d 920, the court held that the departure from the statutory form of oath left no oath at all. The report does not show any objection but an examination of the transcript shows that at the conclusion of the child's examination a motion to strike out was made upon the grounds that she had not been sworn, and that she was not capable of understanding or taking an oath. Moreover, the proceedings on motion for new trial explain the failure of defendant's counsel to make objection at the very outset. It is sufficient to say that there a definite objection was made during the trial, while here there was none.

[3] The appellants' other point is that the verdict was so excessive as to indicate that it was the result of passion or prejudice. In *Hale v. San Bernardino, etc., Co.*, 156 Cal. 713, 715, 106 P. 83, 84, the court said: "The amount of damages in such cases is committed, first, to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just." When in the instant case, the trial judge reduced the verdict from \$5,000 to \$3,000, he performed a function which the cases hold is peculiarly that of a trial judge. The case of *Morris v. Standard Oil Co.*, 188 Cal. 468, 473, 205 P. 1073, 1075, is apposite, for there the trial judge, believing the verdict to be excessive, nevertheless refused to reduce it on motion for new trial. In reversing the judgment on the single issue of damages the court said: "The question of excessive damages is one that is first addressed to the trial court. Practically, the trial court must bear the whole responsibility in every case. The power of appellate courts over excessive damages exists only when the facts are such as to suggest, at first blush, passion, prejudice, or corruption on the part of the jury." (Citing cases.) Had not the trial judge acted in this case, a different question would not be presented. The special damages of \$898.31 are themselves some evidence of the severity of the boy's injuries. He suffered from a fractured femur and from abdominal injuries as well. He was in the hospital for a month attended by a day and night nurse. His leg was in a cast for two months and when it was removed and he was able to go about with crutches, he had to learn to walk all over again. "Traction" was applied to the leg, the pull of a heavy weight. In addition to the fractured femur, his abdominal injuries, while not serious, must be taken into consideration. We cannot say that the judgment is excessive.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

BALZER v. CALER.*

CIV. 5937.

District Court of Appeal, Third District,
California.

Dec. 18, 1937.

Hearing Granted by Supreme Court
Feb. 16, 1938.**1. Trade-marks and trade-names and unfair competition** ⇨68(2)

The requirement of Unfair Competition Act of 1935 that prohibited acts must be done for purpose of injuring competitors and destroying competition applies to sales, offering articles for sale, or advertising them for sale, as well as to gifts of property. St.1935, p. 1548, § 3.

2. Statutes ⇨200

The presence or absence of punctuation marks may be ignored in construing statute if necessary to determine true meaning of language.

3. Trade-marks and trade-names and unfair competition ⇨68(2)

A necessary element of illegal sale of goods for less than cost under Unfair Competition Act of 1935 was that act be performed with purpose of injuring competitors and destroying competition. St.1935, p. 1548, § 3.

4. Trade-marks and trade-names and unfair competition ⇨93(1)

In suit to enjoin grocer from selling meats and groceries at less than cost contrary to Unfair Competition Act of 1935, plaintiff had burden of establishing that such sale was for purpose of injuring competitors and destroying competition. St. 1935, p. 1548, § 3.

5. Trade-marks and trade-names and unfair competition ⇨68(1)

The sale by grocer of meats and groceries below cost for sole purpose of advertising his grocery business and to stimulate trade did not constitute violation of statute prohibiting sale of goods for less than cost for purpose of injuring competitors and destroying competition. St.1935, p. 1548, § 3.

6. Evidence ⇨20(1)

It is common knowledge that large industries with unlimited capital can purchase commodities at wholesale for much lower prices than small independent merchants.

7. Constitutional law ⇨53

A court in passing on constitutionality of statute is not bound by statutory declaration respecting effect of statute, when that legislative statement is evidently wrong.

8. Constitutional law ⇨81

A Legislature, under its police powers, may not, in guise of regulating trade abuses for protection of public interests, arbitrarily interfere with private business or impose unusual and onerous restrictions upon lawful occupations.

9. Statutes ⇨74(1)

The statute prohibiting sale of goods for less than cost for purpose of injuring competitors, by favoring large enterprises which by reason of volume of their sales were able to undersell small merchants without selling below cost in violation of statute, was violative of constitutional provision requiring laws of a general nature to have uniform operation. St.1935, p. 1548, § 3; Const.Cal. art. 1, § 11.

10. Statutes ⇨47

Where statute prohibiting sale of goods below cost for purpose of injuring competitors defined cost as invoice or replacement cost of article plus cost of doing business by vendor, and defined "cost of doing business" as including labor, rent, interest on borrowed capital, depreciation, selling cost, and similar expenses, but did not state what period of time was to be used in estimating cost of doing business and did not provide any other standards for application of statute, such statute was void for uncertainty. St.1935, p. 1548, § 3.

11. Constitutional law ⇨258

A criminal statute which is so indefinite and uncertain with respect to an element necessary to constitute criminal offense prohibited that men of common intelligence will differ substantially as to its meaning or application violates due process clause of Federal Constitution and is void. Const.U.S. Amend. 14, § 1.

12. Constitutional law ⇨87

The attempted regulation by state of lawful private business not imbued with a "public interest," or the fixing of selling price of property, is unconstitutional unless it is necessary under police power for health, peace, or welfare of public.

13. Constitutional law ⇨87

The fixing of a minimum or maximum price beyond which private property may not be sold is an unconstitutional interference with inherent property rights to same extent as a definite stipulation of price at which every article of a mercantile stock must be sold.

14. Constitutional law ⇨87

Grocery stores and kindred enterprises are not imbued with such a "public interest" as will authorize fixing of prices of groceries or regulation of grocery business by state.

15. Constitutional law ⇨298(1)

The statute prohibiting sale of goods for less than cost for purpose of injuring competitors, by seeking to fix minimum prices below which articles should not be sold, infringed constitutional right of owning, controlling, and disposing of private property in violation of due process clause of Federal Constitution. St.1935, p. 1548, § 3; Const.U.S. Amend. 14.

16. Constitutional law ⇨296(1)

Courts have duty to protect individuals, firms, and corporations against unlawful legislative encroachments upon vested right of owning, controlling, and disposing of private property, even though they are adopted in guise of police regulations. Const.U.S. Amend. 14.

17. Appeal and error ⇨179(4)

The reviewing court would not consider question of alleged unconstitutionality of section of statute concerning which no evidence had been presented. St.1935, p. 1547, § 1.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Suit by Everett L. Balzer against Donald L. Caler, also sometimes known as Don Caler. Judgment for defendant, and plaintiff appeals.

Affirmed.

Hanna & Morton, of Los Angeles, for appellant.

Otto A. Gerth, of Los Angeles, for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff appealed from a judgment refusing to issue an injunction to prohibit the respondent, Donald L. Caler, an independent merchant of Los Angeles who was engaged in selling meats and groceries, from disposing of certain staple articles for less than cost thereof, contrary to the provisions of sections 3 and 6 of the Unfair Competition Act of California. Stats. 1913, p. 508, as amended in 1935 at page 1546, Deering's Supp. of 1935, p. 2063, Act 8781.

The trial court held the act to be unconstitutional, but determined that the goods were not sold by the respondent below cost "for the purpose of injuring competitors and destroying competition." On the contrary, the court found that the goods were sold below cost as a means of advertising to attract customers to his store and to stimulate business.

Two questions are presented on this appeal: First, is the act unconstitutional? Second, if the act is constitutional, is it necessary for the goods to be sold for less than cost "for the purpose of injuring competitors and destroying competition" in order to constitute a violation of the statute?

The act, as amended in 1935, was in effect at the time this suit was commenced. It is penal in its nature. It declares that a violation of its provisions shall constitute a misdemeanor punishable by fine or imprisonment, or both. The act is almost limitless in its application to occupations and to the disposal of property which is the product of labor or industry. It attempts to render unlawful and criminal the sale, offering for sale, or advertising for sale, "any article or product, or service or output of a service trade, at less than cost thereof to such vendor" for the purpose of injuring competitors and destroying competition. It also penalizes the gift of any such article or product when it is disposed of for the same purpose. The appellant contends the statute makes it unlawful to sell private property below cost regardless of the purpose with which the sale is made.

Those portions of the act which are involved on this appeal read as follows:

Section 3: "It shall be unlawful for any person, partnership, firm, corpora-

tion, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition, and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act." St.1935, p. 1548.

Definitions: "The term 'cost' as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution 'cost' shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

"The 'cost of doing business' or 'overhead expense' is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising."

Section 6: "The provisions of sections 3, 4 and 5 shall not apply to any sale made:

"(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

"(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

"(c) By an officer acting under the orders of any court;

"(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area.

"Any person, firm or corporation who performs work upon, renovates, alters or improves any personal property belonging to another person, firm or corporation, shall be construed to be a vendor within the meaning of this act." St.1935, p. 1549.

Section 13: "The Legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved." St.1935, p. 1550.

This is a suit for injunction brought by an individual under section 10 of the act which states that "any person * * * may maintain an action to enjoin a continuance of any act or acts in violation of sections 1 to 7" thereof. The complaint is couched in four counts. The first cause alleges that the defendant, Donald L. Caler, owns and operates two stores in the city of Los Angeles at each of which he retails fish, meats, poultry, dairy products, bakery products, and all sorts of groceries; that other merchants also maintain establishments in that vicinity where they retail products and groceries of similar character; that on specified dates in November, 1935, the respondent offered and advertised for sale "Formay" shortening, oleomargarine, "Best Foods" brand of mayonnaise and "Kellogg's" corn flakes at prices which were less than "invoice or replacement cost" thereof to him. It is not alleged in the first count that these offers of sales were made "for the purpose of injuring competitors and destroying competition." The second cause of action after alleging the same facts above stated further charges that the sales were offered "for the purpose of injuring competitors and destroying competition." The third cause of action alleges that the respondent actually sold the products mentioned for less than cost thereof. The fourth cause alleges that he actually sold those products for less than cost "for the purpose of destroying competition" in the trade and business in which the defendant was engaged.

Special demurrers to each count were overruled. The respondent denied the material allegations of the complaint, but admitted that he sold the articles mentioned in the complaint for the prices stat-

ed therein which were slightly less than invoice or replacement prices therefor. But he denied they were sold to injure competitors or to destroy competition. On the contrary, he alleges that he sold the goods for less than cost for the sole purpose of meeting the competition of other merchants who were engaged in selling similar commodities in that vicinity, and for the purpose of advertising and stimulating his own business.

Upon trial of the cause the court adopted findings to the following effect: That the defendant, Caler, is an independent merchant who owns two small stores in Los Angeles, the combined stocks of which are of the aggregate value of about \$12,000; that he retails at each of these stores some two thousand different items of food supplies; that the plaintiff also operates a similar store in that city situated about two miles from the location of the last-mentioned stores; that numerous other merchants operate similar establishments in Los Angeles where they compete with the respondent in the sale of like food supplies, some of which tradesmen conduct only one establishment supplied with a comparatively small stock of goods, while others operate many large enterprises, or system of chain stores in that city and throughout the state of California, with vast capital investments amounting to more than a million dollars, and that they advertise extensively at large expense; that these great establishments buy their commodities at prices substantially lower than those at which the respondent and other small stores are able to purchase them, on account of the large quantities of various articles which the former require; that, for advertising purposes, it is the custom of the managers of these competing stores, and of all like mercantile establishments, to periodically offer for sale certain staple articles of food and supplies similar to those which the respondent is charged with selling below cost, at prices less than cost to them; that the respondent did sell, at the dates stated, the four articles mentioned in the complaint at prices slightly less than invoice or replacement cost therefor; that he did not sell those articles under circumstances rendering the sales exempt from the inhibitions of the Unfair Competition Act as provided by subdivisions (a) to (c) of section 6 thereof, but, on the contrary, that he did sell them for less than cost to meet the reduced prices at

which other competing merchants sold the same or similar articles and with the sole purpose of advertising his business, improving his trade, and stimulating interest on the part of customers in those products and in his business, and not with the intention of injuring competitors or destroying competition. The court specifically found that this method of advertising occasional sales of a limited number of special articles at less than cost does not have the effect of injuring competitors or destroying competition, and that it did not have that effect in the present case. It was further found that the respondent violated none of the provisions of the statute in question but that the act is in conflict with the provisions of article 1, §§ 1 and 14, of the California Constitution, and Amendment 14, § 1, of the Federal Constitution, in denying the constitutional guaranty of the right to own and control private property and to enjoy the privilege of life, liberty, and the pursuit of happiness. The findings are supported by the evidence.

Judgment was accordingly rendered against the plaintiff denying his application for an injunction and dismissing his action. From that judgment this appeal was perfected.

[1,2] It is not a violation of section 3 of the Unfair Competition Act, as it existed before the amendment of that statute in 1937, St.1937, p. 2396, to sell, offer for sale, advertise for sale, or give away goods, unless the act is performed "for the purpose of injuring competitors and destroying competition." The essential purpose of injuring or destroying competition, mentioned in the statute, applies to the sale, offering articles for sale, or advertising them for sale, as well as to gifts of property. The clause with relation to the purpose or intent with which the transaction is performed modifies the first portion of the paragraph affecting the disposition of articles for a consideration, as well as the latter portion relating to gifts of property. The very purpose of the act, as declared by the Legislature, and from a reading of the paragraph as a whole, convinces us that this is a fact. It would be absurd to hold that a merchant might give away his property without any consideration whatever, provided he did not intend thereby to injure his competitors, but, if he sold or offered to sell that same property for an insignificant propor-

tion of its value, he would be civilly and criminally guilty of unfair practice. If that were the proper construction of the statute, all that a merchant would have to do to avoid the penalty of the law would be to sell the property for 1 per cent. of its cost or offer to give to any purchaser of one package of Kellogg's Corn Flakes a duplicate package of the same breakfast food without charge. Or he might give a prize with every item of food that was sold. There is a total absence of reason in that construction of section 3 which limits the modifying clause requiring the transaction to have been done "for the purpose of injuring competitors." There is no merit in this contention of the appellant. There would be no room for his construction of that paragraph were it not for the omission of a comma before the words "for the purpose of injuring," etc. The intent of the Legislature to apply this modifying clause to both sales and gifts of property seems clear, in spite of the omission of a comma. Punctuation is never a controlling factor in construing a statute. The presence or the absence of punctuation marks may be ignored if necessary to determine the true meaning of language employed by the Legislature. *Roth Drug, Inc. v. Johnson*, 13 Cal.App.2d 720, 728, 57 P.2d 1022; *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175; 23 Calif.Jur. 733, § 111. In the authority last cited it is said: "No doubt punctuation may be considered in reading a statute, but punctuation is never a controlling factor of interpretation, and it may be entirely disregarded when necessary to ascertain the true intent and meaning."

[3-5] In applying the foregoing construction of the language of section 3 of the act to the facts of the present case, it becomes apparent respondent was not guilty of violating that statute. Plaintiff failed to prove a cause of action against him. It was a necessary element of the illegal selling of goods for less than cost, as the statute existed when this case was tried, that the act be performed with the purpose of injuring competitors and destroying competition. The burden was on the plaintiff to establish that unlawful purpose. The record in this case is devoid of any such evidence. The court specifically found that the respondent did not sell the goods below cost with that purpose in view. On the contrary, the

court found that he sold the goods below cost for the sole purpose of advertising his grocery business and to stimulate trade. Every reasonable deduction from the evidence supports that finding. Every sound and fair-thinking man knows that it is the common practice of merchants to periodically display in their show windows leader articles from their stocks at reduced prices for advertising purposes to attract the attention of customers and to stimulate trade. It is a well-recognized method of advertising. For more than a quarter of a century merchants in America have occasionally displayed staple articles at reduced prices, offered gifts and prizes, issued trade stamps, paid rebates, and resorted to other cut-rate methods of advertising their commodities to stimulate trade in the hope that a slight sacrifice on a few staple articles would be more than compensated by an increased bulk of business. It is not unusual or strange that the respondent in this case resorted to that common practice. We are unable to comprehend how the court could have found otherwise, regarding the purpose of the sale of these four staple articles, in view of the evidence which was adduced at the trial. At least we must concede that finding is supported by substantial evidence. Indeed, that fact is not controverted by the appellant.

In view of our construction of section 3 of the act we would not be warranted in proceeding to determine the further question as to whether section 3 of the act is unconstitutional and void for uncertainty and unreasonable discrimination because it violates the provisions of article 1, §§ 1 and 14, of the California Constitution, and Amendment 14, § 1, of the Federal Constitution, guaranteeing all men the right to own and control private property and to enjoy the privilege of life, liberty, and the pursuit of happiness without undue interference by unreasonable regulations and by an attempt to fix the price at which an owner may dispose of his own property, contrary to the due process clause of the Federal Constitution, were it not for the fact that a contrary construction of that section is strenuously insisted upon by the appellant.

[6] We are impressed with the assertion that the act in question as it existed in 1935, instead of encouraging competition and destroying monopolies, as the statute declares that it was intended to do,

has just the opposite effect. It seems apparent to us that the act tends to encourage monopolies and destroy competition. It is common knowledge that large and opulent industries with unlimited capital are able to purchase commodities on the open market at wholesale for much less than they can be bought by small independent merchants, for the reason that the former procures them in vastly greater quantities and distributes them among a large number of retail stores under its management. The large industry is able to allocate its overhead expenses, prominent among which is the important item of advertising, among its numerous branches, to its very great advantage. It necessarily follows that the wholesale cost to the large institution of staple articles is much less than the cost of those same commodities to small merchants. The large enterprise therefore may undersell the small merchant without violating the statute. The statute is therefore not uniform in its application. The act renders it unlawful for merchants, regardless of the size or number of their stores and independently of their capital, purchasing power, or overhead expenses, to sell their commodities for less than cost to themselves. The large company may spend thousands of dollars per month in advertising, and distribute that item of cost among numerous branches, while the small merchant cannot afford to spend more than a small proportion thereof. The former may purchase a shipload of Brazilian coffee and sell it to their customers for several cents per pound less than the small merchant is able to do, without violating the provisions of the law. It is evident that the act therefore tends to destroy the small merchant and encourage monopoly.

[7,8] A court is not bound by the statutory declaration with respect to the effect of the law when that legislative statement is evidently wrong. It has been frequently declared that a Legislature, even under its police powers, may not in the guise of regulative trade abuses for the protection of public interests, arbitrarily interfere with private business, or impose unusual and onerous restrictions upon lawful occupations. *Lawton v. Steele*, 152 U.S. 133, 137, 14 S.Ct. 499, 38 L.Ed. 385; *Ganley v. Claeys*, 2 Cal.2d 266, 40 P.2d 817; *Ex parte Drexel*, 147 Cal. 763, 82 P. 429, 431, 2 L.R.A.,N.S., 588, 3 Ann.Cas. 878; *People v. Pace*, 73

Cal.App. 548, 562, 238 P. 1089. In the *Drexel Case* it is said in that regard: "The Legislature, under the guise of police regulations, cannot enact laws which do not pertain to one or the other of these objects, and which impose onerous and unnecessary burdens upon business and property."

Quoting with approval from *Mugler v. Kansas*, 123 U.S. 623, 661, 8 S.Ct. 273, 297, 31 L.Ed. 205, the *Drexel Case* further says: "'The courts are not bound by mere forms, nor are they to be misled by mere pretense. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority.'"

[9] We are of the opinion section 3 of the Unfair Competition Act, as it existed in 1935, is void for uncertainty. It also discriminates between persons of the same class. As we have previously stated, the extensive and wealthy mercantile establishment with numerous branches is able to purchase its commodities at reduced prices and to allocate its overhead expenses so as to retail articles and products at a cost price with which the small merchant cannot compete. The statute favors the large enterprise in that respect. It is an unfair discrimination against the very class of competition which the statute purports to favor. This section is in conflict with article 1, § 11, of the Constitution of California, which provides that "All laws of a general nature shall have a uniform operation."

[10,11] The act is vague, uncertain, and incapable of application in its method of ascertaining the vendor's cost of articles and products for the purpose of fixing a figure below which it is rendered unlawful and criminal to sell the goods. Section 3 defines the term "cost," as applied to distribution, to mean "the invoice or replacement cost, whichever is lower, * * * plus the cost of doing business by said distributor and vendor." The "cost of doing business" is defined as "all costs * * * incurred in the conduct of such business." The act declares that it "must include without limitation the following items of expense: Labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of

licenses, taxes, insurance and advertising." According to the language of the statute, the aggregate of all of these various items must be added to the "invoice or replacement cost" of a particular article which the vendor desires to sell, to determine the price below which he is precluded from disposing of the goods. A bare statement of the asserted rule demonstrates its absurdity. It is not the proportion of the overhead expenses which the value of the article for sale bears to the value of the entire stock of goods, which is to be added to the invoice price of the article, but "all costs * * * incurred in the conduct of such business" are to be added thereto. Moreover, the statute fails to state what period of time is to be included in estimating overhead expenses which are to be added to the invoice price of the article to be sold so as to determine its cost for resale thereof. A merchant's stock in trade varies from time to time. Meats, bakery products and certain classes of groceries deteriorate rapidly. Is the merchant to take stock and hold an accounting every time he wishes to display for sale a few leader articles below normal price for the purpose of advertisement? For the purpose of such sales is he to estimate his average overhead expenses for the period of a year, or for a month, or is he to ascertain that sum on the very day on which he proposes to sell the forbidden article? By what standard is a merchant to determine such elements as depreciation of goods, selling cost, or credit losses? What is to be the measure of the value of his equipment? Is there to be no limit of expenditures for interest, insurance, or advertising? The statute throws no light upon these perplexing problems. Every merchant is left to guess at the rules and standards to be applied and to determine for himself the period for which the overhead expenses are to be calculated. The section is therefore uncertain and void in that regard. Numerous authorities hold that, when a statute is so indefinite and uncertain with respect to an element which is necessary to constitute the criminal offense or the unlawful act prohibited that men of common intelligence will differ substantially as to its meaning or application, it is deemed to be unenforceable and void. Under such circumstances the statute may not be enforced since it violates the "due process of law" clause of the Federal Constitution. *Connally v. General Construction*

Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; *Champlin Refining Co. v. Corporation Comm.*, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062, 86 A.L.R. 403; *Hewitt v. State Board of Medical Examiners*, 148 Cal. 590, 84 P. 39, 3 L.R.A., N.S., 896, 113 Am.St.Rep. 315; *In re Peppers*, 189 Cal. 682, 209 P. 896; *Ex parte Schmolke*, 199 Cal. 42, 248 P. 244; *Mayhew v. Nelson*, 346 Ill. 381, 178 N.E. 921, 923. In the case last cited, the rule regarding the invalidity of a statute for uncertainty is concisely stated as follows:

"A legislative act which is so vague, indefinite, and uncertain that the courts are unable, by accepted rules of construction, to determine, with any reasonable degree of certainty, what the Legislature intended, or which is so incomplete or conflicting and inconsistent in its provisions that it cannot be executed, will be declared to be inoperative and void."

[12-14] A very large number of authorities from nearly every jurisdiction in the land uniformly hold that it is a violation of the constitutional rights of the owner of private property or of a lawful private business not imbued with a "public interest" for the state to attempt to regulate the business or fix the selling price of the property, unless it becomes necessary to do so under police power for the health, peace, or welfare of the public. It is just as grave an interference with these inherent property rights to arbitrarily fix a minimum or a maximum price beyond which private property may not be sold, as to definitely fix an absolute price at which every article of a mercantile stock may be sold. In *Ribnik v. McBride*, 277 U.S. 350, 48 S.Ct. 545, 546, 72 L.Ed. 913, 56 A.L.R. 1327, it is said, "The fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power." The principle is the same. Numerous authorities hold that grocery stores and kindred enterprises are not imbued with a "public interest" which authorizes price fixing or regulation. Nor, under ordinary circumstances may it be said it is necessary for the public welfare to thus interfere with private business or private property. Such interference is destructive of the constitutional inhibition and of private inherent rights to own and control property. Among the numerous cases which hold that an attempt to regulate an ordinary private

business is unconstitutional are the following authorities: *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747; *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596; *Ribnik v. McBride*, *supra*; *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280; *Tyson & Brother United Theatre Ticket Officers, Inc. v. Banton*, 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718, 58 A.L.R. 1236; *Ex parte Dickey*, 144 Cal. 234, 77 P. 924, 66 L.R.A. 928, 103 Am.St.Rep. 82, 1 Ann.Cas. 428; *People v. Pace*, 73 Cal.App. 548, 238 P. 1089; *Ex parte Kazas*, Cal.App., 70 P.2d 962; 2 *Cooley's Constitutional Limitations*, 8th Edition, p. 1300.

In holding a section of the Penal Code, prohibiting the operating of a barbershop on Sunday, to be unconstitutional, our Supreme Court said in *Ex parte Jentzsch*, 112 Cal. 468, 44 P. 803, 804, 32 L.R.A. 664, with respect to legislative interference with lawful business under the guise of the police powers: "So, while the police power is one whose proper use makes most potentially for good, in its undefined scope and inordinate exercise lurks no small danger to the republic; for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws none the less dangerous because well meant."

Since the decision of the *Jentzsch* Case in 1896, the Legislature and municipalities have repeatedly enacted similar statutes and ordinances purporting to remedy abuses in the conduct of private business with relation to the time and manner of the operation thereof. These acts were adopted under a claim that they were authorized by the police powers of the state. More than a score of them have been held to be invalid on the ground that they had no reasonable application to the police power doctrine. The modern method of extending paternal control over private business and property is to reinforce the police power with the theory of a present emergency.

It must be conceded it is often difficult to determine whether the particular facts of a case warrant the regulation of private business or property under police powers. There appears to be no doubt the present action does not come within the

authorized police powers of the Legislature.

In holding that a New York statute was unconstitutional which attempted to fix a maximum price for which the owner of tickets for admission to a theatre might be permitted to sell them, the syllabus in *Tyson & Brother United Theatre Ticket Officers, Inc. v. Banton*, 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718, 58 A.L.R. 1236, correctly states the determined principles affecting price fixing of private property as follows:

"The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, and as such within the protection of the due process clauses of the Federal Constitution.

"The power of the government to fix prices does not ordinarily exist in respect to merely private property or business, but exists only where the business or property involved has become affected with a public interest."

In the case last cited it is further said: "There is no legislative power to fix the prices of provisions or clothing or the rental charges for houses or apartments, in the absence of some controlling emergency."

[15,16] Clearly section 3 of the act in question infringes upon the constitutional right of individuals to own, control, and dispose of private property without legislative interference. It appears to be an effort to unlawfully fix minimum prices at which all articles or products, services and output of trade may be sold by persons, firms, corporations, or associations engaged in business. That is contrary to the "due process" clause of the Federal Constitution. Since the adoption of the Federal Constitution, the right to engage in lawful pursuits and business and the right to own and control private property have been jealously guarded in America. An unbroken line of authorities upholds that valuable principle. It is the duty of courts to protect individuals, firms, and corporations against unlawful encroachments by legislative enactments upon those vested rights, even though they be adopted in the guise of police regulations. In the case of *Powell v. Pennsylvania*, 127 U.S. 678, 8 S.Ct. 992, 995, 1257, 32 L.Ed. 253, Mr. Justice Harlan said in that regard: "The main proposition advanced by the

defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property as guaranteed by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law."

Our California Supreme Court declared the same principle in *Ex parte Drexel*, 147 Cal. 763, 82 P. 429, 2 L.R.A., N.S., 588, 3 Ann.Cas. 878, and in many other decisions.

In accordance with the frequently reiterated assertion of most of the higher courts of our land, that the state may not arbitrarily interfere with inherent personal rights in private business or property by enacting onerous regulations or fixing selling prices, it is said in 2 *Cooley's Constitutional Limitations*, 8th Edition, p. 1300: "Since then [the proclaiming of the Declaration of Independence] it has been commonly supposed that a general power in the State to regulate prices was inconsistent with constitutional liberty."

However, under peculiar and extraordinary circumstances, statutes have been upheld which purport to regulate charges for services rendered by warehouses and elevators which to a considerable extent have the exclusive control and monopoly of handling vast commodities. Prominent among these authorities are the famous *Chicago Warehouse Cases*, *Munn v. People of Illinois*, 94 U.S. 113, 24 L.Ed. 77, upon which the appellant relies. The statutes in those and similar cases were upheld on the theory that such businesses were quasi public in character, and that they were "affected with a public interest" different in nature from the ordinary private business. Upon that theory public hackmen, draymen, ferrymen, and millers have been held to be subject to reasonable regulations. In the same class are included industries which are engaged in supplying public utilities such as water, light, gas, electric power, railroads, canals, and highway transportation. Where one engages in an exclusive business in the nature of a monopoly or in a special business, the privilege of operating which is conferred upon him by authority of the state, he may be subject to reasonable regulations. The wisdom of the decision in the *Chicago Warehouse Cases* has been challenged, but it was assumed the ware-

house business was imbued with a "public interest" which warranted its regulation. As the author of *Cooley's Constitutional Limitations*, supra, at page 1303, says regarding those cases, "It seems to have been the view of both courts [State and Federal] in the *Chicago Warehouse Cases* that the circumstances were such as to give the warehousemen of Chicago, who were the only persons affected by the legislation, a 'virtual' monopoly of the business of receiving and forwarding the grain of the country to and from that important point, and by the very fact of monopoly to give their business a public character, affect the property in it with a public interest, and render regulation of charges indispensable."

It is often difficult to determine just what business is deemed to be affected with a "public interest." In 2 *Cooley's Constitutional Limitations*, 8th Edition, p. 1302, it is said: "What circumstances shall affect property with a public interest is not very clear. The mere fact that the public has an interest in the existence of the business, and is accommodated by it, cannot be sufficient, for that would subject the stock of a merchant, and his charges, to public regulation."

At page 1306 it is stated: "In the following cases we should say that property in business was affected with a public interest: 1. Where the business is one the following of which is not of right, but is permitted by the State as a privilege or franchise. 2. Where the State, on public grounds, renders to the business special assistance, by taxation or otherwise. 3. Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public."

Speaking of the application of the term "public interest" with relation to reasonable regulation of business, the late Chief Justice Taft said in *Wolff Packing Company v. Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 633, 67 L.Ed. 1103, 27 A.L.R. 1280: "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true

that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

Under no stretch of imagination can the ordinary grocery business be considered as "charged with a public interest" as that term is used, for the purpose of upholding the right of the state to regulate the industry or fix the prices of its commodities.

Nor is the case of *Max Factor & Co. v. Kunsman*, 5 Cal.2d 446, 55 P.2d 177, upon which the appellant strongly relies, authority sustaining the right of the Legislature to regulate an ordinary grocery business, or to fix the prices of its commodities. That case arose under an entirely different act from the one which is involved in this case. It was the Fair Trade Act. Stats.1907, p. 984, and amendments, 3 Deering's Gen.Laws of 1931, p. 4902, Act 8702. Section 1½ of that act, which amendment was adopted in 1933, Stats.1933, p. 793, rendered it unlawful and actionable by any one damaged by the willful sale of any commodity protected by a trade-mark for less than the minimum price for which the vendor had contracted to sell the article. That provision was upheld for the express reason that the manufacturer of certain cosmetics and toilet articles which were lawfully protected by trade-marks is entitled to enforce his contract with vendees of those articles to resell them for not less than an agreed minimum price, for the reason that the manufacturer has a property interest and good will in the commodities which the law of trade-marks is bound to respect. That case did not involve the mere question of legislative authority to fix prices. It is an act to enforce contracts between vendors and vendees in which they agree to maintain specified standards of prices upon trade-marked commodities. We are of the opinion that case has no bearing on the issues which are involved in this case.

[17] Section 1 of the act is also challenged as unconstitutional. Since there is no evidence applicable to that section, it is not necessary for us to consider that

problem. *People v. Perry*, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331; *In re Durand*, 6 Cal.App.2d 69, 44 P.2d 367; *Heald v. District of Columbia*, 259 U.S. 114, 123, 42 S.Ct. 434, 66 L.Ed. 852.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



WHOLESALE TOBACCO DEALERS BUREAU OF SOUTHERN CALIFORNIA, Incorporated (a California Nonprofit Corporation), Plaintiff and Respondent, v. NATIONAL CANDY & TOBACCO CO. (a California Corporation) et al., Defendants; National Candy & Tobacco Co. (a California Corporation), Defendant and Appellant. *

Clv. 5936.

District Court of Appeal, Third District, California.

Dec. 18, 1937.

Hearing Granted by Supreme Court
Feb. 16, 1938.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Abe Richman, of Los Angeles, for appellant.

Cupp & Cupp and J. Wesley Cupp, all of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This cause was consolidated with the case of *Everett L. Balzer v. Donald L. Caler*, Cal.App., 74 P.2d 839, for the purpose of presenting to this court the appeals.

This is an appeal from a judgment which was rendered in favor of the plaintiff by another trial judge of Los Angeles county, enjoining the defendants from selling, offering for sale, or advertising for sale, specified tobaccos and merchandise for less than invoice or replacement cost to the vendors, contrary to the provisions of section 3 of the Unfair Competition Act of California. Stats.1913, pp. 508, 509, as amended in 1935 at pages 1546, 1548, Deering's Supp. of 1935, pp. 2063, 2064, Act 8781. This cause presents pre-

*For subsequent opinion see 82 P.2d 3.

cisely the same issues which were determined in the case of *Balzer v. Caler*, 74 P.2d 839, an opinion in which was this day filed by this court. The circumstances of the two cases are identical. The opinion in the case last cited determines all the issues on this appeal.

On the authority of the case of *Balzer v. Caler*, supra, the judgment in this case is reversed, and the court is directed to render judgment in favor of the defendant.

We concur: PULLEN, P. J.; PLUMMER, J.



24 Cal.App.2d 220

**WALKER et al. v. WELLS FARGO BANK
& UNION TRUST CO. et al.**

Civ. No. 10568.

District Court of Appeal, First District,
Division 2, California.

Dec. 24, 1937.

Hearing Denied by Supreme Court
Feb. 21, 1938.

1. Venue ⇨22(1)

Plaintiff by joining individual defendant with corporate defendant waived benefit of constitutional provision authorizing suits against corporation in places other than its principal place of business under certain circumstances, at least so far as individual defendant was concerned. Const. art. 12, § 16.

2. Venue ⇨77

An individual defendant, by joining in motion for change of venue to county of corporate defendant's principal place of business, did not waive right to change of venue from county where neither of defendants resided. Code Civ.Proc. § 395, as amended by St.1933, p. 1840.

3. Corporations ⇨503(1)

The county in which a corporation's principal place of business is located is the county where it "resides" within venue statute. Code Civ.Proc. § 395, as amended by St.1933, p. 1840.

[Ed. Note.—For other definitions of "Reside," see Words & Phrases.]

4. Venue ⇨41

If an action is brought in county of residence of either of two defendants residing in different counties, the other defendant does not have right to change of venue to county of his residence. Code Civ.Proc. § 395, as amended by St.1933, p. 1840.

5. Venue ⇨41

Where action against a corporate defendant and an individual defendant was brought in a county other than residence of either, individual defendant had right to change of venue to the county in which corporate defendant resided and had its place of business, where both defendants joined in motion therefor. Code Civ.Proc. § 395, as amended by St.1933, p. 1840.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Frances B. Walker and others against Wells Fargo Bank & Union Trust Company and another. From an order denying defendants' motion for change of venue, defendants appeal.

Reversed, with directions.

Archibald B. Tinning and Tinning & De Lap, all of Martinez, and Lloyd W. Dinkelspiel, Richard E. Guggenlime, and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellants.

McAdoo, Neblett & Warner, William H. Neblett, Harry W. Dudley, and Allan H. McCurdy, all of Los Angeles, for respondents.

SPENCE, Acting Presiding Justice.

Plaintiffs, as beneficiaries of a testamentary trust, brought this action in the superior court in Contra Costa county against defendant Wells Fargo Bank & Union Trust Co., a corporation, and defendant Alberta Bancroft Reid, said defendants being the trustees of the trust created by the decree of distribution made and entered in the superior court of Contra Costa county pursuant to the last will and testament of Fanny Watts Bancroft, deceased. Said defendants joined in a motion for change of venue to the city and county of San Francisco. The trial court made its order denying said motion, and from said order, defendants appeal.

The nature of the action, as stated by appellants and concurred in by respondents, was one which charged the defendants

"with wrongfully, fraudulently and falsely charging the trust estate with commissions, with procuring secret profits, with having 'looted' the estate, and with having fraudulently served their own selfish and private purposes, and which sought a variety of relief, including removal of the trustees, full disclosure with respect to all dealings with the trust estate, an accounting, judgment against the defendants individually for an amount necessary to make full restitution of the allegedly appropriated funds, for profits purported to have been made by the defendants from dealings with the trust estate, for punitive damages on account of allegedly unlawful acts and for compound interest." In other words, the action was based upon the alleged wrongdoing of the trustees in the administration of the trust. It is conceded that such an action is a transitory action and, if brought against a single individual trustee, the latter would have the right to a change of venue to the county of his residence under section 395 of the Code of Civil Procedure, as amended by St.1933, p. 1840. *Weygandt v. Larson*, 130 Cal.App. 304, 19 P.2d 852; *Spangenberg v. Spangenberg*, 123 Cal.App. 387, 11 P.2d 408.

In the present case, however, the action was brought against a corporation, whose principal place of business was in the city and county of San Francisco, and also against an individual defendant, whose place of residence was in the county of Alameda. The motion of defendants for a change of venue from Contra Costa county to the city and county of San Francisco was based upon these grounds and upon the further ground that the action was not one within the meaning of article 12, section 16, of the Constitution, which provides that a corporation may be sued in places other than its principal place of business under certain circumstances. The motion was supported by appropriate affidavits and no counteraffidavits were filed.

[1,2] Defendants contend that the trial court erred in denying said motion and in our opinion said contention must be sustained. We find it unnecessary to determine whether the cause was one within the meaning of article 12, section 16, of the Constitution, for by joining the individual defendant with the corporate defendant, plaintiffs waived the benefit of the constitutional provision at least so far as the individual defendant was concerned. *Griffin & Skelly Co. v. Magnolia, etc., Co.*, 107

Cal. 378, 40 P. 495; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 P. 209; *Strassburger v. Santa Fe L. I. Co.*, 54 Cal.App. 7, 200 P. 1065. It is therefore conceded by plaintiffs that the individual defendant "had the absolute right to a change of venue to the county of her residence." But they claim that by joining in the motion for a change of venue to the city and county of San Francisco, the individual defendant waived her right to a change of venue. We do not believe that this claim can be sustained as it is based upon a misconception of the right of the individual defendant.

[3-5] While the so-called right to a change of venue is ordinarily exercised by a defendant by moving for a change to the county of his residence, it does not follow that a defendant is always entitled to a change to the county of his residence, nor does it follow that he may not be entitled to a change to the county of the residence of a codefendant. The right with which we are dealing is based upon section 395 of the Code of Civil Procedure, as amended, which reads in part as follows: "In all other cases, * * * the county in which the defendants, *or some of them*, reside at the commencement of the action, shall be a proper county for the trial of the action." (Italics ours.) The county in which the principal place of business of a corporation is located, is the county where it resides within the meaning of said section, and if the present action had been brought either in the city and county of San Francisco or in the county of Alameda, the defendant residing in the other county would not have had the right to a change of venue to the county of the latter's residence. *McClung v. Watt*, 190 Cal. 155, 211 P. 17. But as the action was brought in a third county, which was not the county of residence of either defendant, we are of the opinion that the individual defendant residing in the county of Alameda had the right to a change of venue to "the county, in which the defendants, *or some of them*," resided, and was therefore entitled to move the court for a change of venue to either the county of Alameda or the city and county of San Francisco. Both defendants here joined in the motion for a change to the city and county of San Francisco, and while the corporation was not entitled to such a change on its own behalf, *Strassburger v. Santa Fe L. I. Co.*, supra, the situation presented to the trial court was one where

there was a motion duly made by the individual defendant for a change to a proper county and there was no conflicting motion made by a codefendant. We conclude that the motion of the individual defendant should have been granted.

The order is reversed, with directions to the trial court to grant said motion.

We concur: STURTEVANT, J.;
GOODELL, Justice pro tem.



24 Cal.App.2d 177

PEOPLE v. TRANTHAM.

Cr. 507.

District Court of Appeal, Fourth District,
California.

Dec. 22, 1937.

1. Automobiles ⇨355(6)

Evidence that skid marks were visible on road shortly after head-on collision between accused's automobile and deceased's motorcycle, that marks began on accused's left side of road, swerved sharply to right side, and ended within six feet of accused's automobile, and that no other automobiles had passed since time of collision, sufficed to show that accused, who was intoxicated, had driven on left side of road, thereby forcing deceased onto accused's right side, that accused suddenly swerved to right side and caused collision, so as to support conviction under statute for driving while intoxicated and inflicting bodily injury. St. 1935, pp. 174, 181.

2. Criminal law ⇨29, 1209

Where act involved in one charge is necessarily involved in another and is merely incidental to that charge, only one offense is committed and it cannot be carved into two offenses in order to inflict double punishment. Pen.Code, § 654.

3. Criminal law ⇨200(1)

Where two offenses are entirely separate and distinct, and one is not necessarily included in other, prosecution for one is no bar to prosecution for other, even though same testimony may be applicable to both. Pen. Code, § 654.

4. Criminal law ⇨200(1)

Under information which charged accused with negligent homicide, which offense did not require proof of accused's intoxication, and also charged accused with driving while intoxicated and inflicting bodily injury, acquittal on first offense did not require acquittal on second offense also, since there was a fact necessary in one offense and absent in other that determined that the offenses were separate. Pen.Code, § 654; St. 1935, pp. 173, 174.

5. Automobiles ⇨354

In prosecution for driving while intoxicated and inflicting bodily injury, where deceased was killed in head-on collision between accused's automobile and deceased's motorcycle, evidence that deceased was intoxicated several hours before collision was properly excluded as too remote in time and in view of accused's failure to offer to show causal connection between such intoxication and collision. St.1935, p. 174.

Appeal from Superior Court, Kern County; H. L. Bradshaw, Judge.

Virgil Trantham was convicted of driving a motor vehicle while under the influence of intoxicating liquor and causing bodily injury to another, and he appeals.

Affirmed.

Morris B. Chain and Abram M. Marks, both of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

MARKS, Justice.

By the first count of an information defendant was charged with the violation of section 500 of the Vehicle Code, St.1935, p. 173 (negligent homicide), and in a second count with violation of section 501 of the same Code, St.1935, p. 174 (driving a motor vehicle while under the influence of intoxicating liquor and causing bodily injury to another). He was acquitted of the first offense charged and convicted of the second.

He presents three grounds for a reversal of the judgment: (1) That the evidence is insufficient to support the verdict and judgment; (2) that the acquittal of the first charge is in effect an acquittal of the second; and, (3) exclusion of evidence proffered by him.

At about 6 o'clock on the afternoon of June 20, 1937, defendant was driving his automobile west on Fresno avenue in Kern county. It came into contact with a motorcycle being driven east on Fresno avenue by James Massey and caused injuries to Massey which resulted in his death. Counsel for appellant admits that the evidence of intoxication was so sufficient that it cannot be challenged here.

The act forbidden by law, and committed by defendant while driving his automobile when intoxicated, which supports the conviction, is driving on his left-hand side of the road just before the accident.

The automobile and motorcycle came into a head-on collision on defendant's right-hand side of the road. It is the theory of the people that defendant was driving on his left side of the road; that to avoid the collision, Massey, who was riding on his own right-hand side of the road, swerved to his left; that at the same time defendant swerved to his right; that these maneuvers brought the two vehicles into collision on the north, or defendant's right-hand side of the road.

[1] The following evidence supports this theory:

"Q. Now, some time shortly after you arrived at the place where the car and motorcycle were, did you make any examination of the road surface, of the road near that car? A. Yes, sir.

"Q. And what, if anything, did you find? A. Well, I found skid marks on the road where someone had thrown on the brakes and rolled the wheels and skidded from the left hand side of the road over to the right.

"Q. How close did those skid marks come to the defendant's car? A. Within about six feet.

"Q. And about how long would you say these skid marks were from the place they began to the place they ended. A. I judge from where the car was standing to where the skid marks started about 23 or 24 feet. * * *

"Q. If you know, Mr. Simms, had any other cars passed and traveled over that portion of the road from the time you arrived at the collision until you saw those marks on the road? A. You mean cars passing the scenes of the accident?

"Q. Yes, pass over that place where you saw the skid marks? A. No, all cars

stopped when they got up there and seen there had been a wreck, stopped the closest place they could stop."

In addition to the foregoing testimony the witness made a diagram of the roadway at the scene of the accident on which he showed skid marks starting well over on the south side of the roadway and veering sharply northerly onto its north side and to the place where the vehicles came into contact.

This evidence supports the implied finding of the jury that defendant, while under the influence of intoxicating liquor, drove his motor vehicle in a manner forbidden by law which act proximately caused bodily injury to Massey (section 501, Vehicle Code), for section 525 of the same Code, St.1935, p. 181, requires a vehicle to be driven on its right-hand side of the road except under conditions not in evidence here.

Defendant urges that the same act of negligence on his part was involved in both of the crimes charged and that an acquittal of the negligent homicide charge of necessity must have been an acquittal of the driving while intoxicated charge.

[2, 3] In the recent case of *People v. Coltrin*, 5 Cal.2d 649, 55 P.2d 1161, 1166, this question was considered by the Supreme Court, which said: "The constitutional provision referred to relates to a second jeopardy for the same offense. Section 654 of the Penal Code does not apply to statutes which do not make an act or omission punishable in different ways, but which name different acts and different offenses, and punishes each act separately. *People v. Mehra*, 73 Cal.App. 162, 238 P. 802. If the act involved in one charge is necessarily involved in the other and is merely incidental to that charge, but one offense is committed, and it cannot be carved into two offenses in order to inflict a double punishment. *People v. Mazzola*, 99 Cal.App. 682, 279 P. 211. But where the two offenses are entirely separate and distinct and the one is not necessarily included in the other, a prosecution for the one is no bar to a prosecution for the other even though the same testimony may be applicable to both. In *re O'Connor*, 80 Cal.App. 647, 252 P. 730. In that case, the court said: 'While a single act may be an offense against two statutes, and thus constitute two crimes, if each statute requires proof of a fact additional to those involved

in the other an acquittal or conviction of either does not result in the defendant having been in jeopardy for the other.' In *People v. Kerrick*, 144 Cal. 46, 77 P. 711, the court said: 'to be "necessarily included" in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof. "To entitle a defendant to the plea of autrefois convict or acquit it is necessary that the offense charged be the same in law and fact." *People v. Helbing*, 61 Cal. 620.' In *People v. Day*, 199 Cal. 78, 248 P. 250, the court said: 'It may be conceded that, if the two counts stated precisely the same offense, an acquittal upon one count would operate as an acquittal upon the other count. * * * It is not the great similarity in most of the facts constituting separate offenses, but the presence of a fact necessary in one offense and absent in another, that determines whether offenses are separate.'"

[4] When we apply these rules to the facts of the instant case the contention of defendant cannot be sustained. In order to support the conviction under the second count it is necessary that it be established that defendant was operating his car while under the influence of intoxicating liquor. No such proof is required to support a conviction of negligent homicide. Therefore, there is here "a fact necessary in one offense and absent in another that determines" that the offenses are separate.

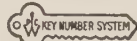
[5] Defendant attempted to prove that Massey was intoxicated several hours before the accident. This evidence was excluded and defendant assigns this ruling as error. This contention cannot be sustained. The evidence was too remote in point of time. There was no causal connection offered to be shown between the accident and Massey's intoxication, if he was intoxicated. One intoxicated motorist may not with impunity run down and kill another intoxicated motorist.

Defendant relies on a short quotation from *People v. Hurley*, 13 Cal.App.2d 208, at page 11, 218, 56 P.2d 978, to support this argument that evidence of the intoxication of Massey should have been admitted under the theory that this intoxication was the proximate cause of the accident. The trouble with this position is that he failed to offer or to show any connection between Massey's intoxication and the accident.

Without some connection between the two the evidence was properly excluded.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



24 Cal.App.2d 247

McALLEN v. SOUZA.

Civ. 10564.

District Court of Appeal, First District,
Division 2, California.

Dec. 27, 1937.

Hearing Denied by Supreme Court
Feb. 24, 1938.

1. Account ⇨3

Where man and woman lived together illicitly for many years until woman's death, under agreement that whatever he made should be his and whatever she made be hers, and he engaged in ranching while she did work ordinarily done by rancher's wives and engaged in dressmaking, using some of proceeds for household expenses but keeping such proceeds separate, denial to her administratrix of accounting and division of property acquired by man was not error, especially in view of community property statute whereby property would have gone to man in absence of testamentary disposition by woman, even if relationship of husband and wife had been established. Probate Code, § 201.

2. Judges ⇨32

In action for accounting and division of property, wherein trial judge died after entry of interlocutory judgment for accounting but before final judgment, no other judge could proceed with trial, in absence of consent or waiver, and hence interlocutory decree was properly set aside and trial de novo had.

3. Account ⇨19

Appeal and error ⇨80(4)

In action for accounting and division of property, interlocutory judgment which ordered an accounting but did not specify amount to which parties were entitled was not "final" nor appealable, and required no findings to support it, and findings made at

time of entry thereof were subject to change or modification at time of final judgment.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

4. Judges ⇨32

A party litigant is entitled to decision upon facts from judge who hears the evidence, when matter is tried without a jury.

5. Appeal and error ⇨864

Where trial judge died after entering interlocutory decree in action for accounting and division of property, interlocutory decree was set aside, new trial was awarded, and final judgment appealed from, reviewing court would not consider alleged contradiction between findings made by deceased judge and findings on which final decree was based.

6. Trial ⇨395(5)

In action for accounting and division of property, tried before court sitting without jury, trial court was required only to make findings upon ultimate facts and did not err in refusing to make findings on immaterial issues.

7. Trusts ⇨63¾

Where man and woman lived together illicitly pursuant to agreement whereby man was to keep money made by him and woman was to keep money made by her, no resulting trust in property acquired by man arose in woman's favor.

Appeal from Superior Court, Contra Costa County; T. D. Johnston, Judge.

Action by Frances McAllen, as administratrix of the estate of Mary Souza, deceased, against A. T. Souza, also known as Antone T. Souza, Antonio T. Souza, and A. T. Sousa. From a judgment for defendant, plaintiff appeals.

Affirmed.

Gerald F. Harrington, of Oakland, for appellant.

Tinning & De Lap, of Martinez, for respondent.

SPENCE, Acting Presiding Justice.

Mary Souza, whose true name was Mary Lucas, died intestate in 1932. Plaintiff was appointed administratrix of her estate and brought this action seeking an accounting of the money and property standing in the

name of the defendant and a division of said money and property. The cause was tried by the court sitting without a jury and, from a judgment in favor of defendant, plaintiff appeals.

The background of this litigation presents a lengthy and unusual story, but we may briefly outline the more important facts, practically all of which were established by uncontradicted testimony. In 1897, the decedent, who was then the wife of Joseph Lucas and the mother of seven children, left her husband's home, taking with her only her youngest child. Some time thereafter, and in the same year, decedent and defendant started having illicit relations. Defendant was a laborer and farm-hand who traveled from place to place. At the request of decedent, defendant rented a house for decedent in Martinez where she earned money by doing dressmaking. Defendant boarded at said house while he was working in the vicinity. In August, 1898, defendant, who had been away from Martinez for two months working on the Pereira ranch, secured work as a woodchopper on the Sheckler ranch, where he was to live in a cabin. Decedent told defendant that she wanted to accompany him to the Sheckler ranch and live with him. Defendant objected, fearing that there might be trouble, but decedent was insistent. She said, "I no going to cause you no trouble. I go with you. I not interfere with your business. Anything you make is yours and what I make is mine." With this understanding, the parties started to live together in 1898 and continued to live together in an illicit relationship for thirty-four years and until the death of decedent in 1932. Six children were born to these parties while so living together. During that time the parties moved from place to place and finally settled on the Pinole ranch. Defendant accumulated real and personal property during that period which is the subject of this litigation. There was a great deal of testimony regarding the work which decedent had done which appears to have been similar to the work frequently done by the wife of a rancher. In addition to doing dressmaking, decedent did many things about the ranch from which she obtained money and she put said money in a receptacle. There was testimony to show that this money was used by decedent and the children for various purposes, including household expenses, but defendant denied receiving any

part of said money. The property which is involved in this litigation is all property which stood in the name of defendant at the time of the death of decedent.

[1] Before considering the pleadings and findings, it may be stated that this is not a case in which either of the parties believed that the relationship of husband and wife had been established. It is conceded that both knew that decedent was the wife of Joseph Lucas and that no divorce had been obtained. Decedent endeavored to obtain a divorce in 1897 but failed in her attempt and it was not until 1928 that Joseph Lucas initiated a divorce action against decedent which resulted in the entry of a final decree in 1930. Nevertheless, defendant and decedent continued to live together and no marriage ceremony was performed at any time. It may be further noted that, even if the parties had entered into a valid marriage in 1897 and had acquired property through their joint efforts during the lifetime of decedent, all of said property would have gone to defendant upon the death of the decedent in the absence of testamentary disposition on the part of decedent. Probate Code, § 201. Plaintiff therefore has attempted to assert greater rights than those that could have been asserted by her as administratrix in the event that decedent had been the lawful wife of defendant.

The allegations of the first count of the complaint are summarized by plaintiff as follows: "That Mrs. Souza and the respondent had agreed to jointly commingle their earnings, services, and gains and that such property as might be accumulated by them thereafter should be the joint property of the parties, and that all of the property now standing in the name of the respondent belonged jointly to the decedent and the respondent."

The allegations of the second count are summarized by plaintiff as follows: "That Mary Souza was the owner of a full, undivided one-half part, parcel share and interest in all of said real and personal property and prayed for a division of said property."

The trial court found against plaintiff on all of the foregoing allegations. It found that the parties "agreed that they would live together and that any money defendant made would be his, and that any money Mary Lucas made would be hers." It further found that it was not true that there was any agreement re-

garding the commingling of earnings or for the joint ownership of any property which might be acquired. Upon these findings judgment was entered in favor of defendant.

Appellant attacks these findings upon the ground that they "do not conform to the evidence," but it is a sufficient answer to state that a review of the record shows that there was ample evidence to support all of the findings made by the trial court.

Appellant's main attack, however, appears to be directed at an alleged error in procedure. A discussion of this attack requires the statement of additional facts. The cause first came on for hearing before Judge McKenzie, before whom it was partly tried. After hearing certain evidence, Judge McKenzie made findings and entered an interlocutory judgment from which defendant appealed. The appeal was dismissed upon the ground that said judgment was not a final judgment and was not one from which an appeal could be taken. *McAllen v. Souza*, 7 Cal.App. 2d 130, 45 P.2d 832. Before the remittitur was filed in the trial court, Judge McKenzie died. After the filing of the remittitur, defendant made a motion to set aside the interlocutory judgment upon the ground that the cause had been only partly tried by Judge McKenzie before his death, that no final judgment had been entered, and that defendant was entitled to have a decision upon all the facts from a judge who had heard all of the evidence. The motion was granted and a trial de novo was had before Judge Johnston.

[2,3] Appellant contends that the trial court erred in setting aside said interlocutory judgment entered by Judge McKenzie, but we find no merit in this contention. We are dealing here with an interlocutory judgment ordering an accounting which differs from certain other types of interlocutory judgments known to the law. The interlocutory judgment here was not final in any sense of the word. It was not appealable (*McAllen v. Souza*, *supra*), it required no findings to support it (*Welch v. Alcott*, 185 Cal. 731, 761, 198 P. 626), and any findings or conclusions made at the time of the entry thereof were subject to change or modification at the time of entry of the final judgment. As was said in *Hughes v. DeMund*, 96 Cal.App. 365, at page 368, 274 P. 405, 406, "An interlocutory decree, in a case such as

this, 'is not to be construed as a final determination of the rights of the parties with respect to any of the matters embraced therein.' [Citing cases.]"

[4] In view of the nature of said interlocutory judgment, we are of the opinion that, when Judge McKenzie died after the entry thereof but before the entry of the final judgment, the cause stood in the same position as any ordinary action, not involving an interlocutory judgment in which the trial judge dies or ceases to hold office after partly trying the action but before the entry of the final judgment therein. In such cases it has been held, at least in the absence of consent or waiver, that no other judge may render a valid judgment without a trial de novo, for "A party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury." In *re Guardianship of Sullivan*, 143 Cal. 462, 467, 77 P. 153, 155. See, also, *Connolly v. Ashworth*, 98 Cal. 205, 33 P. 60. In *Hughes v. DeMund*, supra, 96 Cal.App. 365, at page 368, 274 P. 405, 406, the court quoted with approval from 33 Corpus Juris p. 973, as follows: "Where a case is tried by the judge, and the issues remain undetermined by him, his successor cannot decide, or make findings in the case, without a trial de novo, and consequently he cannot, in such a case, render a valid judgment or decree in the cause, notwithstanding the testimony may have been written down and preserved." The language used in the decisions indicates that the rule applicable to actions generally is likewise applicable to actions where the trial judge may die or cease to hold office after the entry of an interlocutory judgment ordering an accounting but before the entry of final judgment. *Hughes v. DeMund*, supra; *Western Oil, etc., Co. v. Venago Oil Corporation*, 218 Cal. 733, 747, 24 P.2d 971, 88 A.L.R. 1271. Appellant cites and relies upon *DeMund v. Superior Court*, 213 Cal. 502, 2 P.2d 985, but that case is not in point. The interlocutory judgment there was entered by Judge Moncur, who was a duly qualified judge throughout the litigation. The de-

cision upheld Judge Moncur's right to proceed with the trial and enter final judgment despite the intervening actions of Judge Collier. The language and reasoning of that opinion supports the views herein expressed. We therefore conclude that after the death of Judge McKenzie, which occurred prior to the entry of final judgment, no other judge could, in the absence of consent or waiver, proceed with the trial of the cause except upon a trial de novo and that the trial court therefore properly granted the motion of respondent to set aside the interlocutory decree which had been entered by Judge McKenzie.

[5,6] In view of these conclusions, it becomes unnecessary to discuss appellant's claim that there are two sets of findings herein, one made by Judge McKenzie and one made by Judge Johnston, which findings are contradictory on certain issues. Nor is it necessary to discuss at length appellant's claim that it was an abuse of discretion to refuse permission for the filing of an amended complaint at the close of the trial. Suffice it to state that an examination of the proposed amended pleading and the record herein fails to disclose that there was any abuse of discretion or that appellant suffered any prejudice from the order refusing permission to file the same. Appellant further claims that it was error to refuse to make findings on certain alleged material issues, but the trial court was only required to make findings upon the ultimate facts, and in our opinion it made findings upon all material issues.

[7] The only remaining contention of appellant is that a resulting trust arose in favor of decedent. We find no merit in this contention. It is somewhat difficult to ascertain the theory upon which appellant bases this contention, and a search of the record fails to disclose either evidence or findings which would sustain a judgment in favor of appellant upon the theory of a resulting trust.

The judgment is affirmed.

We concur: GOODELL, Justice pro tem.; STURTEVANT, J.

10 Cal.2d 457

**GOLDEN ARROW MINES, Inc., et al. v.
HICKMAN et al.**

Sac. 5186.

Supreme Court of California.

Jan. 10, 1938.

1. Appeal and error ⇨622

Where proceedings for the preparation of a record to be used on appeal have been instituted, the 40-day period prescribed for the filing of the transcript does not commence to run until the proceedings are terminated in the trial court (Rules of the Supreme Court, rule 1).

2. Appeal and error ⇨797(3)

A motion to dismiss an appeal for alleged failure to file a transcript within time was premature, where motion was noticed for a time less than 40 days after the order terminating proceedings for a record was made.

3. Appeal and error ⇨795(2)

The alleged moot character of issues involved in an appeal will not support a motion to dismiss the appeal in absence of points and authorities cited in support of the motion to dismiss giving reference to the ground of the motion, or citation of a pertinent statute or section, noncompliance with which has allegedly rendered the issues moot.

In Bank.

Appeal from Superior Court, Sierra County; Raymond McIntosh, Judge.

Action by the Golden Arrow Mines, Incorporated, and others, against George W. Hickman and others. From an adverse judgment the plaintiffs appeal, and the defendant moves to dismiss.

Motion to dismiss the appeal denied without prejudice.

Breed, Burpee & Robinson and David K. Gilmore, all of Oakland, for appellants.

A. J. Just, of Downieville, Julius A. Strauss, of San Francisco, and Charles H. Seccombe, of Oakland, for respondents.

PER CURIAM.

[1, 2] This is a motion to dismiss an appeal from an alleged failure to file the transcript within time. Examination discloses that the motion was prematurely filed and noticed. It is settled that the forty-day

CAL.REP.73-74 P.2d-45

period prescribed in rule 1 for the filing of the transcript does not commence to run, when, as here, proceedings for the preparation of a record to be used on the appeal have been instituted, until such proceedings are terminated in the trial court. In the present case, the order terminating proceedings for a record was made on September 7, 1937. The motion now under consideration was noticed for a time less than forty days thereafter and, as stated, was premature.

[3] Respondents also allege that the issues involved in the main appeal are moot by reason of the appellants' failure "to file a Moratorium or Affidavit of Labor done upon the mining claims involved * * * as required by the laws of the United States of America * * *." Nowhere in the points and authorities cited in support of the motion to dismiss is any reference made to this latter ground of the motion and no citation of a pertinent statute or section thereof is attempted to be made. Upon such a showing we are not inclined to attach any significance to the point. It is not our function to develop the contention.

The motion to dismiss is denied without prejudice.



10 Cal.2d 428

ARAIŠ v. KALENSNIKOFF.

L. A. 16165.

Supreme Court of California.

Dec. 27, 1937.

As Modified on Denial of Rehearing
Jan. 25, 1938.

1. Bastards ⇨65

The blood test as legal evidence of paternity is "expert opinion" because the conclusions reached by the examiner are based upon medical research and involve questions of chemistry and biology with which a layman is unfamiliar.

2. Bastards ⇨65

The "Landsteiner or Bernstein blood-grouping test" which is a test for establishing paternity, predicated upon the medical theory that the red corpuscles in human blood contain two affirmative agglutinating

substances, that every individual's blood falls into one of four classes and remains the same through life, and that this blood individuality is hereditary so that no agglutinating substance can appear in the blood of a child which is not present in the blood of one of its parents, may not be accepted as conclusive evidence that an alleged father is not in fact the father of a child whose paternity is in dispute. Code Civ.Proc. § 1978.

3. Evidence Ⓒ570

Expert testimony is to be given the weight to which it appears in each case to be justly entitled.

4. Evidence Ⓒ574

The law makes no distinction between expert testimony and evidence of other character in so far as the weight to be given each is concerned, and weight to be given is limited to that which each is entitled to in the particular case.

5. Evidence Ⓒ574

The demonstration of the truth of issues before a court by any means which are generally accepted as tending to prove the facts in dispute is encouraged, but when there is a conflict between scientific testimony and testimony as to facts, the jury or trial court must determine the relative weight of the evidence.

6. Evidence Ⓒ597

Whenever the subject under consideration is one within the knowledge of experts only and is not within the common knowledge of laymen, the expert's evidence is conclusive to the extent that it may not be contradicted by the testimony of nonexpert witnesses. Code Civ.Proc. § 1978.

7. Evidence Ⓒ597

The law does not require expert testimony to be offered wherever relevant except in malpractice cases, and the testimony of an expert in such a case is not conclusive in the sense that it must be accepted as true, but is conclusive only to the extent that it may not be contradicted by the testimony of a nonexpert witness. Code Civ.Proc. § 1978.

8. Bastards Ⓒ65

Parentage is not exclusively a subject for expert evidence.

9. Bastards Ⓒ60

In a bastardy case, evidence of admissions of defendant as related by child's moth-

er and others who corroborated mother's testimony concerning defendant's alleged visits to mother in her home were admissible.

10. Bastards Ⓒ65

In bastardy case, court was required to determine fact of parentage upon all the evidence and to resolve conflict arising from testimony of mother and her witnesses on the one hand and the evidence of the defendant, including a blood-grouping test which purported to show the impossibility of paternity, on the other.

11. Appeal and error Ⓒ1010(1)

A finding which is based upon substantial evidence may not be successfully challenged on appeal.

12. Bastards Ⓒ65

In bastardy case, evidence respecting numerous visits made by defendant to home of child's mother and defendant's actions with alleged child was sufficient to establish paternity, notwithstanding that scientific blood-grouping test purported to show the impossibility of such relationship.

13. Bastards Ⓒ58

In bastardy case, mother was not estopped to allege that defendant was father of her child because she had caused the name of another to be inserted as father of the child in its birth certificate, where she had not led defendant to believe that such statement was true, but rather had given a fictitious name at the defendant's request and for his protection.

14. Bastards Ⓒ94

In a bastardy case, a judgment for plaintiff may include an award of attorney's fees. Civ.Code, § 196a.

In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Daniela Arais, in behalf of her illegitimate minor daughter, Elsie Arais, against Louis Kalensnikoff. Judgment for plaintiff, and defendant appeals.

Modified, and affirmed as modified.

Prior Opinion, 67 P.2d 1059.

Roger Marchetti, of Los Angeles (Ed. S. Green, of Los Angeles, of counsel), for appellant.

M. C. Spicer, of Los Angeles (Charles A. Winter, of Los Angeles, of counsel), for respondent.

EDMONDS, Justice.

The defendant appeals from a judgment determining that he is the father of a child born to Daniela Arais. The principal contention of the appellant is that the judgment must be reversed because the results of a blood test, received in evidence, show his nonparentage; in other words, that the medical evidence is conclusive upon the question.

The mother of the child testified that she met the defendant in November, 1930, and at his request moved to a different house for which he paid the rent and bought the furniture and equipment; "furnished everything I needed to keep myself and children." The defendant, she said, came to her home at least twice a week during the next three years and had frequent relations with her. The child was born in November, 1932. She testified that after the birth of the child, "I quit my job at the restaurant at defendant's request and upon his promise to support me." Thereafter she moved to another location. The defendant, she said, "continued to pay my rent and support me. He usually brought groceries with him when he came. He arranged at the store * * * to let me have groceries or anything I needed on his credit. * * * This arrangement * * * continued until in February, 1936, when defendant refused to support me any more or support Elsie. * * * When defendant came to see me after the baby was born he would hold it and later when she was older he would take her to the playground. He always brought something for the baby. Later he took the baby and had her picture taken. * * * Before the baby was born defendant asked me not to say that he was the father of the child but to use another name. He said he would support the child and make a nice home for her."

A number of witnesses declared that they saw the defendant at the mother's home on many occasions and that he either "always" or "often" brought a basket or bundle with him. Two witnesses testified that the defendant told each of them that he was the baby's father. Others said that at various times they had seen him carrying the baby from the mother's house. A nurse who cared for the mother at the birth of the child testified that the defendant paid her for her work and that on several occasions while she was in the house the defendant came

and brought groceries and clothing for the baby. The grocer named by the mother as having supplied her with food said that he had done so for about two years, commencing early in 1934, at the request of the defendant, who always paid the bills.

The defendant testified that he was never at the home of the mother and had never had any relations with her; "[I] do not know her." He declared that he gave her no groceries or furniture, but "at one time" felt sorry for her and told the grocer to give her some food. As part of his defense he applied to the court for the appointment of a physician to make a blood-grouping test of the mother, the child, and himself. This application was granted upon the consent of the mother. The blood test was made by a physician selected by the court, who thereafter testified that, according to the doctrine of such tests, the defendant is not the father of the child.

In recent years, what is generally called the Landsteiner or Bernstein blood-grouping test, has been presented to the courts as evidence in paternity cases. This test is predicated upon the medical theory that the red corpuscles in human blood contain two affirmative agglutinating substances, and that every individual's blood falls into one of four classes and remains the same through life. According to the Mendelian law of inheritance, this blood individuality is an hereditary characteristic which passes from parent to child, and no agglutinating substance can appear in the blood of a child which is not present in the blood of one of its parents. Yale Law Journal, vol. XLIII, p. 651. According to the testimony of the physician in this case, the blood of the child "contains the agglutininogen B which is not present in the blood of the mother and therefore must have been present in the blood of the father"; but the blood of the defendant does not contain this element. The physician also said that "the factors A and B cannot appear in the blood of the child unless present in the blood of one or both parents," and that therefore, if the child was born to Daniela Arais, the defendant cannot be the father.

The blood test as legal evidence has apparently been considered by only one American court of last resort. State v. Damm, 62 S.D. 123, 252 N.W. 7, 104 A.L.R. 430. The defendant was charged with rape resulting in the birth of a child. At

the trial he offered to be tested and asked the court to require the prosecutrix and the child to undergo the same test. The request was denied and it was held that there had been no abuse of discretion. In the opinion upon rehearing, S.D., 266 N.W. 667, 671, the court extensively reviewed the medical literature on the subject of blood tests, but adhered to its former ruling "to the effect that the trial court did not err in refusing to make the order requested." This case, therefore, passes upon an entirely different question from the one here presented.

[1] Considered as legal evidence, the blood test is expert opinion because the conclusions reached by the examiner are based upon medical research, and involve questions of chemistry and biology with which a layman is entirely unfamiliar. 1 Univ. of Chicago Law Review 798 (1934). The complex biological processes on which the inferences of paternity are made by experts are reviewed and discussed at length by Professor Wigmore in the 1934 Supplement to his work on Evidence. He says that in the present state of scientific discovery, it is generally accepted that the test can be used only negatively; that is, to show that a particular man is not the father of a particular child. He also presents tables showing the probabilities of proving nonpaternity when the blood group of a wrongfully accused man is known, and concludes that tests for negative proof "may after all not be determinative in a given case." Page 58.

[2-5] Whatever claims the medical profession may make for the test, in California "no evidence is by law made conclusive or unanswerable, unless so declared by this code." Section 1978, Code Civ. Proc. Expert testimony "is to be given the weight to which it appears in each case to be justly entitled." State Compensation Insurance Fund v. Industrial Accident Commission, 195 Cal. 174, 231 P. 996, 1000. The law makes no distinction whatever between expert testimony and evidence of other character. Treadwell v. Nickel, 194 Cal. 243, 228 P. 25. Although it encourages the demonstration of the truth of the issues before a court by any means which are generally accepted as tending to prove the facts in dispute, "when there is a conflict between scientific testimony and testimony as to the facts, the jury or trial court, must determine the relative

weight of the evidence." Rolland v. Porterfield, 183 Cal. 466, 191 P. 913, 914.

These are fundamental rules which are firmly embedded in the law of evidence. However, the appellant contends that an exception has been made of medical testimony by the decision in William Simpson Construction Co. v. Industrial Accident Commission, 74 Cal.App. 239, 240 P. 58, 59, and cases which have followed it, and relies particularly upon a statement in the Simpson Case to the effect that medical evidence is, in certain cases, "conclusive upon the question in issue." There the cause of death was in dispute. A workman fell from a scaffold and an autopsy performed by two physicians showed a hemorrhage in his brain and a fracture of his skull. Each physician testified that, in his opinion, a stroke of apoplexy caused the hemorrhage prior to the fall and was the cause of death. The Industrial Accident Commission disregarded this testimony and found that death resulted from the fractured skull. In reviewing the case the court discussed the effect of medical evidence "where 'the subject is one for experts or skilled witnesses alone,'" and held that "the Commission was not bound by the opinion of the medical experts that the proximate cause of the death of the deceased was the stroke of apoplexy." However, it annulled the award because there was no evidence of any kind tending to prove that death resulted from the fall. The decision is, therefore, directly contrary to the position of the appellant here, although some of the language of the opinion taken out of context seems to support it.

[6,7] In discussing the subject of expert testimony in the Simpson Case, the court cited several cases in which damages were claimed because of the alleged malpractice of a physician, and then said: "The rule to be drawn from these decisions, as we understand them, appears to be that whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases neither the court nor the jury can disregard such evidence of experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by nonexpert witnesses." 74 Cal.App. 239, at page 243,

240 P. 58, 59. The general rule is that the law does not require expert testimony to be offered wherever relevant. Malpractice cases are an exception. In such a case the plaintiff must prove by members of the defendant's profession the standard of care or skill ordinarily used in the practice of that profession at a particular place. *Perkins v. Trueblood*, 180 Cal. 437, 181 P. 642; *Callahan v. Hahnemann Hospital*, 1 Cal.2d 447, 35 P.2d 536. The reason for the exception is obvious. Only physicians who practice their profession at a particular place could have any knowledge of the method of treatment customarily used by the other members of the profession practicing there; the subject, therefore, calls for expert opinion only. But the testimony of an expert in such a case is not conclusive in the sense that it must be accepted as true. Indeed, there is often considerable disagreement between different witnesses concerning the standard of care or skill ordinarily used, and the trier of fact must resolve the conflict thus raised. It is conclusive, however, to the extent that it may not be contradicted by the testimony of a nonexpert witness.

[8-12] In *Hines v. Industrial Accident Commission*, 215 Cal. 177, 8 P.2d 1021, the uncontradicted testimony of a physician concerning the cause of a physical disability was said to be conclusive. In *Hartford A. & I. Co. v. Industrial Accident Commission*, 140 Cal.App. 482, 35 P. 2d 366, an award of compensation for an alleged injury was annulled because, in the opinion of the physicians who testified, the appellant's disability had not been caused by his employment, and the expert evidence was held to be conclusive upon the question. It is clear that there is nothing in these cases or the *Simpson Case* which supports the contentions of the defendant that the medical evidence presented on his behalf must be accepted as conclusive. Parentage is not exclusively a subject for expert evidence. The

trial judge heard the testimony of the mother of the child and the witnesses who corroborated her concerning the numerous visits of the appellant to her home, and his actions with the child. The admissions of the defendant as related by these witnesses are also a part of the evidence. It was the duty of the judge to determine the fact of parentage upon all this evidence and to resolve the conflict arising from the testimony of the mother and her witnesses on the one hand and the evidence of the defendant, including the blood test, on the other. The finding so made was based upon substantial evidence and may not be successfully challenged upon appeal.

[13] In the birth certificate, the mother caused John Morales to be named as the father of the child; but this does not raise an estoppel against her and require a reversal of the judgment, as the defendant contends. There is no evidence that she led the defendant to believe that this statement was true. On the contrary, the record supports the implied finding of the trial judge that she gave a fictitious name for the father at the request of the defendant and for the purpose of protecting him.

[14] As there is ample evidence to support the finding of parentage, the trial judge did not abuse his discretion in denying the motion for a new trial.

Also, as section 196a of the Civil Code requires a father to support his child, the trial court had power to order him to pay attorney's fees in the action brought to enforce that obligation. The amount which the defendant was ordered to pay is not excessive in view of the evidence concerning his financial ability and was properly allowed. *Paxton v. Paxton*, 150 Cal. 667, 89 P. 1083.

The judgment is affirmed.

The petition for rehearing is denied.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; NOURSE, Justice pro tem.

24 Cal.App.2d 300

CARAKER v. WEBSTER et al.**Civ. 1694.**District Court of Appeal, Fourth District,
California.**Jan. 7, 1938.**

Rehearing Denied Feb. 2, 1938.

Hearing Denied by Supreme Court
March 7, 1938.**1. Malicious prosecution §51**

A complaint, alleging that defendant, falsely, maliciously, and without reason or probable cause brought about plaintiff's discharge from state position by civil service commission for insubordination, was insufficient as showing on its face that proceedings on which cause of action was founded terminated adversely to plaintiff, so that action amounted to collateral attack on commission's order.

2. Malicious prosecution §56

It must be presumed that charges, alleged to have been made against plaintiff by defendants in action for malicious prosecution resulting in plaintiff's discharge from state position by civil service commission, were true and commission's order of discharge proper, in absence of direct attack thereon for extrinsic fraud in its procurement.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Thomas M. Caraker against G. M. Webster and another for malicious prosecution. Judgment for defendants, and plaintiff appeals.

Affirmed.

P. E. Bingman, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondents.

JENNINGS, Justice.

The appeal herein has been taken by the plaintiff from a judgment which was rendered in favor of the defendants after a general demurrer to plaintiff's fourth amended complaint had been sustained. The order sustaining the demurrer expressly granted permission to plaintiff to amend his complaint within a period of ten days. Plaintiff did not, however, avail himself of the privilege accorded him, but elected to stand on his complaint and gave notice of appeal from the judgment entered against

him subsequent to the expiration of the ten-day period.

[1,2] The fourth amended complaint contains two paragraphs exclusive of the prayer. The second paragraph contains an allegation of damages sustained by plaintiff as a result of the matters set out in the first paragraph and is unimportant on this appeal. The cause of action attempted to be pleaded is contained in the first paragraph which is in the following language:

"That on or about the 6th day of July, 1935, the said defendants contriving and maliciously intending to injure the said plaintiff in his good name and reputation, and to cause him to be cited before the Civil Service Commission of the State of California under a charge of insubordination; that same was falsely and maliciously and without any reason or probable cause therefor caused plaintiff to be charged as above, before said Commission and falsely and maliciously and without probable cause therefor, caused plaintiff to be discharged from his position as hog ranch operator of the Patton State Hospital."

It is apparent from the above-quoted language that the pleader has attempted to allege a cause of action for malicious prosecution and that the basis therefor is that the defendants maliciously, falsely, and without probable cause charged plaintiff with insubordination in a complaint filed with the state civil service commission as a result of which plaintiff was discharged from his position as hog ranch operator of the Patton State Hospital.

It is obvious, therefore, that the complaint shows on its face that the proceedings which form the foundation of his cause of action and which he alleges were instituted by defendants maliciously and without probable cause terminated adversely to him. The instant action then amounts to a collateral attack on the order apparently made by the civil service commission ousting plaintiff from his position. The pleading is barren of any allegation of extrinsic fraud which was employed in procuring the order of discharge. In the absence of direct attack upon the order grounded on extrinsic fraud in its procurement, it must be presumed that the charges allegedly made by defendants were true and that the order of discharge was proper. *Roos v. Harris*, 203 Cal. 201, 263 P. 225; *Fetterley v. Gibson*, 210 Cal. 282, 291 P. 411; *Plum v. Becket*, 120 Cal.App. 507, 7 P.2d 1111. It follows therefrom that the order sustaining

the demurrer to the fourth amended complaint was correct.

The judgment from which this appeal has been taken is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



24 Cal.App.2d 287

In re BOYD'S ESTATE.

SAN FRANCISCO PRESBYTERIAN ORPHANAGE AND FARM v. HANSON
et al.

Civ. 10645.

District Court of Appeal, First District,
Division 1, California.

Jan. 5, 1938.

Hearing Denied by Supreme Court
Feb. 24, 1938.

1. Wills ⇐452

An interpretation of will as devising property to testator's blood relatives is preferred to one under which property will go to strangers.

2. Appeal and error ⇐1008(3)

When trial court's construction of instrument appears reasonable and consistent with party's intent, appellate court will not substitute another interpretation.

3. Wills ⇐706

The trial court's inferences, conclusions, and findings from all evidence admitted to show testator's intention, where will appears ambiguous, has same weight as trial court's fact findings in other actions and will not be disturbed by appellate court, unless contrary to inference which reasonable mind might properly draw from evidence or clearly erroneous.

4. Wills ⇐706

The trial court's construction of will, devising life estate in certain realty to testatrix's cousin, remainder of her property to another cousin for life and reversion of such realty to orphanage, as giving devisee of remainder contingent right to income from such realty after life tenant's death and postponing attachment of reversion until other estates created by will were exhausted, was reasonable one, which appellate court cannot disturb.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

In the matter of the estate of Grace N. Boyd, deceased. From a judgment construing deceased's will in accordance with the contentions of Minnie E. Hanson and another, the San Francisco Presbyterian Orphanage and Farm, a corporation, appeals.

Affirmed.

Rehearing denied; CURTIS and EDMONDS, JJ., dissenting.

Douglas A. Nye, of San Francisco, for appellant.

Snook & Snook & Chase, of Oakland, and Delbert W. Radke, of San Francisco, for respondents.

TYLER, Presiding Justice.

This appeal involves the proper construction to be given the will of Grace N. Boyd, deceased. Testatrix died on the 3d day of January, 1934, leaving a will dated May 10, 1928, which was admitted to probate. Decedent at the date of the will and at her death owned several parcels of land, securities, and cash in the bank. Her nearest and only relatives were two cousins. After making a specific bequest of certain stock to a friend, the will contained certain provisions which form the basis of this controversy. They are as follows: "I devise to Theodore C. Knoderer a life estate in my real property situated at the corner of Golden Gate Avenue and Larkin Streets, in the City and County of San Francisco. I devise and bequeath all the remainder of my property of every name and nature and wheresoever situated, whether now in possession or in expectancy, to my cousin Minnie E. Hanson for life. I devise and bequeath the reversion of the property devised and bequeathed to Theodore C. Knoderer and Minnie E. Hanson, absolutely to the Presbyterian Orphanage, at San Anselmo, Marin County, California."

Theodore C. Knoderer died on the 3d day of October, 1936, during the probate of the will, and his life estate in the particular property in question terminated as of that date. Upon distribution the question was presented as to whether or not appellant, the San Francisco Presbyterian Orphanage, was entitled to have distributed to it the immediate fee after the death of Theodore C. Knoderer or whether the enjoyment of the reversion was postponed until after the death of Minnie Hanson; it being claimed by her that under a proper construction of the will

she is entitled to a life estate in the particular parcel of land upon which Theodore C. Knoderer had enjoyed his life estate, as a successive life estate in such property for her benefit was intended by the testatrix in the event she survived the original life tenant. The trial court no doubt was of the opinion that the will was capable of more than one construction and received evidence under section 105 of the Probate Code to determine the testator's intention as to its true meaning. It appeared therefrom that both Theodore C. Knoderer and Minnie E. Hanson were first cousins of decedent and were her only relatives; that they were the only persons in case of intestacy who would be entitled to share in the estate. It was also shown that they were in needy circumstances; that the appellant San Francisco Presbyterian Orphanage and Farm was a charitable corporation and would ultimately receive full title to all of the property. It also appeared that decedent had no personal association with the charity named or interest in its work, or that there was any particular ground for the bequest. On the contrary, it appears from the face of the will that decedent did not even know the correct name of the charity to be benefited. Under the language of the will, and the surrounding circumstances, the trial court held that the proper construction of the term "remainder of my property of every name and nature and wheresoever situated, whether now in possession or in expectancy," as used in the will, was intended to mean all property and property rights of the decedent which were subject to her testamentary disposition. It was held in particular that one of the property rights of the decedent which had not been disposed of by the preceding clauses of the will was a contingent right to the enjoyment in respondent of the income of the property in which Knoderer had a life interest, which commenced at his death. The last paragraph of the will was construed to be a devise and bequest of the reversion, which did not attach until other estates created by the will, including the estate of respondent Hanson therein for life, had first been exhausted.

[1-3] It is well settled that where the provisions of a will are capable of two interpretations, under one of which those of blood of the testator will take, while under the other the property will go to strangers, the interpretation by which the property goes to those of blood of the testator is preferred. In *re Estate of Hartson*, 218 Cal. 536, 24 P.2d 171; In *re Estate of Wilson*, 65 Cal.App. 680, 225 P. 283. The construction adopted by the trial court is a reasonable one and in keeping with the clause of the will relating to the disposition of the remainder or ultimate succession of the estate, found in the last paragraph thereof, which reads as follows: "I devise and bequeath the reversion of the property devised and bequeathed to Theodore C. Knoderer and Minnie E. Hanson, absolutely to the Presbyterian Orphanage, at San Anselmo, Marin County, California." When the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of a party, appellate courts will not substitute another interpretation though it seems equally tenable. *Kautz v. Zurich Gen. A. & L. Ins. Co.*, 212 Cal. 576, 582, 300 P. 34. In the event that a will may appear ambiguous, and evidence is admitted in order to arrive at the testator's intention, inferences and conclusions drawn by the trial court from all of the evidence, and findings made therefrom have the same weight as the findings of fact made by the trial court in other actions, and such inferences and findings will not be disturbed unless contrary to the inference a reasonable mind might properly draw from the evidence. In *re Kelly's Estate*, 177 Minn. 311, 225 N.W. 156, 67 A.L.R. 1268. Such a determination will not be disturbed on appeal unless clearly erroneous. In *re Mitchell's Will*, 157 Wis. 327, 147 N.W. 332.

[4] As we are of the opinion that the construction given to the will is a reasonable one, we cannot disturb the conclusion of the trial court. The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

24 Cal.App.2d 313

WOOD et al. v. AMERICAN NAT. BANK OF SAN BERNARDINO et al. (SWEATMAN, Intervener).

Civ. 2121.

District Court of Appeal, Fourth District,
California.

Jan. 10, 1938.

1. Trusts ⇨17(3)

An instrument, reciting that signer held title to realty, conveyed to her by ordinary grant deed, in trust for her sister and would execute deed thereof to latter on her request, was sufficient writing subscribed by trustee to create valid trust under statute. Civ.Code, § 852, subd. 1.

2. Trusts ⇨29

A letter stating that writer would like to have certain realty conveyed to her sister as trustee and held in trust for writer's minor daughter was not instrument limiting trust estate or designating beneficiaries, but merely expression of intention by trust beneficiary who acquiesced in provisions of trust instrument, which obligated trustee to convey property as directed by beneficiary on latter's request, by failing to request or direct conveyance so as to carry out such desires for over year during which trust declaration was in her possession before her death.

3. Trusts ⇨140(1)

One for whom trust declaration recited that signer held realty in trust as former's property, which trustee agreed to convey as directed by such owner, was sole beneficiary of trust to exclusion of her minor children, though she expressed desire in letter, written before execution of trust instrument, that they should have use thereof after her death; such declaration being clear and unambiguous as to beneficiary, so as to preclude substitution of unnamed beneficiaries. Civ.Code, §§ 2221, 2222.

4. Descent and distribution ⇨62

A deceased trust beneficiary's surviving husband, conveying his interest in trust property to trustee, had no right to sue bank, to which trustee subsequently conveyed property in trust for such spouses' minor children, for money judgment. Code Civ. Proc. § 1452, now Probate Code, § 581.

5. Descent and distribution ⇨91(1)

An heir at law cannot sue for money judgment on behalf of ancestor's estate be-

fore distribution thereof, nor maintain any action concerning estate property except to regain possession of or quiet title to realty. Code Civ.Proc. § 1452, now Probate Code, § 581.

6. Descent and distribution ⇨91(1)

The minor children of deceased trust beneficiary lacked legal capacity as deceased's heirs at law to sue bank, to which trustee conveyed trust property in trust for them, for money judgment, without probate of deceased's estate.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Chester Brooks Wood and another, minors, by their father and guardian ad litem, Chester G. Wood, and the latter individually, against the American National Bank of San Bernardino and others, for cancellation of two deeds, injunction against performance of a contract and an accounting, in which Ira B. Sweatman intervened. From a judgment for intervener and for plaintiffs in part, plaintiffs appeal, and, from portions thereof, defendant bank appeals.

Judgment for intervener affirmed, and balance of judgment reversed.

Charles Bagg, of San Bernardino, for plaintiffs.

Surr & Hellyer, of San Bernardino, for defendant American Nat. Bank of San Bernardino.

MARKS, Justice.

This action was tried on a second amended complaint and an amendment thereto, the answer thereto of the American National Bank of San Bernardino, and a complaint in intervention of Ira B. Sweatman, and the answers thereto.

Chester Brooks Wood and Carolyn Lyde Wood are the minor children of Chester G. Wood and Letta Brooks Wood, his wife, now deceased. We will refer to the minor plaintiffs as the Wood children and to the American National Bank of San Bernardino as the bank.

About March, 1925, Mrs. Wood was evidently purchasing from W. E. Daimwood and his wife, with her separate funds, a house and lot in the city of San Bernardino. She was ill in a Los Angeles hospital at the time and engaged the bank to complete the purchase. After some cor-

respondence which Mrs. Wood carried on with the bank, through its president, it was decided to take title to the property in the name of Bess Brooks, a sister of Mrs. Wood; Miss Brooks to act as trustee. The bank prepared and had executed an ordinary grant deed dated March 16, 1925, conveying the property from Mr. and Mrs. Daimwood to Bess Brooks. At the same time Bess Brooks executed and acknowledged the following instrument:

"This is to certify that that certain property described as: (Description) conveyed to me by W. E. Daimwood and wife under Deed of even date herewith is in fact the property of my sister Letta Wood, and the title is held by me in trust for her, and I will upon her request execute a Deed to this property as she may direct.
"Bess Brooks."

On the same day this instrument was delivered to Mrs. Wood, a duplicate was placed in the files of the bank. It was never recorded.

Mrs. Wood died intestate March 21, 1926. There has been no probate of her estate. Bess Brooks was never authorized by any court order to incur or convey the property, nor was a substitution of the trustee ever so authorized. Mrs. Wood never requested nor ever authorized Bess Brooks to convey the property to any one.

On April 6, 1926, Chester G. Wood executed a quitclaim deed to the property to Bess Brooks. On the same day Bess Brooks made, executed, and delivered to the bank her promissory note in the sum of \$2,200, due three years after date, bearing interest at 8 per cent. per annum. This note was secured by a deed of trust on the trust estate property. On April 12, 1926, Bess Brooks executed a grant deed conveying this property to the bank, and on the same day the bank and Bess Brooks executed a declaration of trust, reciting, among other things, that the bank held the property in trust for the Wood children with power of sale or disposition. Thereafter, the bank contracted with Robert H. Emery to sell the property to him for \$5,297.07, payable in installments. It received Emery's unsecured note for \$340. The Emery contract was never performed. On April 30, 1926, the bank sold and assigned the Bess Brooks note and deed of trust to Ira B. Sweatman for the consideration of \$2,209.80 to it paid. It is admitted by all parties that Sweatman was

an innocent purchaser for value without notice of any defect in the note and deed of trust. The bank retained possession of the trust property and between June 5, 1926, and March 10, 1934, collected \$2,423.-14 in rents. Against this amount it claims offsets in the form of expenses paid, some of doubtful propriety, in the sum of \$2,367.-11.

This action was first instituted by a complaint filed on September 22, 1927. A second amended complaint was filed on March 8, 1929. An amendment to the second amended complaint was filed on June 13, 1933. The complaint in intervention was filed on April 17, 1933. The case was first tried in 1928 and resulted in a judgment for the bank, which was entered April 24, 1929. On appeal that judgment was reversed by this court. *Wood v. American National Bank*, 125 Cal.App. 248, 14 P.2d 110.

The cause was tried a second time in June, 1933. After the reversal of the judgment and before the second trial, the complaint in intervention was filed. The amendment to the second amended complaint was filed on the last day of the second trial. It contains the prayer of plaintiffs' pleadings which may be summarized as follows: (1) Cancellation of the trust deed from Bess Brooks to the bank; (2) cancellation of the grant deed from Bess Brooks to the bank; (3) enjoining the bank from carrying out the Emery contract; (4) an accounting by the bank of its management of the trust property; (5) for costs; (6) for general relief.

The trial court found the facts of the execution of the various instruments as we have detailed them, with the addition, that in accordance with a letter dated March 9, 1925, written by Mrs. Wood to the president of the bank and quoted in *Wood v. American National Bank*, supra, Mrs. Wood instructed the bank to have title to the property placed in Bess Brooks, as trustee, for the benefit of the Wood children "to be kept intact and preserved for a home for said minor plaintiffs until such time as they should both become of age"; that the reasonable value of the property was \$5,250 and its rental value \$40 per month; that of the \$2,200 loan, \$683.46 had been spent for the preservation of the property; that after April 12, 1926, date of the deed from Bess Brooks to the bank, its services in the case and

in preservation of the property were gratuitous.

The complaint in intervention contained the following allegation: "The entire sum of \$2200.00, which was borrowed by said Bess Brooks as such trustee from defendant The American National Bank of San Bernardino, California, and which was evidenced by said note, was necessary for the preservation of said real property, and said sum and the making of said note and trust deed were each and all necessary to preserve said real property and to prevent the loss of said property by said Bess Brooks as trustee as aforesaid, and by said last two mentioned plaintiffs (the Wood children)."

The trial court found all allegations of this pleading true.

An interlocutory decree was entered which may be summarized as follows: That the bank within sixty days reduce the debt created by the Bess Brooks note from \$2,200 to \$683.42; that the bank be enjoined from carrying out the Emery contract; that an accounting be had; that after the accounting and its approval the bank convey the property to the Wood children subject to its lien in the sum of \$683.42 or so much thereof as may remain unpaid; that in the event the accounting shows money unpaid from the bank to the Wood children they have judgment for such amount.

The final judgment provided as follows:

(1) That the Bess Brooks note and deed of trust constituted a first lien on the property in favor of Ira B. Sweatman; (2) that the Wood children have judgment against the bank in the sum of \$1,516.58; (3) that the deed from Bess Brooks to the bank be canceled and that the bank has no right, title, or interest in the trust property; (4) that the bank transfer to the Wood children the Emery note; (5) that the bank pay to the Wood children the further sums of \$64.88 and \$545.97 in full satisfaction of all obligations of the bank up to March 10, 1934.

Plaintiffs have appealed from the entire judgment. The bank has appealed from portions of the judgment which it carefully specified in its notice of appeal.

The record contains the following stipulation: "It is stipulated between the parties to this action that, since the trial of this action and the entry of the judgment herein, the Intervener, Ira B. Sweatman, has caused said deed of trust executed by

Bess Brooks covering the real property involved in this action to be foreclosed, and that at the sale thereof, the said Ira B. Sweatman purchased said property and is now the record owner of said real property."

The first and perhaps the most important issue for determination on this appeal is the question, Who is the beneficiary, or who are the beneficiaries of the trust of which Bess Brooks was trustee? That such a trust in real property was created is conceded by both parties. That it was an express trust created by an instrument subscribed by the trustee cannot be doubted.

[1] Section 852 of the Civil Code provides as follows:

"No trust in relation to real property is valid unless created or declared:

"1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing;

"2. By the instrument under which the trustee claims the estate affected; or,

"3. By operation of law."

An examination of the deed from Mr. and Mrs. Daimwood to Bess Brooks discloses that it is in the form of an ordinary grant deed and contains no provision limiting the title of the grantee, nor does it attempt to establish a trust. The instrument signed by Bess Brooks on March 16, 1925, recited that the real property conveyed to her in fee by Mr. and Mrs. Daimwood "is in fact the property of my sister Letta Wood, and title is held by me in trust for her, and I will upon her request execute a deed to this property as she may direct." This instrument is a sufficient writing subscribed by the trustee to bring it within the provisions of subdivision 1 of section 852 of the Civil Code. It created a trust with Bess Brooks as trustee with the express power of conveying the property by deed to the nominee of Mrs. Wood. Although Mrs. Wood had this declaration of trust in her possession for over a year prior to her death she did not exercise the right to request or direct a conveyance of the property.

[2] Counsel argue the legal effect of the letter written by Mrs. Wood on March 9, 1925, to the president of the bank regarding the creation of the trust. This letter was evidently considered by the trial judge in reaching his conclusion that the Wood children were the beneficiaries of the trust. Mrs. Wood wrote in part as fol-

lows: " * * * This property was given me by my father to be kept always as a home and I want to follow out his wishes and I know it would be my father's wish that if I do not recover that this property should be kept intact until my children are grown. * * * Yes, I would like to follow your suggestion & have the property deeded to my sister as trustee. If anything happens I do not recover would like the property held in trust for my daughter Carolyn when she becomes of age. * * * Unless my sister is appointed trustee, I realize my son & daughter would never have the benefit of this property should anything happen I don't recover. * * *"

We find nothing necessarily inconsistent between the intention and desires expressed in this letter and the trust as actually created. It may be fairly inferred from the letter that Mrs. Wood had not lost hope of recovery; that it was her desire that the property be kept as a home for herself and the members of her family so that during her lifetime she could enjoy its privileges and comforts with her children; that after her death her children would have the use and ultimately Carolyn would have title to the property. The home was really Mrs. Wood's. During her lifetime she was the natural beneficiary of the trust. It was her expressed desire that, only in the event of her death, both her children, until they were grown, and Carolyn in fee, should succeed to the benefits of the trust. Of course, this desire on the part of Mrs. Wood might have been incorporated in the declaration of trust. While this was not done in fact, it was accomplished in legal effect. Mrs. Wood was named as the beneficiary of the trust with power to direct the conveyance of the property. All that remained for her to do, under the trust, to carry out the desires expressed in her letter was to direct the trustee to convey to her two children their respective estates in the property. Under the trust which was created she had the legal power to execute and put into effect the exact trust which she contemplated when she wrote her letter. This she did not do. Perhaps death intervened to prevent this act. On the other hand, it may be possible that in the year intervening between the creation of the trust and her death Mrs. Wood changed her mind. Under the conditions of the trust she was privileged to do this. The letter expressed a desire or an intention which was never carried into effect though she had the power so to do.

It is not shown that the trustee had any knowledge of the contents of this letter. It was not subscribed by the trustee nor was it the instrument under which the trustee claimed the trust estate. It cannot therefore be considered as an instrument limiting the trust estate or designating the beneficiaries. It was merely an expression of an unexecuted intention on the part of Mrs. Wood. As we have observed, Mrs. Wood had the declaration of trust in her possession for more than a year prior to her death. That document gave her the power to carry out the desires expressed in her letter. It would seem that she thus acquiesced in the provisions of the trust as created and approved the method therein given her of carrying out her desires concerning the estates of her children.

[3] The declaration of trust is clear in its terms and free from uncertainty and ambiguity in its designation of Mrs. Wood as the beneficiary. That being so, there is no room for judicial interpretation and no opportunity for a court to substitute unnamed beneficiaries for a named beneficiary. Sections 2221, 2222, Civ.Code; *Colver v. Scarborough Co.*, 73 Cal.App. 421, 238 P. 1096. We therefore conclude that Mrs. Wood was the sole beneficiary of the trust of which Bess Brooks was the trustee.

There is nothing in our former opinion, 125 Cal.App. 248, 14 P.2d 110, necessary to that decision, which conflicts with the views just expressed. A discussion of the question of the beneficiaries was not necessary to support the final conclusion there reached that a judgment in favor of the bank be reversed on the ground that the bank had notice that Bess Brooks held legal title to the property in trust without the power of conveyance except on direction of Mrs. Wood and upon the further ground that the evidence did not support a finding to the effect that all of the \$2,200 borrowed by the trustee from the bank had been used to preserve the property of the trust estate and pay the bills and expenses of Mrs. Wood.

[4] Having reached the conclusion that Mrs. Wood was the sole beneficiary of the trust we must next turn to the consideration of the question of the right of plaintiffs to sue the bank and obtain a money judgment against it without any probate of the estate of Mrs. Wood and simply as her heirs at law and not as beneficiaries of the trust.

In considering the appeal of Chester G. Wood, husband of Mrs. Wood during her lifetime, it should be sufficient to say that on April 6, 1926, after the death of his wife, he conveyed his interest in the trust property to Bess Brooks. He, therefore, has no remaining interest in it. While he was awarded nothing against the bank, the judgment fails to take into consideration the effect of this transfer.

Section 1452 of the Code of Civil Procedure, in effect at the time this action was instituted (now section 581 of the Probate Code), provided in part as follows: "The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled or until delivered over by the order of the court to the heirs or devisees; and must keep in good tenable repair all houses, buildings and fixtures thereon which are under his control."

* * * The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do."

[5] It seems to be the settled law of California that an heir at law, prior to distribution of his ancestor's estate, cannot sue to obtain a money judgment on behalf of the estate, nor can he maintain any action concerning estate property except to regain possession of or quiet title to real estate. In *Robertson v. Burrell*, 110 Cal. 568, 42 P. 1086, 1087, it is said:

"Plaintiffs are not the proper parties to maintain this action, and they have not legal capacity to do so. While, in a sense, they are beneficiaries of the trust which resulted by the death of their father, the fulfillment of which was imposed upon the surviving partner, yet there were certain intermediate steps and processes necessary to be taken and followed before their beneficial interests could be reduced to possession. And it is these necessary processes which the action under consideration entirely ignores; for there was another trust intervening in time and right, and duties between the close of the surviv-

ing partner's trust and their enjoyment of its fruits. It is true that, as heirs of their father, the title to his property, real and personal, vested in them, but their title did not carry with it the right of immediate enjoyment. The rights and duties of the administrator of their father's estate interposed and intervened. The administrator, also, is a trustee, with well-defined duties, among the first of which is that of collecting the assets of the estate, and paying its just debts, after due notice to creditors. The heirs' title is subject to the performance by the administrator of all his trusts, and they finally come into the possession and enjoyment of only such portion of the estate as may remain after the execution of them by the administrator.

* * *

"Nor can the heir, by any act of his own, strip the representative of any of his rights, nor relieve him from the performance of any of his duties. The heir may sell his interest, but the administrator still has control of the property sold for the payment of debts, and the general purposes of administration. The heir cannot bring an action to enforce payments or collect debts. *Harwood v. Marye*, 8 Cal. 580; *Grattan v. Wiggins*, 23 Cal. [16] 29. And, even when he attempts to do so by suing in his individual capacity and as executor, the right of action not being in both, but in the executor alone, a demurrer will be sustained. *Dias v. Phillips*, 59 Cal. 293." See, also, *Miller v. Ash*, 156 Cal. 544, 105 P. 600; *Spencer v. Continental Casualty Co.*, 16 Cal.App.2d 176, 60 P.2d 339.

[6] It follows from all that has been said that the Wood children lack the legal capacity to sue, and that the right, if any, to maintain this action, which is neither to recover possession of nor to quiet title to real property, rests in an administrator of the estate of Mrs. Wood.

It is conceded that the judgment in favor of the intervener, Ira B. Sweatman, is proper, and that it must be affirmed.

The judgment in favor of the intervener is affirmed. The balance of the judgment is reversed. Each party will pay his own costs of appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

24 Cal.App.2d 277

HOLSER et al. v. MONTEREY COUNTY TRUST & SAVINGS BANK.

Civ. 10604.

District Court of Appeal, First District,
Division 2, California.

Dec. 29, 1937.

I. Limitation of actions ⇨183(5)

In action on notes, wherein plaintiffs alleged that statute of limitations was tolled by maker's promise to pay "when I can," and defendant relied on proof of maker's ability to pay for more than four years prior to commencement of action, answer alleging that action was barred "by subdivisions 1 and 2 of section 337 of the Code of Civil Procedure" sufficiently pleaded statute of limitations, under statute authorizing pleading of limitations by giving "number of the section and subdivision thereof, if it is so divided, relied upon," since pleading of second subdivision was harmless surplusage and facts showing ability to pay need not be alleged. Code Civ.Proc. §§ 337, 458.

2. Limitation of actions ⇨197(3)

Evidence that maker of notes had considerable property in 1930 and thereafter held to authorize finding that action on notes, wherein statute of limitations had been tolled by letter written in 1928 promising to pay "when I can," was barred in 1937 by four-year statute of limitations. Code Civ.Proc. § 337.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action on promissory notes by R. F. Holser and William T. Bailey, partners doing business under the firm name and style of Holser & Bailey, against the Monterey County Trust & Savings Bank, executor of the estate of Fred E. Earl, deceased. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Fred A. Shaeffer, of Santa Maria, for appellants.

Sidney L. Church, of Salinas, for respondent.

NOURSE, Presiding Justice.

On February 25, 1937, the plaintiff commenced this action against the executor of the estate of F. E. Earl to recover upon two promissory notes executed by the de-

ceased—one on December 14, 1922, the other on January 21, 1927. The first note called for the payment of \$122, the second for \$428.67. To toll the running of the statute of limitations the plaintiff pleaded a letter which the deceased addressed to him on December 17, 1928, in which deceased promised to pay plaintiff "when I can." It was then alleged that deceased "within four years last past" had accumulated enough money to pay said indebtedness; also that on November 30, 1928, the deceased was duly adjudged a bankrupt. The prayer was for recovery upon the notes with the interest specified therein from date of execution. The defendant answered that the action was barred "by subdivisions 1 and 2 of section 337 of the Code of Civil Procedure" and by the discharge in the bankruptcy proceedings pleaded in the complaint.

The evidence disclosed that the written promise to pay when able was executed after the decedent was adjudicated a bankrupt but before his discharge. It disclosed that in 1930 and 1931 the deceased had acquired equities in certain real and personal property and had raised substantial crops on farming lands owned or operated by him; that he resided and was engaged in business during that period in Monterey county; and that he had made numerous deposits in cash with a local bank during that period far in excess of his indebtedness to plaintiff. On this evidence the trial court found that for more than four years prior to the commencement of the action the deceased was able to pay the indebtedness; that the action was barred by section 337 of the Code of Civil Procedure and by the proceedings in bankruptcy.

This opinion can be confined to two of the points raised by the appellant—the sufficiency of the plea of the bar of the statute, and the sufficiency of the evidence of ability to pay at a time four years prior to the commencement of this action.

[1,2] The answer pleaded a bar by "subdivisions 1 and 2 of section 337 of the Code of Civil Procedure." Section 458 of this Code provides: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section—(giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure." The pleading complies with the

demands of this section. Appellant relies on Overton v. White, 18 Cal.App.2d 567, 64 P.2d 758, 760, 65 P.2d 99. The case is not in point. The pleading there criticized read: "barred by section 337, c. 3, tit. 2, p. 2." It was there held that this did not meet the requirement to plead the subdivision of the section "if it is so divided." Here the action was one coming within the terms of the first subdivision of section 337. The pleading of the second subdivision was surplusage, but harmless. Appellant argues that, since the defense relied on proof of ability to pay for more than four years, it was necessary to plead the facts showing such condition. But section 458 provides that it is not necessary to state the facts showing the defense, and we cannot add a condition to the statute.

The facts hereinbefore stated show that the deceased was in possession of considerable property and funds in 1930 and 1931. The trial court held that deceased was able to pay the indebtedness at that time. The evidence, though meager, is sufficient to support this finding and this supports the conclusion that the action is barred.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



24 Cal.App.2d 342

**FAVELLO et al. v. BANK OF AMERICA
NAT. TRUST & SAVINGS ASS'N.**

Civ. 5760.

District Court of Appeal, Third District,
California.

Jan. 11, 1938.

Hearing Denied by Supreme Court
March 10, 1938.

1. Acknowledgment ⇨1

To "acknowledge" is to admit, affirm, declare, testify, avow, confess, or own as genuine an execution of a document.

[Ed. Note.—For other definitions of "Acknowledge; Acknowledgment," see Words & Phrases.]

2. Acknowledgment ⇨36(1)

An officer taking an acknowledgment is required to certify that declarant personally appeared before him, that declarant was

known to be one subscribing to declaration, and that declarant acknowledged that he executed document. Civ.Code, §§ 1188, 1189.

3. Acknowledgment ⇨36(1)

The form of certificate of acknowledgment, order in which necessary facts appear therein, and particular words used to set forth those facts are immaterial in determining sufficiency of certificate. Civ.Code, §§ 1188, 1189.

4. Homestead ⇨5

Statutes for purpose of carrying out preservation of homestead, such as statute requiring acknowledgment of declaration of homestead, are remedial and should be at least fairly and reasonably construed. Civ. Code, § 1262.

5. Acknowledgment ⇨49

Technical construction of a certificate of acknowledgment is to be avoided wherever words are reasonably susceptible of an interpretation which will give meaning to all of its clauses and make it legally effective. Civ.Code, §§ 1188, 1189.

6. Acknowledgment ⇨49

A statement in certificate of acknowledgment of declaration of homestead that declarant, on being duly sworn, "deposes" and says that he was the declarant who made the declaration of homestead, established that declarant affirmed fact of his execution of document and gave definite testimony to that effect, since word "depose" means to bear witness to, state of oath, or give testimony. Civ.Code, § 1262.

[Ed. Note.—For other definitions of "Depose," see Words & Phrases.]

7. Homestead ⇨45

Where certificate of acknowledgment of declaration of homestead and its recitals established that mark of declarant, who was unable to write, was made in presence of two witnesses, one of whom wrote his name near mark, that declarant was duly sworn, deposed and stated that he was declarant making annexed declaration of homestead, and that declarant signed that statement with his mark before two witnesses, one of whom again wrote his name near mark, acknowledgment substantially complied with statute so as to render declaration of homestead valid. Civ.Code, §§ 1188, 1189, 1262.

8. Acknowledgment ⇨29

An acknowledgment cannot take place of a verification, but a verification, if it con-

tains necessary information, may act as an acknowledgment. Civ.Code, §§ 1188, 1189.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Tony Favello and another against the Bank of America National Trust & Savings Association to restrain an execution sale of real property on the ground that it was exempt as a homestead. From an adverse judgment, defendant appeals.

Affirmed.

Louis Ferrari and George D. Schilling, both of San Francisco, and C. Ray Robinson, of Merced, for appellant.

Gregory P. Maushart, of Los Banos, and Francis W. Murphy, of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment arising from an action to restrain an execution sale of real property on the ground that it was exempt by virtue of the prior recordation of a declaration of homestead by the judgment debtor, a plaintiff herein.

It is the contention of appellant that the declaration of homestead above referred to is invalid and ineffective to create a homestead exemption by reason of the fact that the declaration was not acknowledged, as required by law.

We need not set forth the declaration of the homestead, as that appears to be regular and in due form. This instrument was executed by Tony Favello by making his mark. His signature by mark was witnessed by two witnesses, accompanied by the following:

"Tony Favello being unable to write, made his mark and signature in our presence and his name was at his request, written near it by Gregory P. Maushart and we at his request have signed our names as witnesses to said mark and signature.

"Gregory P. Maushart,

"Carmella Malardino,

"Witnesses to said mark and signature.
"State of California,
"County of Merced.—ss.

"Tony Favello, being duly sworn, deposes and says:

"That he is the declarant named in and who makes the within and annexed declaration of homestead; that he has read the

same and knows the contents thereof, and that the matters therein stated are true of his own knowledge.

his
"Tony X Favello
mark

"Tony Favello being unable to write, made his mark and signature in our presence and his name was, at his request, written near it by Gregory P. Maushart and we at his request, have signed our names as witnesses to said mark and signature.

"Gregory P. Maushart,

"Carmella Malardino,

"Witnesses to said Mark and Signature.

"Subscribed and sworn to before me this 21 day of March, 1935.

"[Seal] Gregory P. Maushart,

"Notary Public in and for the County of Merced, State of California."

[1] Section 1262 of the Civil Code requires that the declarant acknowledge his execution of the homestead, which acknowledgment must be endorsed on or attached to the instrument. To acknowledge is, according to Webster's International Dictionary, "to admit, affirm, declare, testify, avow, confess or own as genuine his execution of the document."

[2] The officer taking an acknowledgment is required by section 1188 of the Civil Code to indorse on or attach to the instrument a certificate substantially in the form required by section 1189 of the same Code, by which he is required to certify to three factors: First, that the declarant personally appeared before him; secondly, that the declarant was known to him to be the person whose name is subscribed to the declaration; and, thirdly, that the declarant acknowledged that he executed the document.

[3] The form of the certificate used, the order in which these facts appear, and the particular words used to set forth these facts, are of no consequence.

In examining the recitals and certificate annexed to the instrument before us, we find that Favello, being unable to write, made his mark; secondly, that he made his mark in the presence of the two required witnesses; thirdly, at his request his name was written near the mark by Gregory P. Maushart, and that Maushart was one of the two witnesses to the signature of Favello by mark; fifthly, that Favello was duly sworn, deposed and said, "that he is the declarant named in, and he makes the within and annexed declaration of homestead

* * *"; sixthly, he signed this sworn statement again by mark, his name again being written by Maushart, who again was one of the required two witnesses, and that he signed and swore to his declaration before the same Maushart as a notary public.

[4, 5] That the statutes, for the purpose of carrying out the preservation of a homestead, are remedial, and should be at least fairly and reasonably construed, is established as early as *Southwick v. Davis*, 78 Cal. 504, 21 P. 121. In *Reed v. Bank of Ukiah*, 148 Cal. 96, 82 P. 845, in considering an attack on the sufficiency of a certificate of acknowledgment to a mortgage, the court said in substance that it was the policy of the law to construe certificates of acknowledgment liberally, and, if words of equivalent import to those of the statute were employed, it was sufficient, and the certificate would not be vitiated by unsubstantial clerical errors, nor by omission of words not essential to an intelligent understanding of its meaning. Technical construction is to be avoided wherever the words are reasonably susceptible of an interpretation which will give meaning to all of its clauses and make it legally effective.

In *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108, Chief Justice Field, delivering the opinion for the court, laid down the general rule that a certificate of acknowledgment is to be sustained, if possible, and referred to the case of *Brooks v. Chaplin*, 3 Vt. 281, 23 Am. Dec. 209. In that case the certificate did not show in what state the acknowledgment was taken, but the omission was supplied by reference to the deed in which the grantor described himself as a resident of Suffield, in the county of Hartford, state of Connecticut.

[6, 7] Having in mind the three essential facts necessary in the making of an acknowledgment we find that Favello was personally present before Maushart, for it appears upon the document that in two instances Favello's name was signed to it by a witness, which witness was himself the officer certifying its execution, and reciting that Favello, being unable to write, "made his mark and signature in our presence." The fact that Favello was known to Maushart is also made to appear in the same language. In the affidavit the declarant was sworn, deposed and said, "that he is the declarant named in and who makes the within annexed declaration of homestead." To depose is "to bear witness to, state of oath, or give testimony." It is

therefore evident that Favello affirmed the fact of his execution of the document, and that he gave definite testimony to that effect. In effect it appears from the document that Tony Favello stated on oath that he was the declarant who made the declaration of homestead, and that the matters therein stated were true.

In *Carpenter v. Dexter*, 8 Wall. 513, 526, 19 L. Ed. 426, we find the court holding:

"The law of Illinois in force in 1847, upon the manner of taking acknowledgments, provides that no officer shall take the acknowledgment of any person, unless such person 'shall be personally known to him to be the real person who (executed the deed), and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness,' and such personal knowledge, or proof, shall be stated in the certificate. Rev. Stat. Ill. of 1845, chap. 24, § 20.

"Looking, now, to the deed itself, we find that the attestation clause states that it was 'signed, sealed, and delivered' in the presence of the subscribing witnesses. One of these witnesses was the justice of the peace before whom the acknowledgment was taken; and he states in his certificate following immediately after the attestation clause, that the 'above-named William T. Davenport, who has signed, sealed, and delivered the above instrument of writing, personally appeared' before him and acknowledged the same to be his free act and deed. Read thus with the deed the certificate amounts to this: that the grantor personally appeared before the officer, and in his presence signed, sealed, and delivered the instrument, and then acknowledged the same before him. An affirmation, in the words of the statute, could not more clearly express the identity of the grantor with the party making the acknowledgment."

[8] Appellants call our attention to *Pasqualetti v. Hilson*, 43 Cal. App. 718, 185 P. 693, where a notice of nonliability was acknowledged by the owner of the property before a notary public, whereas section 1192 of the Code of Civil Procedure requires such notice to be verified. The court held that the use of an acknowledgment instead of a verification was not a sufficient compliance with the statute. That is entirely correct. An acknowledgment cannot take the place of a verification, but there is no reason why a verification, if it contains the necessary information, may not act as an acknowledgment.

We are of the opinion that the acknowledgment heretofore referred to complied, in substance, with all the requirements of the statute, and, the homestead having been recorded prior to the time of the levy of the execution, the judgment should be affirmed, and it is so ordered.

I concur: THOMPSON, J.



24 Cal.App.2d 298

COLBURN v. SHURAVLEV.
Civ. 10637.

District Court of Appeal, First District,
Division 2, California.

Jan. 7, 1938.

Hearing Denied by Supreme Court
March 7, 1938.

1. Landlord and tenant ☞ 164(1, 6)

The common-law rule that in absence of fraud, concealment, or covenant in lease, a landlord is not liable to a tenant for injuries due to defective condition or faulty construction of demised premises, has not been changed by statute, and fact that landlord was given notice to repair under statute is immaterial. Civ.Code, § 1941.

2. Landlord and tenant ☞ 164(1)

In absence of special warranty or agreement, a tenant in taking leased premises assumes all risks which are obvious to ordinary observation.

3. Landlord and tenant ☞ 164(7)

A tenant, who knew of defective condition of rug when she took possession of apartment, could not recover from landlord for injuries sustained in tripping over rug, since a tenant who voluntarily remains on leased premises with full knowledge of their dangerous or defective condition assumes all risks which are obvious to ordinary observation.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Steffane Colburn, a tenant, against Ivan Y. Shuravlev, landlord, to recover damages for injuries sustained when plaintiff tripped over a defective rug in defendant's apartment building.

From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Maurice R. Carey, Lloyd Hummel, and John A. Gorfinkel, all of San Francisco, for appellant.

Cooley, Crowley & Supple, of San Francisco, for respondent.

NOURSE, Presiding Judge.

In an action for personal injuries, defendant had a judgment for nonsuit from which plaintiff appeals. The action was brought by a tenant against a landlord to recover damages caused to the tenant when she tripped over a defective rug in defendant's apartment and fell injuring her shoulder. Plaintiff first occupied the premises on August 19, 1936, under a month to month tenancy; the injury occurred October 25, 1936. On that day plaintiff had removed the rug from its usual place in the hall and had placed it on the living room rug for the purpose of cleaning it. When the front door bell rang, she hurried to the door and tripped over the rug. At the time she first occupied the apartment, and again a month prior to the injury, plaintiff had notified defendant's manager of the defect in the rug and each time had received the promise that it would be repaired.

On this appeal the respondent contends in support of the judgment that the defect in the rug was patent; that appellant knew of this defective condition at the time she took possession of the premises and throughout the period of her occupancy; that she had an effective remedy under section 1942 of the Civil Code to either repair the defect and deduct the cost thereof from the rent or to vacate the premises. For these reasons, it is contended that plaintiff voluntarily assumed the risks to be anticipated from the dangerous condition of the premises. The appellant does not meet these contentions with any argument supported by California authorities. Her points relating to the duty of the landlord generally, the rules relating to the defense of contributory negligence and to the excuse of "momentary forgetfulness" do not require discussion because the rights of the parties are controlled by the principles which follow. The rule, which is supported in this state by a long line of decisions, is stated in 15 Cal.Jur. pp. 704-706, as follows:

[1,2] "In the absence of fraud, concealment, or covenant in the lease, a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises. This is the rule at common law, and it has not been changed by section 1941 of the Civil Code. That the landlord was given notice under the statute to repair is immaterial. * * * In the absence of special warranty or agreement, the tenant in taking the leased premises assumes all risks arising from damages which are obvious to ordinary observation."

[3] It is sufficient to cite in support of the text *Watwood v. Fosdick*, 212 Cal. 84, 297 P. 881; *Griggs v. Cook*, 106 Cal.App. 551, 289 P. 693; *Ellis v. McNeese*, 109 Cal.App. 667, 293 P. 854; *Priver v. Young*, 62 Cal.App. 405, 216 P. 966, and *Van Every v. Ogg*, 59 Cal. 563. The purport of these decisions is that, when a tenant voluntarily remains on leased premises with full knowledge of their dangerous or defective condition, he assumes all risks which are obvious to ordinary observation.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



24 Cal.App.2d 144

GARFIELD v. PEOPLES FINANCE & THRIFT CO. OF RIVERSIDE et al.

Civ. 1689.

District Court of Appeal, Fourth District, California.

Dec. 21, 1937.

Rehearing Denied Jan. 18, 1938.

Hearing Denied by Supreme Court
Feb. 17, 1938.

1. Malicious prosecution §53

The existence of malice of defendants and lack of probable cause for their filing of criminal complaints must be alleged and proved by plaintiff before judgment based on malicious prosecution can be sustained.

2. Malicious prosecution §56

In a malicious prosecution action, burden of proving both malice and lack of probable cause is on plaintiff.

3. Malicious prosecution §32

Although malice, as matter of law, is not presumed to exist because of lack of

probable cause for filing of criminal complaints, it may be inferred as question of fact where there is no probable cause shown in malicious prosecution action.

4. Malicious prosecution §23

In a malicious prosecution action, lack of probable cause for filing of criminal complaints cannot be inferred from existence of malice.

5. Malicious prosecution §24(6)

In malicious prosecution, evidence of the commitment of plaintiff by magistrate under criminal complaints filed by defendants was prima facie evidence of probable cause for filing of complaints.

6. Malicious prosecution §71(2)

In malicious prosecution action, where there is no substantial conflict in evidence, question of what facts and circumstances amount to probable cause for filing of complaint is one of law.

7. Evidence §66

Where an ambulance registration certificate showed finance company, the mortgagee, as legal owner and plaintiff's lessor, the mortgagor, as registered owner, and the "white slip" was in ambulance while it was in plaintiff's possession as lessee, plaintiff, who was suing finance company and its employee for malicious prosecution for filing complaints against plaintiff for exhibiting a gun when defendants tried to repossess the ambulance, was charged with notice of condition of record title of ambulance as set forth in certificate. St.1931, p. 2517, § 45¼; St.1923, p. 519, § 16; St.1929, p. 514, § 45 (e); Pen.Code, § 693, subd. 2.

8. Appeal and error §93(1)

The reviewing court, in measuring sufficiency of proof, in malicious prosecution action, of probable cause of one of defendants, when he swore to criminal complaint filed against plaintiff, must accept plaintiff's version of the controversy as true.

9. Weapons §14

The pointing of the weapon at complaining witness is not a necessary element of the statutory offense of exhibiting a deadly weapon in a rude, angry, or threatening manner. Pen.Code, § 417.

10. Malicious prosecution §18(1)

In malicious prosecution action, existence of probable cause for filing of complaint must be determined from facts as they

appeared to defendant at time he filed the complaint.

11. Malicious prosecution ⇨19, 20

In malicious prosecution action, the actual guilt or innocence of person against whom defendant filed a complaint is not a controlling factor, since it is only necessary that there be probable cause to believe plaintiff guilty; "probable cause" being a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in belief that charge is true.

[Ed. Note.—For other definitions of "Probable Cause," see Words & Phrases.]

12. Malicious prosecution ⇨64(2)

In malicious prosecution action against mortgagee finance company and its employee, for filing criminal complaint against plaintiff for exhibiting a gun in an angry manner when defendants attempted to repossess an ambulance which plaintiff had leased from mortgagor, who was shown on a registration certificate as registered owner and who had made loan from mortgagee, which appeared on registration certificate as legal owner, evidence not supporting finding of malice and lack of probable cause *held* insufficient to authorize recovery. Pen.Code, §§ 417, 693, subd. 2; St.1923, p. 519, § 16; St.1929, p. 514, § 45.

13. Malicious prosecution ⇨32

In malicious prosecution action, where probable cause for filing of criminal complaint was proven, malice could not be inferred.

14. Malicious prosecution ⇨22

Where defendant in malicious prosecution action had interviewed district attorney and had been sent by him to deputy district attorney for further interrogation, advice of deputy in matter of filing complaint charging plaintiff with assault with deadly weapon constituted an adequate defense, if established, since deputy was acting for his chief.

15. Malicious prosecution ⇨56

To sustain burden of proving malice and want of probable cause in malicious prosecution action, plaintiff must prove that complaining witness did not have reasonable grounds for believing that material facts alleged in criminal complaints were true.

16. Appeal and error ⇨1010(1)

In malicious prosecution action against mortgagee of ambulance and its employee for

filing complaint charging assault with deadly weapon against plaintiff, a physician, who exhibited gun when mortgagee's employee sought to repossess ambulance which plaintiff had leased from mortgagor, evidence showing that defendant communicated facts to deputy district attorney, and that story told to deputy as to what occurred differed from plaintiff's testimony only in immaterial matters, *held* to require reversal of judgment for plaintiff on ground that defendant instituted prosecution in good faith on advice of counsel and that there was probable cause for belief in truth of charges.

Appeal from Superior Court, Riverside County; Roy D. McPherrin, Judge.

Action by Sidney R. Garfield against Peoples Finance & Thrift Company of Riverside and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Best & Best, of Riverside, for appellants.

Edward W. Lloyd, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiff for damages for alleged malicious prosecution resulting from his arrest under two criminal complaints which were sworn to by J. D. Weatherly, an employee of the Peoples Finance & Thrift Company of Riverside.

The amended complaint contains two causes of action. The first is based on a complaint sworn to before the justice of the peace of Mecca township in Riverside county in which plaintiff was charged with violating the provisions of section 417 of the Penal Code. The second is based on a complaint filed in Riverside township charging plaintiff with assault with a deadly weapon.

The answers of the defendants put in issue all of the material allegations of the amended complaint and pleaded that they acted on the advice of counsel. The answer of the corporate defendant further puts in issue the authority of J. D. Weatherly, its employee, who swore to the two complaints. This defense seems not to have been stressed during the trial and need not be considered here.

The trial court found in favor of plaintiff on all material issues. It found dam-

ages under the first count in the sum of \$500, and under the second in the sum of \$2,549.49, and rendered judgment accordingly.

We need only consider here the questions of malice on the part of the defendants, probable cause, and the defense of acting on advice of counsel.

[1-4] The existence of malice on the part of the defendants and the lack of probable cause for filing the complaints must be alleged and proved by plaintiff before a judgment based on malicious prosecution can be sustained. The burden of proving both malice and lack of probable cause is on plaintiff. *Starkweather v. Eddy*, 210 Cal. 483, 292 P. 467. While malice, as a matter of law, is not presumed to exist because of lack of probable cause, it may be inferred as a question of fact where there is lack of probable cause. 16 Cal.Jur. 747, and cases cited. Lack of probable cause cannot be inferred from the existence of malice.

In *Burke v. Watts*, 188 Cal. 118, 204 P. 578, 581, it is said: "In *Runo v. Williams*, 162 Cal. 444, 450, 122 P. 1082, 1085, it is said: 'The two essential facts which must concur to support an action for malicious prosecution are want of probable cause and malice and the burden of proving both is upon the plaintiff. Malice in fact is really the foundation of the action and is usually the pivotal point upon which the action turns. It is always a fact directly in issue. Its existence may be inferred by the jury from want of probable cause for the prosecution or from acts or declarations of the defendant expressing or indicating prejudice, ill will or malicious motive in the matter of the prosecution. The want of probable cause does not raise a legal presumption of malice; the law presumes nothing on that issue any more than it does on any other issue of fact in a civil action. The jury may, however, if they find that there was no probable cause for the prosecution infer malice therefrom, although malice is not a necessary inference to be deduced therefrom.' It was held in *Moneyweight Scale Co. v. McCormick*, 109 Md. 170, 72 A. 537, that 'the malice which is required to be shown is the wrongful motive that prompted the prosecution, and may be established by proof of any other motive than that of bringing a guilty party to justice.'"

In *Johnson v. Southern Pacific Company*, 157 Cal. 333, 107 P. 611, 613, it is said:

"It was shown that, after the taking of the evidence upon the preliminary examination, the committing magistrate adjudged that the plaintiff was probably guilty of the offense and made the order committing him to answer thereto in the superior court. It is settled law that this is prima facie evidence of the existence of probable cause for the prosecution. *Ganea v. Southern Pacific R. R. Co.*, 51 Cal. 140; *Hahn v. Schmidt*, 64 Cal. 284, 286, 30 P. 818; *Diemer v. Herber*, 75 Cal. 287, 290, 17 P. 205; *Holliday v. Holliday*, 123 Cal. 26, 32, 55 P. 703."

[5] If there is no evidence sufficient to overcome this prima facie evidence of probable cause arising from the commitment of Dr. Garfield by the magistrate, plaintiff's case must fail for want of proof of probable cause.

In *Lee v. Levison*, 173 Cal. 166, 159 P. 438, 440, "probable cause" is thus defined: "This court from the earliest history of the state has adopted the definition for 'probable cause' derived from the discussion in *Greenleaf's treatise on Evidence*: 'Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.'"

[6] In *Richter v. Neilson*, 11 Cal.App. 2d 503, 54 P.2d 54, 59, the court said: "The rule is that where there is no substantial conflict in the evidence the question of what facts and circumstances amount to probable cause is one of law (*Booraem v. Potter Hotel Co.*, 154 Cal. 99, 97 P. 65; *Holliday v. Holliday*, 123 Cal. 26, 55 P. 703; *Ball v. Rawles*, 93 Cal. 222, 28 P. 937, 27 Am.St.Rep. 174 [supra]; *Moore v. Durrer*, 127 Cal.App. 759, 16 P. 2d 676; *Haydel v. Morton*, 8 Cal.App.2d 730, 48 P.2d 709, [supra]); and that no presumption of malice arises from a want of probable cause. *Griswold v. Griswold*, 143 Cal. 617, 77 P. 672 [supra]. Moreover, probable cause does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting; and the question of whether there was probable cause must be determined from the facts as they existed and appeared to the party prosecuting at the time he preferred the charge. *Harkrader v. Moore*, 44 Cal. 144; *Griswold v. Griswold*, supra."

At page 514 of 11 Cal.App.2d, at page 59 of 54 P.2d of this last-cited case it is further said: "We are also unable to sustain

plaintiff's contention that a legal duty was imposed on defendant 'to check up on the actual payments' which had been made by plaintiff before swearing to the complaint, and that her failure so to do was evidence of malice. The rule is that if there are any circumstances within the knowledge of the prosecuting witness, or which he is chargeable with knowing, which would destroy the apparent effect of the facts stated by him, or if, after obtaining the advice of counsel, and before acting upon it, other facts should come to his knowledge, which he did not submit, his good faith in seeking advice or in acting thereon would be impeached, and the defense dependent upon such good faith would fail. But it is not necessary that a prosecuting witness shall institute an investigation of the crime itself, or seek to ascertain whether there are other facts relating to the offense, or to find out whether the accused has any defense to the charge; nor is he required to exhaust all sources of information bearing upon the facts which have come to his knowledge, and therefore if it is shown that he acts in good faith and fairly discloses to the prosecuting attorney all the facts within his knowledge relating to the offense, and is advised that there is probable cause for an arrest, his defense of probable cause is established and he is exonerated from liability even though the defendant should show at the trial other facts sufficient to secure his acquittal and which might have been ascertained by the prosecuting witness if he had made more diligent inquiry therefor. *Dunlap v. New Zealand F. & M. I. Co.*, 109 Cal. 365, 42 P. 29, [supra]; *Ball v. Rawles*, supra; *Johnson v. Southern Pacific Co.*, 157 Cal. 333, 107 P. 611 [supra]."

With these well-settled rules of law before us, we must proceed to the consideration of the three questions confronting us, namely, sufficiency of the proof of malice, sufficiency of the proof of lack of probable cause, and sufficiency of the proof that defendants acted in good faith and on the advice of counsel.

There is no direct evidence of the existence of any malice on the part of either defendant. The proof of the existence of malice must depend on the sufficiency of the evidence to establish lack of probable cause for the prosecution, for if plaintiff did not establish lack of probable cause there would be no proof of malice. Under such circumstances there would be no

proven fact from which malice could be inferred by the trier of fact. Therefore, we must examine the evidence to determine its sufficiency to support the finding of lack of probable cause for the two prosecutions, not only to determine its sufficiency on that question but also on the question of malice. They must stand or fall together.

Plaintiff is a duly licensed and practicing physician and surgeon who was operating several hospitals for the care of employees of contractors engaged in constructing the aqueduct for the Metropolitan Water District. He was stationed at one of these hospitals near Desert Center in Riverside county. This hospital was known as the Contractors General Hospital. In October, 1933, he needed an ambulance for use at this hospital. Thomas J. Casey was an undertaker with his place of business in Indio. Plaintiff and Casey entered into a parol agreement whereby Casey secured an ambulance for the use of plaintiff at his Desert Center Hospital. The terms of this agreement are not at all clear and can only be estimated from what was done under it and from a most informal writing executed on October 5, 1934.

Casey purchased the ambulance from a sales agency of the Ford Motor Company. An unpaid balance of its purchase price was financed in the usual way through the Universal Credit Company. Plaintiff was to pay Casey \$25 per month for eighteen months. These monthly payments were to be applied on this debt, the balance of each of the monthly installments was to be paid by Casey, who was to conduct the funerals of those dying at plaintiff's hospital. Painted on the sides of the ambulance were the words "Contractors General Hospital." In October, 1933, the ambulance was placed in plaintiff's possession at his Desert Center Hospital, where it remained until a short time after May 28, 1935, except for a few days in the summer of 1934 when Casey repossessed it. Apparently plaintiff was to pay all expenses of operation and upkeep and was to have the use of the ambulance until the aqueduct should be completed. The Universal Credit Company appeared on the state registration certificates as the legal owner and Thomas J. Casey as the registered owner of the ambulance. These certificates did not disclose any interest of plaintiff in the ambulance as lessee or otherwise.

Early in March, 1935, Casey probably became delinquent in his payments to the Universal Credit Company. On three prior occasions the Peoples Finance & Thrift Company of Riverside had financed the purchase of motor vehicles for Casey. On each of these occasions the loans had been satisfactorily repaid. He went to the office of the corporation in Riverside and through L. A. Weatherly, its manager, negotiated a new loan with the ambulance as security. Weatherly testified that Casey told him that he (Casey) was using the ambulance at the Desert Center Hospital, but told him nothing of any lease to or contract with plaintiff. Casey's testimony on this question is conflicting. At one time he testified he told Weatherly that plaintiff had the ambulance under some agreement; that he (Casey) was in default because plaintiff owed him money and would not pay it. He several times corroborated the testimony of Weatherly.

[7] The loan to Casey was made by the Peoples Finance & Thrift Company of Riverside. Its money was used to pay the purchase price indebtedness of Casey to the Universal Credit Company. Casey and his wife executed a chattel mortgage on the ambulance to the Peoples Finance & Thrift Company of Riverside. It was duly recorded and filed. Section 45 $\frac{1}{4}$, California Vehicle Act, as added by St. 1929, p. 517, as amended by St. 1931, p. 2517. New registration certificates were issued showing the Peoples Finance & Thrift Company of Riverside as the legal owner and Casey as the registered owner. There is evidence that the "white slip" was in the ambulance while it was in plaintiff's possession, and until May 28, 1935. Plaintiff must, therefore, be charged with notice of the condition of the record title of the ambulance as set forth in this certificate. He at no time sought to register his interest under the lease.

Section 16 of the California Vehicle Act, St. 1923, p. 519, in effect at the time here in question, defined an "owner of a motor vehicle" as follows: "A person having the lawful use or control or the right to the use or control of a vehicle under a lease or otherwise for a period of ten or more successive days."

Section 45 of the same act, St. 1923, p. 524, as amended by St. 1929, p. 514, provides the formalities which must be observed on the transfer or change of ownership of a motor vehicle and requires a

change of the registration certificates. These provisions were not followed at the time plaintiff became lawfully entitled to the use and control of the ambulance under his lease which was for a period of more than ten successive days. Subdivision (e) of section 45, as amended by St. 1929, p. 514, provides as follows: "(e) Until said division shall have issued said new certificate of registration and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

We are not here concerned with the actual ownership of the ambulance. The foregoing sections of the California Vehicle Act only become important as they bear upon the good faith of the Peoples Finance & Thrift Company of Riverside in demanding possession of the ambulance and of plaintiff in resisting that demand and forcibly retaining its possession.

Casey made no payment on his indebtedness to the Peoples Finance & Thrift Company of Riverside though several demands were made upon him. Finally, he told the representatives of that corporation that he could not pay his indebtedness; that the ambulance was at the hospital near Desert Center; that the corporation should repossess and take possession of it.

On May 27, 1935, J. D. Weatherly was sent to the hospital to repossess the ambulance. He went to the hospital, saw plaintiff, and told him he had come for the ambulance. Plaintiff told Weatherly that he was in possession of the ambulance under an agreement with Casey and believed that his possession was legal. He (plaintiff) called his attorney in Los Angeles and was advised to retain possession. This was communicated to both J. D. and L. A. Weatherly. L. A. Weatherly finally advised his brother (J. D.) to return without the ambulance. The meeting was amiable. Several other matters were discussed at that time with which we need not burden this opinion.

On May 27, 1935, the attorney for the Peoples Finance & Thrift Company of Riverside held a telephone conversation with the attorney for plaintiff. Each attorney disclosed to the other the facts upon which his client based the claim of the

right of possession of the ambulance. The attorneys reached the conclusion that the controversy should be settled in a civil court action. This was a sensible as well as a sound legal conclusion which should have been followed, and if the advice of counsel had been followed this action would never have been instituted. There is nothing in the record to indicate that the attorneys for defendants had any advance information of the events that followed.

On May 28, 1935, L. A. Weatherly sent his brother to repossess the ambulance. He took Bill Peterson with him to drive the ambulance to Riverside. Asley Mullins accompanied the two on the trip.

When J. D. Weatherly reached the hospital he told plaintiff that he had come for the ambulance and was going to take it to Riverside. Plaintiff asserted his right of possession and refused to surrender it. Weatherly went to the ambulance, found the ignition locked and the key gone. His car was backed to the front of the ambulance and Weatherly proceeded to tie the two vehicles together with a rope. Plaintiff went to the place where the two vehicles were parked and attempted to untie the rope. Failing in this he called for a gun. A revolver was brought by Dr. I. S. Cherry, an assistant at the hospital. Plaintiff testified that with the gun hanging at his side, in his hand, he advanced to the rope and attempted to untie it; that he was unsuccessful in doing so because Weatherly held the ends of the knot; that while he held the gun at his side he said to Weatherly, "You better stay away from the ambulance"; that he did not threaten to shoot Weatherly nor did he point the gun at him; that he was "somewhat excited" and "somewhat angry" at the time; that he did not know that the revolver was unloaded; that as he could not untie the rope he called for a knife which was brought by a hospital interne and the tow rope was cut; that Weatherly then drove away with his companions saying, "Let's go get the sheriff." Plaintiff explained his reasons for arming himself as follows: "Why I thought the presence—I thought there was going to be a fight, and I thought the presence of a gun would impress them sufficiently so as to keep everything quiet and peaceful."

Dr. Cherry testified that when he procured the revolver he unloaded it. This

was not known to plaintiff until a later date.

Weatherly's testimony differs from that of the plaintiff in but three particulars: (1) That plaintiff pointed the revolver at him, and (2) said, "If you touch that ambulance I will shoot you"; (3) that the revolver was loaded as he could see the color of the shells and the bullets in the chamber of the cylinder. He was corroborated by his two companions in all particulars except as to the revolver being loaded. From the position they occupied they could not see into the chambers.

Weatherly went before the justice of the peace of Mecca township and made a complete statement of the above occurrence. The only particulars in which this statement differed from the testimony of plaintiff is (1) that the gun was pointed at Weatherly, and (2) that plaintiff threatened to shoot him if he touched the ambulance. There was nothing said at that time about the revolver being loaded.

Section 417 of the Penal Code provides as follows: "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, or any other deadly weapon whatsoever, in a rude, angry or threatening manner, or who in any manner, unlawfully uses the same in any fight or quarrel is guilty of a misdemeanor."

Subdivision 2 of section 693 of the Penal Code provides that lawful resistance sufficient to prevent a public offense may be made by the party about to be injured "to prevent an illegal attempt by force to take or injure property in his lawful possession."

[8,9] When we measure the sufficiency of the proof of probable cause of J. D. Weatherly when he swore to the complaint filed in Mecca township we must accept plaintiff's version of the controversy as true. *Murray v. Kunde*, 91 Cal.App. 440, 267 P. 158. Plaintiff admitted that he was excited and angry; that he exhibited the revolver in the hope that it would dissuade Weatherly from his purpose of taking the ambulance, or, in other and less elegant but expressive words, "bluff" Weatherly. Thus plaintiff admitted that his actions constituted a violation of every necessary element of the crime denounced by section 417 of the Penal Code, unless they were done in lawful defense of his possession

of the ambulance, as the pointing of the weapon at the complaining witness is not a necessary element of the offense charged. If he had no paramount lawful right of its possession he was clearly guilty of the offense charged.

[10-13] As we have before remarked, we are not here concerned with a decision of the fine and close legal question as to which party had the actual right of legal possession of the ambulance, for the existence of probable cause must be determined from the facts as they appeared to J. D. Weatherly at the time he filed the complaint. *Richter v. Neilson*, supra. The actual guilt or innocence of Dr. Garfield is not the controlling factor here for it is only necessary that there was probable cause to have believed him guilty. "Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." *Lee v. Levison*, supra. Weatherly knew that the ambulance was registered with the Peoples Finance & Thrift Company of Riverside as legal owner and Casey as the registered owner; that the corporation had a chattel mortgage which gave it the right of immediate possession under the existing default. He also knew from the certificates of registration that plaintiff had failed to attempt to register his leasehold interest and the penalty imposed for such failure. Sections 16 and 45, California Vehicle Act. These facts were sufficient to raise in his mind a reasonable belief that his employer had the legal right to the immediate possession of the ambulance. It follows that there was probable cause for filing the complaint in Mecca township. Probable cause having been proven, malice may not be inferred. The portion of the judgment rendered on the first cause of action must be reversed because the findings of malice and lack of probable cause are not supported by the evidence.

[14-16] The proof offered in support of the second cause of action differs in some respects from that introduced in support of the first. This variance sufficiently appears when we consider the defense of acting on advice of counsel.

On May 29, 1935, J. D. Weatherly interviewed the district attorney of Riverside county and was by him sent to a deputy district attorney for further interrogation. The testimony of these two officials is not contradicted.

It is not necessary to review the testimony of the district attorney as all facts disclosed to that officer were communicated to the deputy. The deputy was acting for his chief and the advice of the deputy should constitute an adequate defense, if established.

The deputy district attorney testified as follows:

"Mr. Weatherly came into my office. Someone brought him in, I don't remember who, and I asked him what his troubles were and he said that the day before he had gone down on the desert to retake possession of a car which was mortgaged to the Peoples Finance & Thrift Company here in Riverside, that he went down to the Contractors Hospital where this ambulance was located and that he told Doctor Garfield that he came to take possession of the ambulance; that he went out to take the ambulance; that there was someone there who attempted to interfere with his taking the ambulance and that he backed up or had his car backed up to the ambulance and tied a rope from the rear of his car on to the front part of the ambulance and Doctor Garfield came out of the hospital, out of the building and that Doctor Garfield told him not to take the car; that someone there had a gun and that Doctor Garfield got possession of the gun, that he pointed the gun at himself, Mr. Weatherly, and told Mr. Weatherly that if he touched the ambulance that he would shoot him.

"I asked Mr. Weatherly if the gun was loaded and Mr. Weatherly said, 'Yes, the gun was loaded.' I asked him how he could tell it was loaded and he said that he could see the rim of the butt end of the cartridge, that the gun was a revolver and that the brass part of the cartridge could be seen and he saw it and that he saw the bullets, or the bullet end of the cartridge, and I asked him if he was sure he could see those things and he said that he was. I asked him how far the gun was from him and he said within a foot or a foot and a half from his body and was pointing at him and I said, 'Well, if the gun was pointed directly at you how could you see the brass part of the cartridge,' and he said, 'Well, it was not pointed directly at me all the time, part of the time it was sideways,' so he could see that, the butt end of the cartridge, and I asked him who had given him the contract on the automobile and he said that Mr. Casey

of Indio had given him a contract and that it was an ambulance instead of an automobile, and I asked him how it happened the ambulance was down at the hospital and he told me that Mr. Casey had lent the automobile or rented the automobile on some sort of deal to the doctor and I asked him if he threatened Mr. Garfield in any manner himself and he said no, that he did not and he told me that the rope that was attached onto the ambulance was cut with a knife and I asked him if anybody attempted to assault him with a knife and he said no, there was no motion made toward him with the knife or any threat made with the knife. I asked him what kind of revolver it was and as I recall he told me he thought it was a .38.

"We talked there about half an hour, I imagine. I asked him if he had the pink certificate on the automobile and as I recall he told me that the Peoples Finance & Thrift Company had it, and he told me about the mortgage. I asked him if it was a chattel mortgage in the regular form and he said it was. I asked him if it provided he could retake possession of the automobile in default of payments and he said it did. I do not just recall any other part of the conversation I had.

"Q. By Mr. Best: Was anything said about being there on the day previous? A. Oh yes. He told me he had been there the day before and I went into that thoroughly with him and he said when he went down the day before he stopped at Mr. Casey's and Mr. Casey told him to go and take the ambulance, that it was down at the Contractors General Hospital and to go down and get it if he wanted; that he went down there and saw Doctor Garfield and talked with him and that Doctor Garfield called up his attorney, Mr. Paradise, and that he called up the Peoples Finance & Thrift Company in Riverside and that he left that day but was ordered to go back on the following day to take possession of the car.

"Q. Was anything said about the terms of this rental agreement or lease or anything of that kind? A. Not that I recall. As I recall he did not have the rental agreement with him. I don't recall having seen that at that time but he told me that Doctor Garfield had either borrowed or rented the car from Mr. Casey, and I had some discussion with him about the person who had mortgaged the car or given title to it as security for a debt, as to

his right to lease it, and I believe I told Mr. Weatherly that the person who had given a contract on the car, the person who rented a car from another party who had a contract on it, that he acquired no greater right than the person who gave it, that had the contract against the car.

"Q. Then was a complaint signed? A. Yes, I suppose there was. There was a complaint in the office given to Mr. Weatherly and he was directed to go to the Justice Court and file it.

"Q. Did you give Mr. Weatherly any advice in regard to signing the complaint or not? A. Yes, I told Mr. Weatherly there was sufficient evidence to warrant the filing of the criminal complaint charging assault with a deadly weapon, in my opinion."

It thus appears that the story told to the deputy district attorney by J. D. Weatherly differs from the testimony of plaintiff in but three particulars: (1) The revolver was loaded; (2) it was pointed at Weatherly; and (3) plaintiff threatened to shoot Weatherly.

It should be here noted that at the preliminary examination held on the felony charge, the committing magistrate held plaintiff to answer. This was prima facie evidence of the existence of probable cause. It should also be observed that no one, including plaintiff, knew that the revolver was unloaded, except Dr. Cherry. On May 29, 1935, after the plaintiff had been released on his own recognizance, he, with his attorney, appeared in the office of the district attorney and made a voluntary statement which was taken down in shorthand by a stenographer. In that statement the following appears:

"Q. Weatherly says you came out with a gun in your hand and told him you would shoot him if he touched the ambulance. Do you remember that? A. I might have said it. As a matter of fact, he did touch the ambulance and tied a rope on it and I did not shoot him. * * *

"Q. Did you point the gun at any of these fellows? Weatherly says you pointed it at him and told him you were going to shoot him if he didn't leave it alone. Did you do that? A. I don't particularly recall doing that. I know I had the gun in my hand and I believe I avoided pointing it at him."

The case of *Perry v. Washington National Ins. Co.*, 14 Cal.App.2d 609, 58 P.

2d 701, 704, 59 P.2d 158, is persuasive here. There the plaintiff recovered damages for malicious prosecution. The defendants presented their case to a deputy district attorney and were advised to file complaints. The facts they detailed to the official were widely variant from the plaintiff's evidence of the affray which was proven at the trial of the malicious prosecution action and upon which the judgment rested. In reversing the judgment because plaintiff had failed to prove malice and lack of probable cause and because defendants had acted on the advice of counsel, the court said:

"And with regard to the causes of action for malicious prosecution it is well established, as pointed out in *Haydel v. Morton*, 8 Cal.App.2d 730, 48 Pac.2d 709, and *Richter v. Neilson*, 11 Cal.App.2d 503, 54 P.2d 54, that the burden is always upon the plaintiff to establish the concurrence of two indispensable elements, first, that the defendant acted without probable cause, and, secondly, that he was actuated by a malicious motive. *Griswold v. Griswold*, 143 Cal. 617, 77 P. 672; *Moore v. Durrer*, 127 Cal.App. 759, 16 P.2d 676; *Davis v. Pacific Tel. & Tel. Co.*, 127 Cal. 312, 57 P. 764, 59 P. 698; *Carpenter v. Ashley*, 15 Cal.App. 461, 115 P. 268. As shown also in the *Haydel* and *Richter* Cases, *supra*, the term 'probable cause' as used and applied in the law of malicious prosecution has been defined to be a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true (*Johnson v. Southern Pacific Co.*, 157 Cal. 333, 107 P. 611; *Lee v. Levison*, 173 Cal. 166, 159 P. 438; *Selvester v. Kennedy*, 137 Cal.App. 250, 30 P.2d 63, and cases cited therein); and in this connection it has been repeatedly held that the existence of probable cause is not negated merely by a showing that the accused has been able at the trial of the criminal charge to obtain an acquittal; that such favorable determination does not even create a conflict on the issue of probable cause. (*Haydel v. Morton*, *supra*; *Dunlap v. New Zealand F. & M. I. Co.*, 109 Cal. 365, 42 P. 29; *Moore v. Durrer*, *supra*; *McKenna v. Heinlen*, 128 Cal. 97, 60 P. 668). Furthermore, as indicated, even though a want of probable cause is shown, malice must also be affirmatively established (16 Cal.Jur. 735; 18 R.C.L. 28); and it is held, therefore, that though it be found that the facts upon which the person bas-

es the charge do not in point of law constitute a crime, if they are of such character as to induce in the mind of a reasonable person the honest belief that an offense has been committed and the accuser is not actuated by improper or sinister motives, he shall not be held liable in damages afterwards for having caused the arrest. [Citing cases.]

"Moreover, as stated in the *Richter* Case, *supra*, it has long since been the law that if in addition to his own belief a defendant proves that before commencing the prosecution of the action alleged to be malicious he sought the legal advice of an officer selected by the people to prosecute offenders against laws, and in good faith fully and fairly disclosed to that officer all the information he possessed, and he advises that a crime has been committed and the prosecution is instituted upon a complaint prepared by that officer, the defendant has made out a complete defense to the action [citing cases] however erroneous such advice may have been (*Potter v. Seale*, 8 Cal. 217, 218, 226; 18 R.C.L. 45)."

The burden of proving malice and want of probable cause rests on plaintiff and may not be lightly avoided. To sustain this burden he must prove that the complaining witness did not have reasonable grounds for believing that the material facts alleged in the criminal complaints were true. He did not sustain such burden. Plaintiff was excited and angry. He armed himself with a weapon. While so armed and angry he told Weatherly that he had better stay away from the ambulance. We must conclude that plaintiff did not in words threaten to shoot Weatherly nor did he point the revolver at him. If the weapon had been loaded and if plaintiff had been found guilty of the crime of assault with a deadly weapon, the judgment could not have been reversed because of insufficiency of the evidence. The threatening manner of plaintiff, had the revolver been loaded, coupled with his other acts, would have furnished the necessary elements of the crime. It is true that the revolver was not loaded. This fact was known only to Dr. Cherry. Plaintiff did not know that fact until after the altercation. Weatherly at all times stoutly maintained and believed that it was loaded. Ordinarily a man would not arm himself with an unloaded revolver and with it attempt to bluff three men who

were his adversaries. The very actions of plaintiff furnished grounds for the belief that the revolver was loaded.

The evidence shows that Weatherly did entertain a "suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." *Lee v. Levison*, supra. In other words, there was probable cause for his belief in the truth of the charges. The evidence shows that defendants instituted the prosecution in good faith on advice of counsel.

The judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



24 Cal.App.2d 302

PEOPLE v. CLARK.

Cr. 1587.

District Court of Appeal, Third District,
California.

Jan. 8, 1938.

Hearing Denied by Supreme Court
Feb. 7, 1938.

1. Jury $\hookrightarrow$ 29(2, 5)

A defendant charged with felony may waive jury trial or consent to trial by a jury consisting of less than 12 members. Const. art. 1, § 7, as amended in 1928.

2. Jury $\hookrightarrow$ 29(5)

Where one juror in felony prosecution became ill pending trial, and defendant personally and his attorney expressly waived in open court the absence of sick juror and consented to trial by remaining jurors, waiver was valid and court had jurisdiction to pronounce sentence. Const. art. 1, § 7, as amended in 1928.

3. Jury $\hookrightarrow$ 29(2)

The constitutional provision authorizing waiver of jury trial "in all criminal cases," which amended former provision authorizing such waiver only in misdemeanor cases, would be assumed to have been adopted expressly to extend right of waiver to felony cases. Const. art. 1, § 7, as amended in 1928.

4. Criminal law $\hookrightarrow$ 998

In criminal prosecution wherein court had jurisdiction and conviction was regular

on its face, defendant could take advantage only by appeal of fact that jury comprised only 11 members, and, by failing to appeal or to move for arrest of judgment or new trial, defendant waived objection to such irregularity and could not raise objection, after time for appeal had passed by habeas corpus, petition for special writ, or independent motion to set judgment aside and appeal from denial thereof.

5. Criminal law $\hookrightarrow$ 998

An independent motion to set aside judgment of conviction, made after lapse of time allowed for appeal from the judgment, may prevail only when the judgment is void.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Frank Clark was convicted of two felonies, and he presented motion to vacate the judgment of commitment. From an order denying the motion, he appeals.

Affirmed.

Frank Clark, in pro. per.

U. S. Webb, Atty. Gen., Wilmer W. Morse, Deputy Atty. Gen., and F. C. Cloudsley, Dist. Atty., and Max M. Wilens, Deputy Dist. Atty., both of Stockton, for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from an order of court denying his motion to vacate the judgment of commitment which was rendered against him upon conviction of two felonies. It is contended the court was without jurisdiction to render the judgment for the reason that the verdict was returned by only eleven jurors. One of the twelve jurors sworn to try the case became ill and was unable to complete the case. By consent of both parties, including the defendant and his attorney, in open court the absence of the sick juror was waived.

In March, 1931, the defendant was charged by an information filed in San Joaquin county with the crimes of robbery and an assault to commit murder, together with the former conviction of another felony. He admitted the former conviction, but pleaded not guilty to the other charges. He was represented at the trial by an attorney. A jury of twelve individuals was regularly impaneled and sworn to try the

cause. Pending the trial one of the jurors became ill and was unable to attend court. By consent of both parties, the defendant personally, his attorney agreeing thereto, expressly waived in open court the absence of the sick juror and the defendant consented to the completion of the trial with the remaining eleven jurors.

The jury, consisting of eleven persons, returned a unanimous verdict against the defendant, finding him guilty of the two felonies with which he was charged. No motion for a stay of judgment was made. Time for sentence was waived, and the defendant was sentenced to imprisonment in Folsom state prison. The prison board subsequently fixed his term at twenty-five years. Since that time he has been and now is serving sentence in that prison.

September 13, 1937, the defendant presented a motion to the superior court of San Joaquin county to vacate the judgment of commitment on the ground that the court was without jurisdiction to render it since he was not convicted by a jury consisting of twelve persons. This motion was made on the theory that the defendant had no authority to waive the absence of the sick juror or to consent to a trial by less than twelve jurors. The motion was heard upon stipulated facts. It is conceded the absence of the juror was waived by the defendant as above related and that he consented to be tried by the remaining eleven jurors. The motion was denied. From the order denying that motion this appeal was perfected.

[1,2] The motion to vacate the judgment was properly denied. The defendant was authorized by article 1, § 7, of the California Constitution to, and did in open court formally waive the absence of the twelfth juror, consenting to be tried by the remaining eleven jurors. That procedure did not divest the court of jurisdiction to pronounce judgment. There is no sound reason why a defendant may not waive a part of a jury since the constitution provision authorizes him to waive the entire jury. Since the amendment of the above section of the Constitution in 1928, that procedure is specifically authorized. Prior to 1928, article 1, § 7, of the Constitution provided that: "A trial by jury may be waived in all criminal cases *not amounting to felony*, by the consent of both parties, expressed in open court." That section now reads that "A trial by jury *may be waived in all criminal cases*, by the consent

of both parties, expressed in open court by the defendant and his counsel."

A defendant who is charged with a felony may waive trial by a jury or may consent to a trial by a jury consisting of less than twelve members. *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 254, 74 L.Ed. 854, 70 A.L.R. 279, note; 105 A.L.R. 1114, note. In the leading case, *Patton v. United States*, supra, under circumstances exactly like those of the present case, the verdict finding the defendant guilty of a felony, which was returned by a jury consisting of eleven persons, the twelfth juror having been excused on account of illness, was upheld as valid and binding. In that case the defendant in open court waived the absence of the twelfth juror. In an elaborate opinion which reviews all of the earlier cases on that subject, some of which are conflicting with the views there expressed, the Supreme Court of the United States definitely and logically holds that in the absence of a constitutional or statutory provision to the contrary, a defendant may waive a trial by jury, or he may consent to a trial by a jury consisting of less than twelve members. In that case every contention which is made by the defendant in this case is determined adversely to him. In the *Patton Case* the court says: "An appeal was taken to the Circuit Court of Appeals upon the ground that the defendants had no power to waive their constitutional right to a trial by a jury of twelve persons."

The Supreme Court concludes that:

"A person charged with a crime punishable by imprisonment for a term of years may, consistently with the constitutional provisions already quoted, waive trial by a jury of twelve and consent to a trial by any lesser number, or by the court without a jury. * * *

"We conclude that article 3, § 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so is to convert a privilege into an imperative requirement. * * *

"We are of opinion that the court has authority in the exercise of a sound discretion to accept the waiver, and, as a necessary corollary, to proceed to the trial and determination of the case with a reduced number or without a jury; and that jurisdiction to that end is vested by the foregoing statutory provisions. The power of waiver being established, this is the

clear import of the decision of this court in *Schick v. United States*, 195 U.S. 65, 70, 71, 24 S.Ct. 826, 49 L.Ed. 99, 102, 103, 1 Ann.Cas. 585."

A large number of cases from various jurisdictions support the foregoing conclusions of the Supreme Court.

[3] In the present case, not only is there no statute to the contrary, but the California Constitution, as amended in 1928, specifically authorizes the defendant to waive trial by jury "In all criminal cases," which includes both felonies and misdemeanors. The courts have consistently held that a defendant who is charged with a felony may waive a jury and plead guilty to the offense. Furthermore, it is held that when a defendant pleads guilty to the offense with which he is charged that procedure is, in effect, a waiver of his right to trial by jury. *People v. Lennox*, 67 Cal. 113, 7 P. 260; *People v. Hickman*, 204 Cal. 470, 476, 268 P. 909, 270 P. 1117; *State v. Baer*, 103 Ohio St. 585, 134 N.E. 786. Since the Constitution formerly authorized the waiver of a jury trial only in misdemeanor cases, it must be assumed the amendment was adopted for the express purpose of extending that right to felony charges.

The case of *People v. O'Neil*, 48 Cal. 257, upon which the appellant relies, is not determinative of this case, for the reason that the Constitution as it then existed did not permit a defendant to waive trial by a jury in a felony charge. It follows that since he could not then waive a trial by jury, he would not be permitted to consent to a verdict which was rendered by a part of a jury only. Moreover, that case was determined on the ground that the information failed to state a cause of action for the reason that it was not alleged the offense was committed in the county in which it was tried.

In the case of *People v. Garcia*, 98 Cal. App. 702, 277 P. 747, 748, which was tried after the amendment of the Constitution above referred to, the defendant was charged with a felony. At the trial both attorneys waived a trial by jury, but the defendant himself did not do so. The amendment provides that a trial by jury may be waived only "by the consent of both parties, expressed in open court by the defendant and his counsel." The court said in the *Garcia* Case: "It is at once obvious that this inviolate constitutional right may not be taken away in disregard

of the fundamental legal privilege and power of election guaranteed to the party charged, by attempting to vest in his representative the dual capacity and authority of counsel and accused."

The court also infers that the purported waiver of a trial by jury was not made, even by the attorneys, *in open court*. The defendant was convicted. The People appealed from the order granting defendant's motion for a new trial. That order was affirmed on appeal, on the sole ground that the defendant himself had not personally agreed to the waiver of a jury and that the purported waiver was not made in open court. That case does not afford the appellant in this case any comfort. It is not authority favorable to him.

The only other case in this jurisdiction, which even remotely refers to the issue which is involved in this case, is *People v. Bruneman*, 4 Cal.App.2d 75, 40 P.2d 891, 894. This case does not support the contention of the appellant in this cause. The *Bruneman* Case does not involve the question of waiver of a jury or any part thereof. The judgment of conviction in that case was reversed solely on the ground that two individuals who were not members of the trial jury, were permitted to remain in the jury room while the jury was engaged in considering the evidence and determining their verdict. It is true that those two individuals had been sworn as "alternate jurors." But they were not members of the jury which heard and determined the case. They had no right to be present while the jurors were considering and determining their verdict. Their participation in the deliberations of the jury sworn to try the cause, or even their presence in the jury room during the deliberations of the jury, was unlawful and rendered the verdict void. The court says in that case, quoting with approval from the case of *People v. Knapp*, 42 Mich. 267, 3 N.W. 927, 36 Am.Rep. 438, regarding that situation: "'The presence of a single other person in the room is an intrusion upon this privacy and confidence, and tends to defeat the purpose for which they are sent out.' Other cases, to like effect, are *Rickard v. State*, 74 Ind. 275; *State v. Wroth*, 15 Wash. 621, 47 P. 106; *Gibbons v. Van Alstyne*, 56 Hun 639, 9 N.Y.S. [156] 157."

[4,5] Moreover, since the trial of a criminal case without a jury, or by a jury consisting of less than twelve members, in

any event is no more than an irregularity of procedure, the court having jurisdiction of the person of the defendant and of the cause, if an error in that respect did exist, and we are of the opinion it did not exist in the present case, the defendant would be required to take advantage of the irregularity by an appeal from the judgment. The judgment in the present case is regular on its face. The defendant failed to move for an arrest of judgment or for a new trial. He also failed to appeal from that judgment. He therefore waived his objection to such asserted irregularity, and may not raise the question by habeas corpus, a petition for a special writ or by an appeal from an order denying his application to set the judgment aside by means of an independent motion which is made subsequent to the time allowed for an appeal from the judgment. It is only when the judgment is void that such a motion may prevail. *People v. Russell*, 139 Cal.App. 417, 34 P.2d 203; *People v. Howard*, 7 Cal.App.2d 283, 46 P.2d 268; *People v. Ramirez*, 139 Cal.App. 380, 33 P.2d 848; *Powelson v. Lockwood*, 82 Cal. 613, 23 P. 143; *In re Fife*, 110 Cal. 8, 42 P. 299; *Goodman v. Superior Court*, 8 Cal.App. 232, 96 P. 395; *Amos v. Superior Court*, 196 Cal. 677, 239 P. 317.

There is no merit in this appeal.

The order is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



24 Cal.App.2d 322

**JOHNSON v. CALIFORNIA INTERURBAN
MOTOR TRANSP. ASS'N et al.**
CIV. 10284.

District Court of Appeal, First District,
Division 1, California.

Jan. 11, 1938.

Rehearing Denied Feb. 10, 1938.

Hearing Denied by Supreme Court
March 10, 1938.

1. Associations ⇐20(18)

Evidence that president of voluntary association of motortruck freight carriers gave members the privilege of using name of association in proceedings before railroad commission, the expenses of which were to be borne by members, was insufficient to support finding that president of association had authority to employ attorneys at associa-

tion's expense to institute proceeding before commission to establish unlawfulness of operations of rival carrier, as respects liability of members of association for services rendered by attorneys.

2. Associations ⇐20(5)

Attorneys instituting proceeding before railroad commission to establish unlawfulness of operations of nonmember of voluntary association of motortruck freight carriers were charged with notice that president of association did not have authority to initiate proceeding on behalf and at expense of association, as respects liability of members of association for services rendered by attorneys.

3. Attorney and client ⇐166(2)

A letter from attorney to president of voluntary association of motortruck freight carriers, assuming that contract had been entered into employing attorneys to institute proceeding before railroad commission to establish unlawfulness of operations of nonmember, and setting forth attorneys' intended charges and stating that attorneys felt that a designated sum should then be raised, was insufficient to support finding that association entered into agreement with attorneys establishing scale of charges, as respects liability of members of association for services rendered by attorneys.

4. Attorney and client ⇐78

An attorney cannot employ another attorney at expense of client.

5. Associations ⇐20(5)

Evidence that some members of voluntary association of motortruck freight carriers, at meeting attended by four out of nine members of executive committee and at which no official action was taken, agreed to contribute to fund for payment of attorneys, held insufficient to support finding that association expressly ratified its president's employment of attorneys instituting proceeding before railroad commission to establish unlawfulness of operations of nonmember.

6. Principal and agent ⇐166(1)

An essential element of ratification is knowledge by principal of unauthorized act of agent and of material circumstances, whether ratification is expressed or implied.

7. Principal and agent ⇐166(1)

An express ratification without knowledge of all material circumstances of transaction is not binding on the principal, and

the court will not imply ratification in absence of such knowledge.

8. Corporations ⇨426(11)

An agreement by officer of company engaged in business as a motortruck carrier of freight to contribute to expense of proceedings instituted by attorneys before railroad commission to establish unlawfulness of operations of rival carrier, for a consideration moving from attorneys, warranted finding that company expressly ratified unauthorized employment of attorneys so as to be jointly and severally liable for attorneys' fees with other carriers employing attorneys.

9. Estoppel ⇨92(1)

The knowledge of members of voluntary association of motortruck freight carriers that attorneys were rendering services in a proceeding before railroad commission involving a question in which they were interested, but which was brought at the instance of and for the account of other members, did not constitute an "acceptance of benefits" of attorneys' services so as to estop the first-mentioned members from denying liability for attorneys' services.

[Ed. Note.—For other definitions of "Acceptance of Benefits," see Words & Phrases.]

10. Attorney and client ⇨166(2)

Evidence which was sufficient to show that attorneys employed by president of voluntary association of motortruck freight carriers, acting in his individual capacity, to institute proceeding before railroad commission to establish unlawfulness of operations of rival carrier, agreed to look exclusively for their compensation to fund undertaken to be collected by president of association, warranted conclusion that members not ratifying attorneys' employment were not liable for attorneys' fees.

11. Attorney and client ⇨152

Attorneys, instituting proceeding before railroad commission to establish unlawfulness of operations of motortruck freight carriers pursuant to agreement that they would be paid a certain sum per day for their services, could not include in their account anything paid by them to their office assistants or others employed by them to perform work of a legal nature.

12. Account stated ⇨19(3)

Evidence held insufficient to show that president of voluntary association of motor-

truck freight carriers employing attorneys to institute proceeding before railroad commission to establish unlawfulness of operations of rival carrier stated an account between attorneys and association and its members, as respects members' liability for services rendered by attorneys.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by Gordon Johnson against the California Interurban Motor Transportation Association, an unincorporated association, and others, to recover balance due for legal services rendered defendants by plaintiff's assignors. From a judgment for the plaintiff, the defendants appeal.

Partly affirmed as modified, and partly reversed.

H. J. Bischoff and Wallace K. Downey, both of Los Angeles, for appellants.

Courtney L. Moore, of San Francisco, for respondent.

PER CURIAM.

By this action the plaintiff, as the assignee of Thelen & Marrin, a firm of attorneys at law, and of Sanborn, Roehl & Brookman, another such firm, sought to recover the sum of \$9,972.75 as a balance due said firms for legal services rendered and expenses incurred by them on behalf of defendants. Judgment went in favor of plaintiff and against all the defendants for the sum prayed, interest, and costs. These have appealed from the judgment.

The court made findings of fact and conclusions of law. They are long and detailed. A brief outline of the main facts of the case will assist in understanding them.

In the years 1930 and 1931 C.S. McLenegan was president of Pioneer Express Company, having his office in San Francisco. He was also president of defendant California Interurban Motor Transportation Association (referred to herein as the association), which had as its secretary David G. Shearer, who resided in Los Angeles, having an office there in which, among his other activities, he performed his duties as such secretary. The association is unincorporated and is of a nonprofit character. Its membership

consists of persons, corporations, or partnerships engaged in the business of transporting goods and merchandise on the highways of the state by motortruck, which activities bring them under the jurisdiction of the railroad commission. Pacific Motor Transport Company is engaged in a similar business and is not a member of the association. Its method of operation differs from that of its competitors in that while they use motortrucks exclusively for transportation, it, in addition to employing these, makes use of the facilities of the Southern Pacific Company, its method being to collect the goods or merchandise from the shipper, assemble them in carload lots, which then move by railroad to a convenient point in the vicinity of their destination, from where they are transported by truck to the respective consignees.

The defendants—or at least those of them against whom judgment was given—are members of the association, and consist of two groups, the members of one of such groups being controlled by or affiliated with Pacific Freight Lines Company, this group being commonly referred to as Pacific Freight Lines, and the members of the other group being under similar control or affiliation of Southern California Freight Lines, Ltd. During the year 1930 and up to February, 1931, A. V. Wainwright was president of Pacific Freight Lines Company, and C. G. Anthony its vice president, at which time Anthony succeeded to the presidency. These two gentlemen were also officers of its controlled companies. Of Southern California Freight Lines, Ltd., R. E. Connell was president, and Henry J. Bischoff chairman of its board of directors, and similarly these two held offices in its controlled subsidiaries.

In or shortly before the month of October, 1930, the Pacific Motor Transport Company filed with the railroad commission a tariff, reducing rates for its service between various points in Northern California. Among these rates was one for transportation between San Francisco and San Jose and adjacent territory, in which the operations of the Pioneer Express Company were conducted. C. S. McLenegan, thinking there was possibly some illegality in the mode of operations of the Pacific Motor Transport Company, consulted an attorney, Paul S. Marrin, of the firm of Thelen & Marrin, and on his advice determined to bring suit in the railroad commis-

sion in an effort to establish the unlawfulness of those operations. As the question involved was one which interested highway carriers generally, in conference between McLenegan and Marrin it was agreed it would be advisable to have others of them join in the proceeding; particularly was it thought desirable to use the name of the association as a complainant. McLenegan as president of the association had no authority to authorize this, the management of the association's affairs being in the board of directors and, between meetings of that body, in the hands of the executive committee. He so informed Marrin, and that he would seek authority from that body for such use. He was not able to obtain it, but in a conversation with secretary Shearer was reminded by him that, by virtue of a resolution contained in the minutes of the association, any member thereof had the privilege of using its name in proceedings before the railroad commission, on condition, however, that he himself bore the expense of the proceeding and did not engage the responsibility of the association. Satisfied to act upon this, McLenegan immediately informed Marrin that he had talked with Shearer and that in Shearer's opinion it was proper to make the desired use of the association's name. Without further inquiry Marrin joined the association as a party complainant.

Before rendering his opinion to McLenegan on the advisability of bringing the proceeding Marrin had consulted with A. B. Roehl, of the law firm of Sanborn, Roehl & Brookman, and had asked him if he would be willing to be associated with Marrin's firm in the event a proceeding should be commenced. Roehl agreed; and, having among his clients two highway carriers,—Valley Motor Lines, Inc., and United Motor Transport Lines, Inc.—brought the matter of the contemplated proceeding to their attention, and these consented to appear as complainants therein. The proceeding was thereupon commenced the firm of Sanborn, Roehl & Brookman appearing in the complaint as attorneys for the two carriers last mentioned, and Thelen & Marrin so appearing for Pioneer Express Company and the association. Marrin had been given no authority to associate any attorney with him; Roehl apparently assumed that he had; in any event he made no inquiry into the matter; and thereafter the two firms cooperated, freely consulting one another and working on the preparation of the case in common. This, of course,

would have been a perfectly natural and usual thing to do without this formal association, since all the complainants had a common interest in the questions involved. As regards the members of the association, they appeared in the proceeding merely by the attachment to the complaint of a list of their names, and the complaint contained a reference thereto and an allegation that they were such members.

On December 12, 1930, a meeting of attorneys and clients was held in Marrin's office to consider the question of fees and expenses. It was attended by Mr. Sanborn, of Sanborn, Roehl & Brookman, by the clients of this firm—Messrs. Harms and Frasher, who owned or controlled Valley Motor Lines, Inc.,—Mr. Marrin and Mr. McLenegan. The attorneys stated that they would charge for their services at the rate of \$100 per day for the actual number of days they had devoted or should in the future devote to the case, and must in addition be reimbursed for certain contemplated expenses. They estimated that these fees and expenses would amount to \$5,000, and requested their clients to take steps to get contributions from various carriers throughout the state in order to furnish this amount. The attorneys were aware that this was the method by which the complainants (other than the association) expected to procure funds to meet the expense of the litigation. McLenegan undertook the task of collecting the funds. On the same date Marrin addressed to McLenegan a letter confirming the attorneys' estimate of the cost and the scale of fees proposed to be charged by them.

On March 4, 1931, C. G. Anthony wrote to the railroad commission requesting that the Pacific Freight Lines group be eliminated from the proceeding.

On April 6, 1931, at which time no trial of the proceeding in the railroad commission had yet been had, Mr. Anthony and his attorney, Reginald L. Vaughn, held a conference with Attorneys Roehl and Marrin in the office of the former for the purpose of having them place at their disposal certain data prepared for use in such trial by Grove C. Foster, who had been employed by Roehl and Marrin for that purpose. They wished to make use of this data in applying to the commission for the suspension of a new rate filed with the commission by Pacific Motor Transport Company and which, if put in operation, would seriously

affect the business of Imperial Valley-Los Angeles Express, one of the corporations composing the Pacific Freight Lines group. They also requested the assistance of W. H. Kessler, an attorney associated in the office of or employed by Roehl. These requests were granted by Roehl and Marrin on condition that Anthony re-enter his group of companies in the pending proceeding and contribute to the expense thereof. To this demand Anthony acceded, stating that it had always been the intention of his companies, although for certain reasons he had withdrawn their names from the proceeding, to bear their share of such expense. Thereafter Vaughn, acting under the instructions of Anthony, wrote to the railroad commission formally withdrawing the previous withdrawal of the Pacific Freight Lines group of companies.

In his efforts to collect funds to defray the expense of the litigation McLenegan wrote numerous letters to highway carriers, including officers and members of the association. Therein he informed them that he, as president of Pioneer Express Company, through his attorneys, Thelen & Marrin, in conjunction with Valley Motor Lines, Inc., and United Motor Transport Lines, through their attorneys, Sanborn, Roehl & Brookman, had initiated the litigation and that those three concerns were responsible for the expense thereby occasioned; but that as all carriers, including the members of the association, were equally interested in the questions at issue, and as the cost thereof would be more than the three complainants mentioned could bear, he felt that all highway carriers affected by the increasing competition of Pacific Motor Transport Company should share in that expense. In his campaign for contributions he enlisted the aid of secretary Shearer; and both in personal interviews with members, either at meetings of the association or on other occasions, solicited their financial assistance, and in doing so kept them informed of the different steps taken in the proceeding, and also apprised them of the estimate given by the attorneys of the amount of the expense and of the rate of compensation to be charged by them. In these contacts with officers and members of the association he at all times gave them to understand that he had made it quite clear to his attorneys that the Pioneer Express Company and its two cocomplainants above mentioned were alone responsible for the cost of the litigation.

McLenegan was but partially successful in the collection of funds. Pioneer Express Company contributed \$1,000, Valley Motor Lines, Inc., the same amount, and other contributions amounted to \$445. These amounts were paid over to the attorneys.

The trial of the proceeding in the railroad commission took place in the month of May, 1931, and at that time the demands of the attorneys, made through Marrin, for payment of fees and expenses became insistent. At this juncture McLenegan conceived the idea that he might be more successful in collecting funds from members of the association if he requested from each of them a specific amount, which he determined by applying a percentage figure to the gross receipts of that member's business. McLenegan had no authority to levy an assessment on the members, and his adoption of this method did not purport to be such. The change of procedure was unavailing; in fact, it introduced a new obstacle to success, since it gave to members the opportunity to dispute the correctness or the justice of the amount requested. No more funds were collected.

On the termination of the litigation a bill or account for services and expenses, showing a balance due of \$9,772.75, was sent by Thelen & Marrin, addressed to C. S. McLenegan, care of Pioneer Express Company. It was in the joint names of the law firms we have named, and was made out to Pioneer Express Company, Valley Motor Lines, Inc., United Motor Transport Lines, the California Interurban Motor Transportation Association and Pacific Freight Lines Company, and was stated to be for "legal services rendered to date in the above entitled action in accordance with the terms of employment set forth in the letter addressed to Mr. C. S. McLenegan dated May 12, 1930." Payment not being forthcoming, the present action was brought. Neither the Pioneer Express Company, Valley Motor Lines, Inc., nor United Motor Transport Lines was made a party defendant, the only concerns sued being the association, the two groups of member carriers above mentioned, and one or two carriers alleged to belong to one or other of these groups.

We come now to the findings of fact and conclusions of law made by the trial court. They are quite long and extremely detailed. Summarized, they are generally to the effect that McLenegan on November 25, 1930, notified the law firms of Thelen & Marrin

and Sanborn, Roehl & Brookman "that it was proper to use the name of the California Interurban Motor Transportation Association as a party complainant" in the proceeding before the railroad commission, and that on the following day he informed David G. Shearer, secretary of the association, that a complaint had been prepared and filed naming said association and its members as parties complainant, and that said two law firms were appearing as attorneys for the association; that on the same day, November 26th, a meeting of the legislative committee of the association was held, among the members of which were R. E. McConnell and H. F. Bischoff, respectively president and chairman of the board of directors of Southern California Freight Lines, which by stock ownership controlled five of the defendants named herein; that Shearer informed said legislative committee that said complaint would be filed and that it was proposed to join the association and its members as parties complainant, and that as a result of said meeting the executive committee of the association had full knowledge of the foregoing facts; that no action was taken by said committee disavowing the acts of the president and secretary, or denying McLenegan's authority in employing attorneys to represent the association and its members. That on December 3, 1930, McLenegan had a meeting with A. V. Wainwright, who at that time was president of defendant Pacific Freight Lines Company, which by stock ownership or other affiliation controlled seven other of the defendants herein, and that as the result of his conversation with Wainwright said Pacific Freight Lines Company and its affiliates were fully informed that said proceeding had been commenced in the name of the association and on behalf of its members. That on December 8, 1930, the complaint in the proceeding was amended and a copy of it sent by McLenegan to Shearer, as a consequence of which said Shearer, as secretary of the association, had full and complete knowledge thereof, that the association and its members were named therein as complainants, and that the said two law firms appeared as attorneys of record for said association and its members. That on December 12, 1930, said law firms made and entered into an agreement with the association, establishing a scale of charges for their services and for payment of expenses to be incurred in the litigation. That on December 13, 1930, McLenegan wrote Shearer, quoting in full a letter writ-

ten to him on the preceding day by Paul S. Marrin, of the firm of Thelen & Marrin, confirming said arrangement in regard to fees, and instructed said Shearer to take steps immediately for the purpose of raising the funds which would be needed, and that the association and its members thus had full and complete knowledge of the facts concerning the litigation already detailed, and of the basis of fees to be charged for attorneys' services. That on the same day McLenegan wrote to Wainwright and McConnell a similar letter; that Wainwright replied thereto and did not in his reply, nor at any time, disavow the acts of McLenegan; that McConnell also replied, expressing his opinion that said litigation was hopeless and that the companies represented by him did not desire to participate therein. That a meeting of the executive committee of the association was held on January 8, 1931, at which were present various members of the association, including Messrs. Wainwright, Anthony, McConnell and Bischoff; and at said time McLenegan announced to those present the facts respecting the litigation heretofore detailed, and in addition stated the contents of or read the letter of Marrin confirming the basis of the attorneys' charges, and that at said meeting the acts of McLenegan were ratified, approved, and confirmed by the executive committee of the association and by the members represented at said meeting, including all the corporate defendants.

That on March 4, 1931, C. G. Anthony wrote to the railroad commission, requesting that the names of Pacific Freight Lines and its affiliated companies be eliminated from the amended complaint, and on March 5, 1931, Reginald Vaughn, attorney for said company, wrote a formal letter to the commission withdrawing those companies from the litigation.

That thereafter and prior to April 4, 1931, the Pacific Motor Transport Company filed with the railroad commission a tariff of proposed rates for transportation of freight in Southern California, including one numbered 380, which would materially affect the earning capacity of Imperial Valley-Los Angeles Express, one of the subsidiaries of Pacific Freight Lines Company; that in connection with the matter a meeting took place between Mr. Anthony, his attorney Mr. Vaughn, Mr. Roehl and Mr. Marrin; that at that time Anthony requested the assistance of the attorneys and

the use of Mr. Foster—a rate expert who had been employed by the attorneys to prepare data as to comparative transportation rates to be used in the trial of the proceeding in the railroad commission—in securing the suspension of item 380 of the proposed tariff; that the attorneys refused to accede to this request until the Pacific Freight Lines and its affiliated and subsidiary companies reentered the litigation as parties complainant; that Anthony thereupon agreed that said companies would reenter said litigation and would participate in the payment of the fees and expenses in connection therewith; and that on May 7, 1931, he reentered their appearance as parties complainant in the railroad commission proceeding.

That the reasonable value of the services rendered by plaintiff's assignors to the defendants and each of them is the sum of \$9,975; that the expenses incurred amount to \$2,242.75; that the sum of \$2,445 has been paid, leaving a balance due of \$9,772.75, with interest.

Among the conclusions of law made by the court are that C. S. McLenegan, as president of the association, had express authority to commence litigation before the railroad commission in the name of the association and to employ attorneys to conduct said litigation, to agree with them concerning the amount of their compensation and to make the same a charge against the association and its members, and did so in the matter here involved; that on January 8, 1931, the association, its officers, its executive committee, and its members, including the defendants herein, had knowledge of all the facts hereinbefore set out in the court's findings of fact, and with such knowledge approved, ratified and confirmed the acts of president McLenegan; that thereafter said association and its members were fully informed as to the progress of the matter, and that neither said association nor any of its members nor any of the defendants notified plaintiff's assignors that McLenegan had acted without or beyond his authority, but accepted the benefit of said services, and by said course of conduct of the association and of its members they each approved, ratified and confirmed the agreements and arrangements made by McLenegan on behalf of the association and its members with the plaintiff's assignors, and that said association and each of its members are estopped to deny the authority of

McLenegan in so acting, and are estopped to deny their liability for the services rendered.

An additional conclusion of law is made concerning Pacific Freight Lines Company and its subsidiaries, and the Southern California Freight Lines and its subsidiaries, to the effect that with full and complete knowledge that all of said defendants were named as parties complainant in said proceeding, and that plaintiff's assignors expected to be paid for the services rendered and expenses incurred by them in connection with said proceeding by said defendants and each of them, did give and grant to said president of said association, as agent of all of said defendants express authority to employ plaintiff's assignors on their behalf, and expressly approved, ratified, and confirmed all of the acts of said president.

Further conclusions of law were that an account was stated between plaintiff's assignors and each of the defendants in the amount of \$9,772.75, which they each promised and agreed to pay; and that each of the defendants became indebted to plaintiff's assignors in the said sum for services rendered at their special instance and request, and which each promised to pay, and also became indebted to plaintiff's assignors in said sum as the reasonable value of said services.

From this enumeration it is seen that we have here:

1. A finding of express authority in McLenegan as president of the association to commence the proceeding in the railroad commission and to employ attorneys at the association's expense;

2. A finding that the association entered into an agreement with the attorneys establishing the scale of charges;

3. A finding of express ratification by the association and its members at the meeting of January 8, 1931;

4. A finding of implied ratification by the association;

5. Findings of express ratification by both the Pacific Freight Lines and Southern California Freight Lines groups of defendants;

6. A finding of implied ratification by the Pacific Freight Lines group;

7. Findings of estoppel against the association and its members by acceptance of the benefit of the services of the attorneys, and of an account stated between the same.

Each of these findings is attacked by the appellants as not supported by the evidence.

From a careful study of the voluminous record and briefs in the case we have reached the following conclusions:

- [1,2] As to 1, there is no evidence in the record to sustain a finding of express authority in McLenegan as president of the association to initiate the litigation before the railroad commission on behalf of and at the expense of the association. His only authority to use the name of the association was that enjoyed by all members under the resolution hereinbefore mentioned, which by its terms made the right or privilege conditional upon the member availing himself of it himself bearing the attendant expense. And here it is pertinent to say that the attorneys were charged with notice of this limitation—doubly so as it applied to McLenegan who, as president of the Pioneer Express Company, had a direct personal interest in bringing the association into the proceeding as he would thereby greatly diminish that company's ultimate liability for a proportion of the cost thereof.

- [3,4] As to 2, this finding is based on the letter from Marrin to McLenegan of December 12, 1930. This letter assumed that a contract of employment of both firms of attorneys had already been entered into, and it merely set forth their intended charges and stated that both Roehl and the writer felt that the sum of \$5,000 "should be raised at this time." It was addressed to "Mr. C. S. McLenegan, c/o Pioneer Express Company" (as indeed all Marrin's communications during the litigation were), and the writer of the letter was aware that McLenegan had undertaken the task of collecting a fund to defray the expense thereof. As to the firm of Sanborn, Roehl & Brookman, there is no evidence of their employment by McLenegan either on behalf of the Pioneer Express Company or of the association. The record shows that Roehl accepted the invitation of Marrin to become associated with his firm without any inquiry as to Marrin's authority, and it need hardly be said that an attorney at law has no authority as such to employ another attorney at the expense of his client. 3 Cal.Jur. p. 702; Cormac v. Murphy, 58 Cal.App. 366, 208 P. 360. McLenegan himself, in explaining to members of the association the appearance of this firm in the case in soliciting their contributions, stated his understanding to be

that they were appearing for two of the Pioneer Express Company's cocomplainants.

[5] As to 3, this is a finding of express ratification by the association and its members of plaintiff's assignors at the meeting of January 8, 1931. The respondents place great reliance upon this finding. In their brief they say: "This meeting of January 8th entirely changed the status of the parties and their legal responsibility. Up to this time it is questionable whether the attorneys had any claim against the Association or its members." We can find nothing in the evidence relating to this meeting that made any such change. That evidence shows without contradiction that it was called by secretary Shearer in compliance with a telegram sent to him by McLenegan. The latter testified that he was not sure whether he had asked Shearer to call a meeting of the executive committee, or named certain members of the association whom he knew to be such members. Shearer testified that he had not been requested to call the executive committee, but specified names only. In any event, out of a membership of nine on that committee only four were present and no official action of any kind was taken. At the meeting McLenegan recounted what he had done so far in the litigation; made it clear that he had commenced it on his own responsibility—a fact known to some of those present through previous communications from McLenegan—stated that it was going to cost much more than he had anticipated and appealed to those present for financial assistance, pointing out that they were as much interested in the question as he and the other carrier complainants. He read or stated to them the contents of Marrin's letter of December 12th relating to attorney fees and expenses; told them that members of the association in the north had agreed to contribute \$2,500, being one half of the amount mentioned in the letter, and asked that those present contribute the other half. While some present declined to make any contribution whatever, others agreed to contribute, and from the promises received McLenegan returned to San Francisco in the confident belief that the \$2,500 he had requested would be raised, and he reported to the attorneys that he had "received assurances from the members there that they would undertake the payment of the \$2,500 requested."

As to 4, a finding of implied ratification by the association. This finding is based

upon the assumption that when the officers and members of the association learned that a proceeding had been instituted in the name of the association by McLenegan, and attorneys had been employed to conduct it, it became their duty to disavow the action of McLenegan and notify the attorneys that they would not be liable for the cost of the proceeding.

[6,7] An essential element of the legal principle of ratification is knowledge by the principal of the unauthorized act of his agent and of its material circumstances. This is equally necessary whether the ratification be express or implied. And an express ratification without knowledge of all the material circumstances of the transaction is not binding on the principal. Much less will the court imply ratification in the absence of such knowledge, since it is this knowledge which gives rise to the duty of disavowal, and without which there is nothing from which ratification may be implied. On this subject we quote from volume 2 of Corpus Juris Secundus, title Agency, § 42: "Either at common law or under the terms of applicable statutory provisions it is ordinarily required that for a ratification of an unauthorized act or transaction of an agent to be binding, the principal shall have full knowledge at the time of ratification of all material facts and circumstances relating to the unauthorized act or transaction, or that someone authorized to represent the principal, other than the agent whose act is being considered, have such knowledge. As a corollary to the rule that the principal must have knowledge of the material facts relating to the unauthorized act of his agent in order to ratify the same, it follows that notwithstanding a principal's approval of unauthorized acts which have been done on his behalf by another, if the material facts be either suppressed or unknown there is no valid ratification. In this respect it is immaterial whether the principal's want of knowledge is due to designed or undesigned concealment or wilful misrepresentation on the part of the agent or his mere inadvertence, or whether the question of ratification arises between the principal and the agent or arises with respect to third persons. * * * With respect to the manner in which unauthorized acts may be ratified, the general rule that full knowledge of the facts surrounding an agent's act is essential to a ratification thereof is as observed in sections 47-62 of this title, ap-

plicable to implied ratification of an agent's acts by his principal." 2 C.J.S., Agency, § 42, p. 1081; Allen v. San Francisco, etc., Exchange, 59 Cal.App. 93, 210 P. 41.

The unauthorized act here found to have been ratified is the employment of the attorneys by McLenegan *on behalf of the association*. The record is plain that he, in common with his fellow members, had the privilege of using the association's name but at his own expense. In his efforts to secure funds by voluntary contribution he at all times made it clear that the association's responsibility had not been engaged; and there is no hint in the testimony that they were ever apprised otherwise, either by the attorneys or anyone else, until after the conclusion of the litigation. To this statement there is one qualification relating solely to the Pacific Freight Lines group of defendants, which arises in the consideration of finding 5.

[8] 5. Findings of express ratification by both the Pacific Freight Lines and Southern California Freight Lines groups. It will have been seen from our statement of what passed between Messrs. Anthony, Vaughn, Roehl, and Marrin on April 6, 1931, that Anthony, now informed that the attorneys were expecting to be compensated by the association and its members, agreed, for a consideration moving from the attorneys, to contribute a share of the expense of the litigation. This the trial court construed to be an express ratification of their unauthorized employment, and we cannot say that it is not a legitimate inference from the testimony, and sufficient to sustain the finding as to the Pacific Freight Lines group of defendants, rendering the members of that group jointly and severally liable with Pioneer Express Company for the fees of Thelen & Marrin, and similarly liable with Valley Motor Lines, Inc., and United Motor Transport Lines, Inc., for the fees of Sanborn, Roehl & Brookman.

As to the Southern California Freight Lines group, we find the record bare of evidence to sustain a finding of express ratification as to them; nor, as to 6, do we find any evidence of an implied ratification by the Pacific Freight Lines group, which finding, however, if our conclusion as to an express ratification by this group is correct, becomes immaterial.

[9] The finding 7, of estoppel against the association and its members to deny liability is also without support in the evidence, since there is no evidence of any vol-

untary acceptance by them of the attorneys' services. That they knew that attorneys were rendering services in a proceeding involving a question in which they were interested, but brought at the instance of and for the account of other persons is not sufficient to constitute an acceptance of the benefit of those services. All the material facts of the transaction must be known. As is stated in the work just referred to: "In accordance with the rules heretofore discussed in section 42, knowledge on the part of the principal of the facts surrounding an unauthorized transaction is ordinarily necessary in order that benefits received by him shall amount to an implied ratification of acts done on his behalf." 2 C.J.S., Agency, § 49, p. 1101; Corporation of America v. Harris, 5 Cal.App.2d 452, 43 P. 2d 307.

[10] A further point is urged in support of the appeal, namely, that the record establishes that the attorneys agreed to look exclusively for their compensation to the fund undertaken to be collected by McLenegan. We are of the opinion that the preponderance of the evidence shows this to be the fact, and it is consistent with the attitude taken by the attorneys up to the time of the completion of their services and the failure to collect sufficient money demonstrated that this source was not available. Thus McLenegan, who was plaintiff's own witness, testified:

"It had been distinctly understood that the California Interurban Motor Transportation Association was not going to pay any sum out of their treasury. The members thereof were supposed to support the fight.

"Q. When was that distinctly understood? A. At the time the original complaint was filed.

"Q. That was stated to whom—Mr. Marrin? A. Yes."

Contradictory testimony was given by Marrin in these words: "He did not tell me that the Association would not be financially responsible. He did say this, that he did not consider that the ordinary dues received by the treasury would be adequate to meet the cost of the litigation, and some special arrangement would have to be made to collect the amount of the cost of the litigation from the members of the Association." This testimony of Marrin, if accorded credence by the trial court, was sufficient to justify its finding against appellants' contention.

[11] It is also contended by the appellants that the demand of plaintiff includes two items not warranted by the terms of employment of plaintiff's assignors, namely, 43 days' services at \$25 per diem of W. H. Kessler, an attorney at law associated with or employed in the office of Sanborn, Roehl & Brookman, and 8 days of Gordon Johnson, an attorney at law associated with or employed in the office of Thelen & Marrin, at the same rate—a total of \$1,275. In the letter of Marrin to McLenegan of December 12, 1930, in which the cost of the litigation was estimated at \$5,000, it was stated that there would be expense incurred in preparing necessary exhibits, and an expert or experts to act as witnesses in the case. For this purpose Grover C. Foster was employed, who prepared comparative tables of transportation rates, which were used as exhibits, and was also called as a witness in the proceeding before the railroad commission and testified. His charges are listed in the account as disbursements, and their justness is not questioned. The work performed by Kessler and Johnson was in the preparation for and in the trial of the cause and was of a legal nature and rendered by them as attorneys at law. We have already had occasion to point out, *supra*, that an attorney has no authority by virtue of his retainer to employ counsel or assistants at the expense of his client. The inclusion in the account of sums paid or incurred for such services was clearly improper. The charge of \$100 per day stipulated by Marrin for his services, and a similar charge for those of Roehl, must obviously be held to cover anything paid by them to their office assistants or others employed by them to perform work of a legal nature.

[12] Finally, the court's finding of an account stated between the plaintiff's assignors and the association and its members is without support in the record. McLenegan was without authority to state an account nor is it apparent that he purported to do so.

It follows from what we have said: First, that the sum of \$1,275 should be deducted from the judgment; second that as thus modified the judgment should be affirmed as to defendants Pacific Freight Lines Company, Commercial Dispatch Lines, Ltd., Consolidated Motor Transport Company, Motor Freight Terminal Company, San Joaquin Valley Transportation Company, Imperial Valley-Los Angeles

Express, Los Angeles-San Pedro Transportation Company, and Boulevard Express, Inc.; and, third, reversed as to all the remaining defendants. It is so ordered, and respondent to bear his own costs of the appeal.



24 Cal.App.2d 308

O'NEAL v. SEABURY, County Livestock Inspector, et al.

Civ. 5913.

District Court of Appeal, Third District,
California.

Jan. 8, 1938.

1. Appeal and error ⇨781(4)

The appellate court will not determine issues on appeal from judgment dismissing action to enjoin enforcement of county ordinance creating cattle tuberculosis control area, where state agricultural department included such county within general tuberculosis control area of state before submission of case to appellate court, thereby rendering all such issues moot. St.1933, p. 74, § 100 et seq.; p. 99, § 234.25.

2. Evidence ⇨46

The appellate court will take judicial notice of state agricultural department's proclamation incorporating Madera county in state cattle tubercular control area. Code Civ.Proc. § 1875, subd. 3; St.1933, p. 74, § 100 et seq.

3. Appeal and error ⇨781(1)

An appellate court will not review or determine moot questions.

Appeal from Superior Court, Madera County; E. N. Rector, Judge.

Action by John O'Neal, individually and on behalf of the Madera County Beef Breeders Protective Association, against W. A. Seabury, as county livestock inspector of the County of Madera, and others, for an injunction against enforcement of a county ordinance creating a cattle tuberculosis control area. From a judgment of dismissal, plaintiff appeals.

Appeal dismissed.

David E. Peckinpah, of Fresno, and Barcroft & Barcroft, of Madera, for appellant.

George Mordecai, Dist. Atty., of Madera, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from a judgment which was rendered against them, dismissing their action following an order sustaining a demurrer to their complaint without leave to amend the pleading. The complaint alleges that certain officers of the county of Madera threaten to enforce against the plaintiffs the provisions of an ordinance of that county, No. 164, adopted to create a "Tuberculosis Control Area" for the purpose of inspecting, segregating, and testing cattle for the purpose of eradicating tuberculosis therefrom; that the ordinance is in conflict with the provisions of the Agricultural Code of California, St.1933, p. 60; Deering's Supp. to Gen.Laws of Calif., 1933, p. 771, Act 144, with respect to the same subject. The complaint merely prays for an injunction to prohibit the officers of the county from enforcing the provisions of the ordinance. A general demurrer to the complaint was filed. The demurrer was sustained. The plaintiffs failed to amend their complaint. No request to be permitted to amend their pleading was made. Judgment of dismissal of the action was subsequently rendered. From that judgment this appeal was perfected.

Under the provisions of section 234 of the Agricultural Code, St.1933, p. 99, the department of agriculture of the state of California formerly established a district or area, including the entire state, with the exception of Madera and certain other counties, for the purpose of enforcing inspection, segregation, and testing of beef and dairy cattle to eradicate tuberculosis therefrom. Madera and other counties were formerly excluded from the general state area of the tuberculosis district pursuant to the provisions of section 234.5 of the Code, St.1933, p. 100, which reads as follows: "The director may withdraw one or more counties within a tuberculosis control area from such an area when the funds available for indemnity and administration are not sufficient to continue the work under the provisions of this article."

Pursuant to the provisions of section 234.25 of the Code, St.1933, p. 99, the coun-

ty of Madera thereupon established a tuberculosis control district including the entire territory of that county, and enacted ordinance No. 164, which is involved in this appeal.

While the ordinance was in force this suit for injunction was brought against the defendants. Before the appeal in this case was submitted to this court for determination, pursuant to the authority conferred upon the agricultural department of the state of California by Division 2 of the Agricultural Code, St.1933, p. 74, § 100 et seq., that department of the state, on July 3, 1937, formally included the county of Madera within the general "tuberculosis control area" of the state and thereby made it a part of the state district bringing the county of Madera under the exclusive control of the agricultural department of the state with respect to the inspection, segregation, and testing of beef and dairy cattle to eradicate tuberculosis therefrom. This act including Madera county in the state tubercular control area had the effect of abrogating the tubercular ordinance of that county, No. 164, which was involved on this appeal. The proclamation of the agricultural department which has the effect of abrogating the ordinance in question reads as follows:

"State of California
"Department of Agriculture
"Tuberculosis Control Area
"Proclamation

"To Whom It May Concern:

"Under and by virtue of the authority and power conferred upon me as Director of Agriculture of the State of California, as provided in and by Article 3 of Chapter 3 of Division II of the Agricultural Code, I do hereby establish, maintain, and proclaim that certain area included within the exterior boundaries of the Counties of Sonoma, Marin, Napa, Glenn, Colusa, Yolo, Solano, Sutter, Yuba, Sacramento, Sierra, Nevada, Placer, El Dorado, Amador, Contra Costa, San Joaquin, Stanislaus, Merced, Madera, Fresno, Kings, Tulare, San Benito, Monterey, San Luis Obispo, Calaveras, Tuolumne, Mariposa, Alpine, Mono, and Inyo, in the State of California, and the whole of said area, to be a 'tuberculosis control area', as defined in and by said Agricultural Code.

"In witness whereof, I have hereunto set my hand and caused the seal of the Department of Agriculture of the State of California to be hereunto affixed at my

office in Sacramento, California, this third day of July, 1937.

"[Seal] [Signed] A. A. Brock,
"Director of Agriculture of the
State of California."

[1] Since the officers of Madera county no longer have authority to perform any of the acts complained of or threatened under the Madera tubercular ordinance in question it would be useless and idle to issue an injunction. All of the issues which are presented on this appeal have therefore become moot. Neither of the parties to this suit may now be helped or injured by a determination of the issues presented on this appeal. No affirmative act of the officers is alleged to have been performed to the injury of the plaintiffs. No damages are sought. As the state tuberculosis control district now exists under the law, the defendants are powerless to enforce the Madera ordinance and an injunction becomes useless. Under such circumstances this court will not proceed to perform the idle act of determining issues which have become moot.

[2] The appellate court will take judicial notice of the official acts of the executive departments of this state. Section 1875, subd. 3, Code Civ.Proc. Pursuant to the preceding section, this court will take judicial notice of the proclamation of the agricultural department of the state, incorporating Madera county as a part of the state tubercular control area above referred to. That proclamation was called to our attention by the plaintiffs in this case.

[3] An appellate court will not review or determine questions which are moot, since the decision will serve no beneficial purpose to the litigants or at all. *Carter v. Stevens*, 211 Cal. 281, 295 P. 28; *Hild v. Justice's Court*, 10 Cal.App.2d 443, 52 P.2d 251; 2 Cal.Jur. 125, § 13; 3 Am.Jur. 308, § 733.

In the case of *Carter v. Stevens*, supra, it was held that, when the rules affecting a fire marshal prescribed by statute have been changed and superseded by a subsequent amendment, before the action is heard and determined on appeal, the issues respecting the application of the former statute become moot. In the case of *Robinson v. Robins Dry Dock & Repair Co.*, 238 N.Y. 271, 144 N.E. 579, 36 A.L.R. 1310, the court said, with respect to the amendment of a statute pending the dis-

posal of the case on appeal: "It is in the general true that the province of an Appellate Court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the Appellate Court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

It is therefore ordered that the appeal in this case be and the same is hereby dismissed on the ground that the issues have become moot.

We concur: PULLEN, P. J.; PLUMMER, J.



24 Cal.App.2d 341

PEOPLE v. ESTRADA et al.

Cr. 1997.

District Court of Appeal, First District,
Division 2, California.

Jan. 11, 1938.

Hearing Denied by Supreme Court
Feb. 10, 1938.

1. Criminal law ⇐1081

Provisions of the Rules of the Supreme Court and District Courts of Appeal regarding the giving notice of appeal and application to trial court showing grounds of appeal are mandatory and jurisdictional. Rules of the Supreme Court and District Courts of Appeal, rule 2, § 7.

2. Criminal law ⇐1081

An appellant failing to file application for appeal within time prescribed by court rules may not obtain relief under statutory provisions. Code Civ.Proc. § 473, as amended by St.1933, p. 1851, § 34; Rules of Supreme Court and District Courts of Appeal, rule 2, § 7.

3. Criminal law ⇐1081

Where appellant gave oral notice of appeal upon being sentenced, but failed to file application with trial court stating in general terms the grounds of appeal within five days after giving notice of appeal, as required by court rules, appeal would be dismissed. Code Civ.Proc. § 473, as amended by St.1933, p. 1851, § 34; Rules of the Supreme Court and District Courts of Appeal, rule 2, § 7.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

24 Cal.App.2d 182

PEOPLE v. JACKSON et al.

Cr. 424.

District Court of Appeal, Fourth District, California.

Dec. 22, 1937.

Hearing Denied by Supreme Court
Jan. 20, 1938.

Proceedings by the People of the State of California against Frank Estrada and others. From the judgment, defendants appeal.

Appeal dismissed.

Gladstein, Grossman & Margolis, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Respondent has moved to dismiss this appeal upon the ground that appellants have failed to comply with the provisions of rule II, section 7, of the Rules of the Supreme Court and District Courts of Appeal.

Appellants were sentenced on October 26, 1937, and thereupon gave oral notice of appeal. The clerk's certificate, made on November 7, 1937, shows that up to that time no application had been filed as provided in the above-mentioned rule.

Said rule requires that "the appellant, must, within five days after giving notice of appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal shall be dismissed. * * *"

[1-3] The authorities hold that the provisions of the rule are mandatory and that "where the defendant fails to conform with this rule * * * the appellate court is without jurisdiction to consider his appeal." *People v. Lewis*, 219 Cal. 410, 414, 27 P.2d 73, 74; *People v. Nichols*, 114 Cal.App. 136, 137, 299 P. 752; *People v. Schroeder*, 112 Cal.App. 550, 552, 297 P. 105. It is further held that an appellant, who fails to file the application within the time prescribed in the rule, may not obtain relief under the provisions of section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851, § 34. *Gonzales v. Superior Court*, 3 Cal.2d 260, 44 P.2d 320.

The appeal is dismissed.

We concur: NOURSE, P. J.; STURTEVANT, J.

1. Criminal law ⇨1023(8), 1134(10)

An order denying a motion in arrest of judgment is not appealable, but any error committed by trial court in denying such motion is reviewable on appeal from judgment of conviction.

2. Criminal law ⇨204, 296

In prosecution for grand theft and violation of Corporate Securities Act, where defendants entered pleas of former jeopardy and prior acquittal but produced no evidence supporting them, it was incumbent on trial court to instruct jury to find for the prosecution on issues raised by those pleas.

3. Criminal law ⇨296, 739(4)

In prosecution for grand theft and violation of Corporate Securities Act, where defendants entered pleas of former jeopardy and prior acquittal but produced no evidence to support them, course of proceedings was confided to trial court's discretion, and trial court did not abuse discretion in refusing to grant a separate trial on those pleas and in submitting issues raised by them to the same jury at the same time issues presented by pleas of not guilty were submitted.

4. Indictment and information ⇨196(5)

A count of indictment charging that, as part of conspiracy to violate certain section of Corporate Securities Act, "it was agreed by and between said defendants, acting as officers of the said corporation, would purchase for and on behalf of said defendants certain securities," was not so uncertain and unintelligible as to demand reversal of conviction under that count, where substance of charge was clarified as trial progressed, and ambiguity of language was cured by subsequent allegations. *St.1931*, p. 943, § 6.

5. Licenses ⇨18½

Mineral deeds purporting to convey to state residents fractional interests in oil which might be produced from certain described lands in Oklahoma and Texas with right of ingress and egress, and granting undivided interest in and to all bonuses, rents, royalties, and other benefits, were "securities" within statute defining security as a certificate of interest in an oil, gas, or min-

ing title or lease and requiring corporation dealing in them to have a broker's license. St.1931, p. 943, § 6; St.1933, p. 2308, § 2(a), subd. 7.

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

6. Statutes ⇨174

The provisions of statutes framed for the protection of the public may not be circumvented by sham, and the substance rather than the mere form of transactions constitutes the proper test for determining their real character on question whether statutory provisions have been circumvented.

7. Licenses ⇨8(1)

The Corporate Securities Act need not be construed in compliance with the common-law rule of strict construction, but it should be construed in accordance with the fair import of its terms. St.1917, p. 673, as amended.

8. Criminal law ⇨402(1)

In prosecution for grand theft and violation of Corporate Securities Act, trial court did not err in admitting secondary evidence of contents of corporate books which formed a necessary part of the prosecution's case, where possession of books was traced to defendants or to their counsel, and counsel answered negatively court's question whether they had books in their possession at time of trial. Code Civ.Proc. § 1855.

9. Licenses ⇨42(4)

In prosecution of two corporate officers for violation of Corporate Securities Act by causing corporation on designated dates to act as broker in selling securities without a license, evidence warranted jury in finding that each officer knew of transactions carried on by the other and thus supported conviction of both with respect to all transactions mentioned in indictment. St.1931, p. 943, § 6.

10. Conspiracy ⇨47

In prosecution of defendants who represented that prospective purchasers of mineral deeds would receive from oil royalties a stated monthly income for at least as long as they should live, evidence was sufficient to sustain convictions for conspiring to obtain property by false promises with fraudulent intent not to perform promises. Pen. Code, § 182, subd. 4.

11. False pretenses ⇨7(5)

A conviction for grand theft consisting of fraudulent acquisition of certain described

personality of others by means of false representations or pretenses could not be sustained on ground that representations amounted to false promises, where accusation of grand theft was drawn in accordance with statute which defines that crime with no reference to promises. Pen.Code, § 484, as amended by St.1935, p. 2194.

12. Embezzlement ⇨4

False pretenses ⇨20

Larceny ⇨1

The effect of statute defining crime of grand theft is merely to amalgamate crimes of larceny, embezzlement, false pretenses, and kindred offenses under the cognomen of theft. Pen.Code, § 484, as amended by St.1935, p. 2194.

13. False pretenses ⇨2

The statutes defining crime of grand theft and denouncing crime of obtaining money, property, or labor by false pretenses are not inconsistent, but the applicable provisions of statute defining grand theft have in effect repealed identical provisions of other statute. Pen.Code, § 532, and § 484, as amended by St.1935, p. 2194.

14. False pretenses ⇨7(5)

Representations amounting to no more than mere predictions of events to occur in the future or consisting of expressions of opinion are insufficient to sustain conviction for obtaining property by false pretenses, but the representations shown to have been made must relate to an existing or to a past fact. Pen.Code, § 532, and § 484, as amended by St.1935, p. 2194.

15. False pretenses ⇨49(4)

In prosecution for grand theft consisting of fraudulent acquisition by defendants of certain described personality of others by means of false representations or pretenses, evidence disclosed that representations were statements looking to the future alone and was insufficient to sustain convictions. Pen. Code, § 484, as amended by St.1935, p. 2194.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Russell O. Jackson and another were convicted of conspiring to violate and of violating the provisions of section 6 of the Corporate Securities Act, St.1917, p. 677, as amended by St.1931, p. 943, of conspiring to obtain certain described property of named individuals by false promises

with the fraudulent intention not to perform such promises, and of grand theft, and they appeal from the judgments and from orders denying a motion for new trial and a motion in arrest of judgment as to certain counts of the indictment under which they were found guilty.

Appeal dismissed in part, and judgments and order denying motion for new trial reversed in part and affirmed in part.

Hervey & Holt, of San Diego, for appellants.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., Frank T. Dunn, Asst. Dist. Atty., and Victor C. Winnek, Deputy Dist. Atty., all of San Diego, for the People.

JENNINGS, Justice.

[1] The defendants have appealed from judgments pronounced against them following their conviction of several offenses alleged to have been committed by them by an indictment which contained fifteen separate counts. The first count of the accusatory pleading charged the defendants with having conspired to violate the provisions of section 6 of the Corporate Securities Act of California, St.1917, p. 677, as amended by St.1931, p. 943, in the manner described in said count. The next eight counts alleged specific violations by the defendants of section 6 of the above-mentioned statute. Counts 10, 12, and 14 separately charged that the defendants on designated dates had conspired to obtain certain described property of named individuals by false promises with the fraudulent intent not to perform such promises. Each of the remaining counts, to wit, counts 11, 13, and 15 charged the defendants with the crime of grand theft. Upon the conclusion of the trial the jury returned separate verdicts finding defendants guilty of all the offenses of which they were accused except the offense of conspiracy alleged in count 14. Defendants thereafter presented a motion for a new trial which was granted as to the offenses alleged in counts 2, 7, 8, and 9 and denied as to the offenses alleged in the remaining ten counts. A motion in arrest of judgment was likewise denied as to the remaining ten counts. The appeal here perfected is taken not only from the judgments pronounced as aforesaid, but also from the court's order denying a new trial and from the order denying the

motion in arrest of judgment. With respect to the purported appeal from the last-mentioned order it is settled that an order denying a motion in arrest of judgment is not an appealable order. Any error committed by the trial court in denying such a motion is reviewable on an appeal from the judgment. *People v. Williams*, 184 Cal. 590, 194 P. 1019; *People v. Rubens*, 11 Cal.App.2d 576, 54 P.2d 98, 1107.

[2,3] The first contention advanced by appellants which will here be considered is the contention that the trial court committed prejudicial error in advising the jury to return verdicts in favor of respondent on the pleas of former jeopardy and prior acquittal which the record indicates were entered by appellants to the accusation contained in each count of the indictment. The transcript shows that no evidence was produced during the trial in support of these pleas. It also appears, however, that, before a jury was selected to try the cause, appellants moved the court for a separate trial of the issues tendered by the special pleas, which motion was denied, and appellants thereupon objected to proceeding with the trial until the issues raised by such pleas had been determined, which objection was overruled.

Appellants concede that there is authority in this state which supports the action taken by the trial court in this case, i. e., submitting the issues raised by the special pleas to the same jury at the same time the issues presented by pleas of not guilty were submitted. That the concession thus made is proper and, further, that when such pleas have been entered and no evidence supporting them is produced, it is incumbent upon the trial court to instruct the jury to find for the prosecution on the issues raised by the special pleas, is apparent from the decision in *People v. Newell*, 192 Cal. 659, 221 P. 622.

Appellants nevertheless insist that the peculiar circumstances of this case are such that it was error for the trial court to proceed to trial on the issues presented by their pleas of not guilty in the face of their demand for a separate trial of the special pleas and of their objection to going to trial until the issues raised by their special pleas had been determined. The circumstances which appellants contend are proper to make the instant case an exception to the general rule announced in *People v. Newell*, supra, are fully

set forth in *Jackson v. Superior Court*, Cal.Sup., 74 P.2d 243. In passing it should be noted that the offenses here charged against appellants are different offenses than those alleged in the case last cited and that the decision therein is for this reason not applicable to the present situation. In our opinion, the circumstances upon which appellants rely are not sufficient to create an exception to the general rule heretofore stated. We know of no rule requiring the trial of issues raised by the special pleas in advance of the regular trial. The course of the proceedings was confined to the discretion of the trial court, and no abuse of such discretion is manifest from a refusal to grant a separate trial on the special pleas.

[4] A second contention which merits brief consideration relates to the sufficiency of the indictment. Appellants complain that the pleading whereby they were charged with the commission of the above-mentioned offenses is fatally defective. They particularly challenge the sufficiency of the first count wherein an attempt was made to accuse them of having conspired to violate the provisions of section 6 of the Corporate Securities Act, as amended. It may be remarked in passing that a demurrer which was interposed to the indictment was overruled. The language of the first count which is subjected to special criticism is as follows: "As a part of said conspiracy, it was agreed by and between said Russell O. Jackson and Frank A. Scott, acting as officers of the said Fidelity Sales & Holding Corporation, would purchase for and on behalf of said Russell O. Jackson and Frank A. Scott, certain securities." It is urged that this language is ambiguous, uncertain, and unintelligible. That the quoted sentence is not a model of proper grammatical construction may readily be conceded. That it is so uncertain and unintelligible as to demand reversal of that part of the judgment which relates to the first count of the indictment is not apparent. Review of the record herein shows that not only was it made abundantly clear to appellants as the trial progressed that what was charged against them by the criticized verbiage was that as officers of the corporation they would cause the corporation to purchase for them certain securities, but close inspection of the involved allegations contained in the first count indicates that the language to which appellants except was

clarified and its ambiguity and uncertainty cured by subsequent allegations. We think, therefore, that appellants' denunciation of the language at this stage of the proceeding is not justified and that the apparent incorrectness of grammatical construction of the quoted language does not warrant the penalty of reversal which is demanded.

[5] A third contention of appellants relates to the offenses alleged in counts 1, 3, 4, 5, and 6, of which they now stand convicted, and deserves serious consideration. The last-mentioned counts in effect charge that appellants caused the corporation of which they were officers to deal in designated securities when, as they well knew, said corporation had no broker's license permitting it so to deal. The securities in which it is alleged the corporation thus dealt are described in the indictment as certificates of interest in oil titles. The record shows that, as a necessary part of its case in attempting to prove the commission by appellants of the offenses alleged in the above-mentioned five counts, the prosecution introduced in evidence a number of written instruments, some of which were executed either in the state of Texas or Oklahoma and others in California. Each of the instruments thus produced is entitled "Mineral Deed." One of the deeds thus entitled which was executed by the Fidelity Sales & Holding Corporation in the county of San Diego on May 20, 1935, will serve to illustrate the contention of appellants which is now being considered. This deed purported to convey to the American Fidelity Corporation, Limited, an undivided one-half interest in and to all of the oil, gas, and other minerals in and under and that might be produced from certain described lands in the state of Oklahoma, "together with the right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating, and developing said lands for oil, gas, and other minerals and storing, handling, transporting, and marketing the same therefrom with the right to remove from said land all of Grantee's property and improvements. This sale is made subject to any rights now existing to any lessee or assigns under any valid and subsisting oil and gas lease of record heretofore executed; it being understood and agreed that said Grantee shall have, receive, and enjoy the herein granted undivided interest in and to all bonuses, rents,

royalties and other benefits which may accrue under the terms of said lease in so far as it covers the above-described land from and after the date hereof, precisely as if the Grantee herein had been at the date of the making of said lease the owner of a similar undivided interest in and to the lands described and Grantee one of the lessors therein." The habendum clause of the instrument is the usual clause which appears in deeds conveying a fee title to land.

It is the contention of appellants that the various instruments introduced in evidence as aforesaid were deeds whereby interests in real property were transferred, that they do not come within the definition of "Securities" as this term is defined in the California Corporate Securities Act, and that appellants could not therefore be successfully prosecuted therefor as charged in the indictment.

The word "security" is defined in section 2 (a), subd. 7 of the Corporate Securities Act, as amended by St. 1933, p. 2308. The only portion thereof which is relied upon by respondent as indicating that the mineral deeds produced in evidence come within the definition there given is the following: "Certificate of interest in an oil, gas or mining title or lease." It is respondent's contention that the instruments, although in form deeds conveying interests in land, are in reality certificates of interest in oil titles.

In the face of the conflicting contentions thus advanced, a statement of the factual background surrounding the execution of the deeds as this history was developed by the evidence produced during the trial may be of assistance. In attempting to reproduce the picture, it will be provisionally assumed that the trial court made correct rulings with respect to the admission and rejection of evidence, although in fairness to appellants it should be stated that certain rulings of the court relating thereto are questioned by them.

Two corporations occupy prominent positions in the story. They are the American Fidelity Corporation, Limited, and the Fidelity Sales & Holding Corporation. The former was incorporated on August 29, 1932, and the latter on February 27, 1933. In February, 1935, the total number of shares of stock of the first-mentioned corporation which had been issued was 167. Of the stock thus issued the stock certificate book of the corporation showed

that Russell O. Jackson held 85 shares, J. O. Hayes 80 shares, F. A. Scott one share, and John K. Jackson one share. R. O. Jackson was the president and F. A. Scott the vice-president of this corporation. No stock was ever issued in the Fidelity Sales & Holding Corporation. R. O. Jackson was the president and F. A. Scott the vice-president of this corporation. The same suite of offices was used by both corporations. During the years 1934 and 1935 an extensive campaign of newspaper and radio advertising was carried on by the American Fidelity Corporation, Limited, for the purpose of interesting the public in what was denominated its "Regular Monthly Income Plan." Thereby a large number of persons became interested in the proposal, and considerable quantities of various types of securities were transferred to the corporation in exchange for the hereinabove described mineral deeds. That the volume of business thus carried on by this corporation was large and the profits resulting therefrom not inconsiderable, particularly to appellant Jackson, is apparent from the fact that at all times material to the present inquiry he, as president of the corporation, received a salary of \$1,000 per month. He also received a cash dividend of \$100 per share declared on December 14, 1935, and a cash dividend of \$800 per share declared on February 1, 1936. Not only by means of the radio and newspaper advertising was the monthly income feature stressed, but also to numerous prospective investors who called at the office of the company it was consistently emphasized that an exchange of stocks, bonds, and other property owned by them for the oil royalty deeds which the corporation had for sale would result in the payment to such persons of a definite monthly sum throughout the remainder of their lives and to their heirs after they should have passed from the sphere of mortal existence.

The manner by which these allegedly valuable interests in oil royalties were acquired by the American Fidelity Corporation, Limited, and were passed on to those persons who surrendered their stocks and bonds in various well-known and long-established corporations and companies deserves mention. Some person in Texas or Oklahoma, usually J. O. Hayes, would execute a mineral deed in the form heretofore described conveying a designated interest in oil, gas, or other minerals which might thereafter be produced from land

described in the deed to the Fidelity Sales & Holding Corporation. Thereafter this corporation would execute a similar deed conveying the oil royalty interest to the American Fidelity Corporation, Limited. The last-mentioned corporation would then by like mineral deeds convey to its customers fractional parts of the interest which it had obtained from the Fidelity Sales & Holding Corporation. At first blush the interposition of the Fidelity Sales & Holding Corporation in the scheme would appear to be cumbersome and useless. However, when the entire history of a transaction of this character was exposed, the reason for the presence therein of the holding corporation became clear. The purchase and sale of one such interest may be noted for the purpose of illustrating the plan of operation. This particular interest was denominated 450 Units Wilcox-Buxton Lease. The evidence showed that it was purchased by the Fidelity Sales & Holding Corporation from J. O. Hayes on May 10, 1935, for a consideration of \$19,000 and sold on the same day to the American Fidelity Corporation, Limited, for the sum of \$23,625 and thereafter sold by the last-mentioned corporation to the public for \$45,000. The gross profit accruing therefrom to the American Fidelity Corporation, Limited, was therefore \$21,375. However, the Fidelity Sales & Holding Corporation also derived a gross profit of \$4,625 from the transaction so that the combined gross profit obtained by the two corporations was \$26,000. It is apparent, therefore, that the Fidelity Sales & Holding Corporation was utilized in the scheme of operations as a convenient device for enlarging the spread of profit which would finally accrue to both corporations when the various interests were parceled out and sold to the public. In this connection it should be observed that the evidence indicated that the funds required for the purchases of such interests by the Fidelity Sales & Holding Corporation were uniformly furnished by the American Fidelity Corporation, Limited. It should further be observed that the last-mentioned company held a broker's license issued by the state corporation department, whereas the holding corporation had no such license. In conformity with the regulations of the State Corporation Department reports of purchases and sales made by the American Fidelity Corporation, Limited, were regularly submitted by this corporation to the State Corporation De-

partment. In these reports the purchase price was consistently stated to be the price which the American Fidelity Corporation, Limited, had paid the holding corporation, no mention being made of the price originally paid by the holding corporation when it acquired such interests.

Having in mind the above-stated history of the transactions whereby the various interests were acquired and sold, we may proceed to a consideration of appellants' contention that these property rights or interests were interests in real property and therefore not securities, and that the Fidelity Sales & Holding Corporation was not required by law to have a broker's license in order to deal in such interests, and that consequently the conviction of appellants of the offenses alleged in counts 1, 3, 4, 5, and 6 was improper and the judgment, so far as it relates to said counts, must be reversed.

It is admitted by both parties to this appeal that there is no California authority which bears directly upon the problem thus presented and that the question is a novel one in this state. It must, we think, be conceded that the various instruments entitled "Mineral Deeds" are in form deeds and that they purport to convey interests in real property. It must further be conceded that the term "Securities" in its ordinary meaning does not cover deeds to real property. However, as heretofore observed, the Corporate Securities Act of this state in section 2, subd. 7 as amended thereof, states that a certificate of interest in an oil, gas, or mining title or lease is a "security" for the purposes of the act. We find no unusual difficulty in arriving at the conclusion that the instruments under consideration, although they are in form deeds, in reality amount to certificates of interest in an oil or mining title and that they therefore come within the definition of securities, as stated in the statute. The deeds themselves show that what was intended to be conveyed thereby consisted of fractional interests in oil which might be produced from certain described land. No attempt was made to convey any other interest in the land. Undoubtedly, an owner of land may by suitable conveyance divest himself of his entire interest or a part thereof in whatever minerals may rest beneath the surface of the earth. There is nothing incomprehensible about dividing land horizontally as well as vertically. We suppose that the right or ownership

of the landowner in the oil which is either known or suspected to be under the surface of the ground may be properly called an oil title just as we use the expression "land title" to signify ownership of the surface which is the commonly accepted meaning of the expression "land title" or "title in land." Another obstacle, however, presents itself in the process of reasoning whereby the conclusion is reached that the instruments under consideration come within the proper purview of the Corporate Securities Act. This difficulty occurs by reason of the use of the word "certificates." Admittedly, the instruments in question have the appearance and legal phraseology of deeds. There is nothing in them which indicates that they possess the character of mere certificates. No language is contained within them which is usually found in those instruments which are legally denominated "certificates." Nevertheless, although the instruments are undoubtedly deeds in form and by their terms convey more extensive rights than certificates, we are constrained to the opinion that they come within the scope of the statute.

[6] In arriving at this conclusion, we find material assistance in looking through the mere form of the instruments to the facts and circumstances which surrounded their execution. It should be and is an established principle of the law that the substance and not the mere form of transactions constitutes the proper test for determining their real character. If this were not true, it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public. This the law does not permit. *People v. Ratliff*, 131 Cal.App. 763, 772, 22 P.2d 245; *People v. Reese*, 136 Cal.App. 657, 672, 29 P.2d 450.

The evidence showed the true character of the business in which appellants were engaged and in whose accomplishment the so-called "mineral deeds" were executed. Through the media of newspaper advertisements and radio programs and by oral representations the desirability of providing a definite monthly income for life was emphasized. By the same means the decrease in value of well-known securities and the failure of such securities to pay dividends, facts which at the time were only too familiar to the public, were continuously stressed and the ability of the American Fidelity Corporation, Limited, to take over such securities and assure

the owners relief from pecuniary worries and financial independence through payment to them of definite and satisfactory monthly income was persistently advertised. Such conduct is that which is generally practiced by those who are engaged in the business of selling stocks and bonds, familiar types of "securities," to the public. Furthermore, the evidence showed that in each and every instance the grantee in one of the mineral deeds executed by the American Fidelity Corporation, Limited, did for a time receive at least the amount per month which had been promised. The peculiar and rapid decrease in such monthly payments need not here be mentioned, since the pecuniary value of whatever the purchasers received is not a factor necessary to be considered in arriving at a determination of the real character of the instruments.

There is, however, another feature which deserves mention. This feature is the splitting up of the various interests which the American Fidelity Corporation, Limited, had acquired into numerous fractional parts. We note, for example, that in one of the mineral deeds executed by the corporation to a purchaser the interest transferred was "an undivided 20/1280th." In a third it was a "10/1200th." In a fourth it was a "15/1280th." In a fifth instance it was described as "an undivided 2.100/216 interest." These fractions are exceedingly small and, when this feature is taken into consideration along with the emphasis placed upon the factor of monthly income, it is apparent that the instruments, whereby such infinitesimal interests were transferred were neither issued nor received as deeds but that in fact they were nothing more than certificates of very small interests in oil titles. It should be noted that each of such deeds gave to the grantee the "right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands for oil, gas, and other minerals." Bearing in mind, however, that all the grantees, named in such deeds were residents of San Diego county, whereas the lands were located in Oklahoma and Texas, and observing also the very small fractional interests conveyed, we have no hesitancy in declaring that the quoted language consists of empty words and that it was never anticipated that the grantees would ever avail themselves of the right so generously accorded to them.

As heretofore stated, there is a dearth of authorities in this state bearing on the question now under consideration. There are, however, two California decisions which, though not precisely in point, are of material assistance to the solution of the problem. The first of these is *Domestic and Foreign Petroleum Co., Ltd., v. Long*, reported in 4 Cal.2d 547, 51 P.2d 73. In this case lessees under an oil and gas lease made assignments of percentages of oil and other substances to be produced during the lease and money to be derived from the sale thereof. Apparently the instruments of assignment were entitled "grant deeds" and used the words "grant" and "convey," terms manifestly appropriate to deeds rather than to certificates of interest. It was contended by the defendants in the action that the instruments were not securities as this term is defined in the Corporate Securities Act. This contention did not prevail and it was held that the instruments were securities. It should be observed that the assignments expressly provided that the grantors or such persons as they might designate should be the only persons authorized to drill for or produce oil and that the grantees should "not have any voice concerning said operations." In this regard the instruments analyzed in the cited decision differ from those which are the subject of inquiry in the present proceeding. Nevertheless, as heretofore pointed out, when due consideration is here given to the circumstance that the interests granted by the "mineral deeds" in the instant action were very small fractional interests in oil and gas to be produced from land located in Texas and Oklahoma and that such deeds were sold to California residents, no insurmountable difficulty is encountered in arriving at the conclusion that the grant of a right of ingress and egress to the land "for the purpose of mining, drilling, exploring, operating, and developing said lands for oil, gas, and other minerals, etc.," was not in fact a substantial right but rather that it was a purely formal right never expected to be utilized and therefore a most immaterial, wholly unimportant provision which we are at liberty to disregard in attempting to discover the true character of the instruments. Being persuaded to the view that the grant of a right to drill and develop the land described in the so-called "mineral deeds" was, under the circumstances, purely formal and manifestly illusory, we find most pertinent to the present problem the following quotation from 4 Cal.2d 547, at page 555, 51 P.2d 73, 76: "Instruments such as those in the *Craven Case* [*People v. Craven*, 219 Cal. 522, 27 P.2d 906] and the instant case are not issued to persons who expect to reap a profit from their own services and efforts exerted in the management and operation of oil-bearing property, but to those in the category of investors, who, for a consideration paid, stipulate for a right to share in the profits or proceeds of a business enterprise or venture to be conducted by others." The second decision to which we refer is *People v. Rubens*, 11 Cal.App.2d 576, 54 P.2d 98, 100, 1107. In this latter case the defendant owned an oil lease on land located in Sacramento county, Cal. By the terms of the lease he was authorized to prospect for, sink wells, and produce oil and gas from the land. He thereupon proceeded to sell interests in the enterprise under the fictitious name of Capitol Lease Development Company and operated the oil development business in the name of a corporation having 25,000 shares, of which he was the president and manager and owned all but 2 shares of the issued stock. Each of the instruments whereby the interests were conveyed was entitled an "option to purchase oil and gas lease assignment," and purported to give to the vendee named therein an "option to purchase oil and gas lease assignments of (an undivided) five sixty-fourths (5/64) of an acre" of the entire tract of land, but failed to describe the allotted portion thereof. Another term of the instrument provided that within 30 days from the "bringing in" of the first well on the entire tract of land the purchaser should pay an additional designated sum of money which would entitle such vendee to a community lease for his proportionate interest in the entire project. A certain proposed drilling program to be effectuated by the above-mentioned corporation was set out in the instrument which further stipulated that the corporation would, upon completion of the contracts to purchase the interests, execute to each of the purchasers a community lease for his proportionate interest in the entire project on a designated participating basis. Attached to each of such instruments was the detailed form for the proposed community lease which amounted to a contract making each purchaser a pro rata shareholder in the oil-producing enterprise to be conducted on the entire tract

of land. The defendant was charged with issuing and selling certificates of interests in an oil and gas lease without having secured a permit therefor in violation of the Corporate Securities Act. After conviction upon this and other charges contained in the indictment under which he was prosecuted he appealed from the judgments of conviction. One of the principal questions presented on the appeal was whether or not the above-described instruments were securities as this term is defined in the Corporate Securities Act. The reviewing court, although it concluded that each unit or share sold by the defendant represented a five sixty-fourths undivided portion of an acre of land, nevertheless found that the instruments in which the defendant was shown to have been dealing were in fact securities as that term is defined in the Corporate Securities Act.

In addition to the above-cited California authorities our attention has been particularly directed to a very recent decision of the Supreme Court of Rhode Island which presents a striking factual similarity to that which appears in the instant proceeding. The decision to which reference is thus made is *State v. Pullen*, decided on June 14, 1937, and reported in 192 A. 473. In this case the state of Rhode Island brought an action to restrain the sale of securities by the defendant, because of his failure to register with the division of banking and insurance, as a broker or salesman of securities. The trial court found in plaintiff's favor, and on appeal by the defendant the judgment was affirmed. The securities in which the defendant was dealing were called oil royalties founded upon a lease agreement whereby the owner of lands in Texas leased the same to an oil company for the sole purpose of mining and operating for oil and gas. The lease contained a covenant expressly permitting assignment of the respective estates of the lessor and lessee, but it was provided that before such assignment should bind the lessee a written transfer of the assignment was required to be furnished to the lessee. In accordance with this provision the lessor proceeded to sell to purchasers fractional shares of his rights to receive oil royalties and to effectuate the same executed instruments which were entitled "Mineral Deeds." These instruments were substantially similar to the mineral deeds now being considered on the present appeal and consti-

tuted the written evidence of the rights which the defendant in the cited case desired to sell in Rhode Island. The Rhode Island statute, Gen.Laws 1923, c. 273, § 1 (c), defined the term "security" as follows: "The term 'security' or 'securities' shall mean and include the currency of any government other than the United States, in whatever form the same may be dealt in, any bond, stock, treasury stock, note, debenture, certificate of interest in a profit sharing agreement, certificate of interest in an oil, gas or mining lease, evidence of indebtedness, or any form of commercial paper, transferable certificates of interest or participation, or transferable shares, or similar evidences of beneficial interest issued by any person as defined in subdivision (b) of this section."

It was contended in the cited case, just as is here contended, that the mineral deeds constituted written evidence of interests in realty and that they did not come within the meaning of the above-quoted language of the statute. In disposing of this contention the Rhode Island court declared that the technical nature of the instruments was inconsequential in view of the purpose and design of the statute regulating the sale of securities. The court therefore proceeded to look through the legal form of the documents and announced that in reality they amounted to investment contracts which were peculiarly adapted to perpetuation of the evil which the statute was designed to eradicate. It was held, therefore, that the instruments, although deeds in form technically representing evidence of interests in real property, primarily constituted evidence of shares in oil produced under an oil lease and that they came within the meaning of the statutory definition of "securities."

It is proper to observe that, in so deciding, the court was careful to point out that the proceeding which it was considering was equitable in character, that it was not a criminal action for enforcement of the penalties provided by the act, and that strict construction of the statute was not therefore required.

[7] In this respect the cited case is essentially different from the instant action. We are nevertheless constrained to the view that the reasoning of the Rhode Island Supreme Court is applicable to the problem which is here presented. The instruments which we have here are essen-

tially similar in form to those that were considered in the cited case. The purpose of our statute is the same purpose which the Rhode Island court declared was the purpose of the statute of that state. *People v. Craven*, 219 Cal. 522, 27 P.2d 906. In *People v. White*, 124 Cal.App. 548, 12 P.2d 1078, the defendant had been convicted of the offenses of selling securities without having secured a permit from the commissioner of corporations and of grand theft. On appeal one of the legal principles which he relied upon in support of his contention that the instruments in which the evidence showed he had dealt were not "securities" as defined by our statute was the familiar rule requiring strict construction of penal laws. In disposing of the contention thus presented the appellate court used the following language at page 555 of 124 Cal.App., at page 1081 of 12 P.2d: "Appellant here contends that it is the rule that criminal statutes are subject to the rule of strict construction, and that under a strict construction the contracts in question do not come within the provisions of the Corporate Securities Act. Whatever may be the rule elsewhere, in this state the common-law rule that penal statutes are to be strictly construed has no application, and statutes of this state are to be construed according to the fair import of their terms and with a view to effect the object of the statute as well as to promote justice. Pen.Code., § 4; Pol.Code., § 4; Civ.Code., § 4." We think therefore that, having in mind the purpose of the Corporate Securities Act, we are not compelled to construe the statute in compliance with the common-law rule of strict construction, but that we should rather indulge in a construction of the act in accordance with the fair import of its terms.

[8] A fourth contention of appellants relates to the admission of certain evidence. During the trial witnesses produced by respondent were allowed to testify as to observations which they had made of the books of the two corporations hereinabove mentioned and excerpts from the books were received in evidence. In each instance where such evidence was admitted appellants interposed timely objection the chief basis of which was that it was improper to admit secondary evidence of the contents of the books in the absence of proof that the books themselves were lost or had been destroyed. It must, however, be noted that possession

of the corporate books was traced to appellants themselves or to the counsel who represented them, and inquiry by the court as to whether or not counsel had the books in their possession at the time of trial brought a negative response.

Examination of the record impels the conclusion that the trial court ruled correctly in admitting the evidence. The extracts taken by the auditors from the books of the two corporations formed a necessary and logical part of respondent's case. There was satisfactory proof that the books had last been seen in the possession of appellants or their counsel. Certainly the court could not compel appellants to produce any incriminating writing. *People v. Chapman*, 55 Cal.App. 192, 203 P. 126. Counsel for appellants in whose office the evidence indicated the books had last been seen categorically denied in reply to the court's inquiry that they had possession of the books. It is apparent that for all practical purposes the original documents which formed a necessary part of respondent's case were as effectually lost as though their actual loss or destruction had been conclusively established. Under these circumstances no error was committed in the reception of secondary evidence of the contents of the books. Code Civ.Proc. § 1855; *People v. Powell*, 71 Cal.App. 500, 513, 236 P. 311.

[9] A fifth contention advanced by appellants relates to their conviction of the offenses charged in the third, fourth, fifth, and sixth counts of the indictment. As heretofore noted, it was alleged in these counts that appellants, acting as officers of the Fidelity Sales & Holding Corporation, had committed specific violations of section 6 of the Corporate Securities Act, as amended, by causing the corporation on designated dates, to act as a broker in selling the hereinabove described mineral deeds. It is urged that, at most, the evidence which was produced by respondent to establish the commission of the offenses thus alleged was insufficient to support Jackson's conviction of any more than two thereof, and likewise insufficient to support Scott's conviction of more than two of the offenses. The basis for this contention exists in the four mineral deeds which were relied upon by respondent as the final link in the chain of evidence whereby the prosecution sought to prove the commission of the four specific offenses charged in the above-mentioned counts

of the indictment. Two of these deeds were executed by appellant Jackson alone as president of the Fidelity Sales & Holding Corporation and two by appellant Scott alone as vice-president of the corporation. From this fact it is declared that there was no showing that Scott participated in or had any knowledge of the execution by Jackson of the two deeds which bore Jackson's name alone, and likewise that there was an entire lack of evidence to connect Jackson with the execution of the two deeds to which Scott's signature was appended.

The contention thus presented is devoid of merit. It fails to take into consideration the numerous circumstances which surrounded the business in which appellants were shown to have been engaged as these circumstances were developed by the evidence. Examination of the record impels the conclusion that the evidence submitted by respondent was ample to justify the jury in drawing the inference that each of the appellants was fully cognizant of the execution of deeds in the name of the corporation by the other. Evidence which was not contradicted showed that Jackson was president and Scott vice-president of this corporation in which no stock was ever issued. That these two individuals completely controlled and dominated the corporation is plain and that it was used by them as a convenient auxiliary to the American Fidelity Corporation, Limited, of which appellants were likewise the principal officers in the business of dealing in oil royalties, is also clear. That the Fidelity Sales & Holding Corporation was created and used by appellants for the purpose of increasing the amount of profit derived by the American Fidelity Corporation, Limited, from the sale of royalties is not open to doubt. That the former corporation was purely a dummy manipulated and used by appellants in the business of dealing in oil royalties is apparent. These circumstances and others that might be mentioned render it inconceivable that either of the appellants who were shown to have been so closely associated in the business of dealing in oil royalties could have been ignorant and uninformed as to the execution of the mineral deeds by the other as an officer of the corporate dummy which they jointly controlled.

in counts 10, 11, 12, 13, and 15. As heretofore noted, these offenses were conspiracy to obtain property by false promises with the fraudulent intent not to perform such promises and grand theft. Counts 10 and 12 alleged the commission by appellants of the crime of conspiracy, and the remaining three counts charged the offense of grand theft.

With respect to their conviction of the crime of conspiracy as charged in counts 10 and 12, appellants complain that the evidence produced by respondent to prove the charge was insufficient to justify the jury's verdict of guilt. It is pointed out that section 182 of the Penal Code defines "Criminal Conspiracy," and that subdivision 4 of the section makes it a crime for two or more persons to conspire to obtain money or property by false promises with fraudulent intent not to perform such promises. It is strenuously urged that all the evidence bearing upon this particular charge of conspiracy which was submitted showed that the statements which were relied upon as constituting promises were mere statements of opinion and were not and could not from their nature be regarded as promises. Without attempting to restate the voluminous evidence relating to the representations which appellants made in their endeavors to persuade their patrons to surrender property which they owned in return for the so-called oil royalties, it may be said that the effect of all such representations was that the prospective purchasers would receive from the royalties a stated monthly income for at least as long as they should live. Appellants maintain that the representations thus made did not and could not amount to promises, but that they were obviously no more than mere predictions that the oil royalties would yield certain returns, and that, bearing in mind the peculiar character of the investments, it is clear that the statements attributed to them were mere expressions of opinion. In this connection it is pointed out that it is recognized that no one can definitely know the exact quantity of oil which exists beneath the surface of the earth even in a proven oil field. It is further declared that the testimony of respondent's witnesses regarding this feature showed that they understood that appellants were not guaranteeing that the royalties would yield the various returns stated and, even if they did have a different understanding, they must have realized from the very nature

[10] The remaining contentions developed by appellants on this appeal relate to their conviction of the offenses charged

of the investments which they were making the obvious impossibility of any such guaranty.

Again it must be remarked that we may not overlook the circumstantial background against which the various specific sales of oil royalties made by appellants were projected. The obvious credulity of appellants' victims is too plain to be disregarded. The very emphasis placed upon the repeated representation that the investment of comparatively small amounts of money would yield not probably or possibly but certainly, and not approximately but surely, specified, definite returns each month for as long a time as the investors should remain alive, is an outstanding circumstance to which we may not close our eyes. Under the circumstances which surrounded the sales of oil royalties we are not prepared to say that the jury could not reasonably have inferred that the representations in fact amounted to promises that appellants would turn over to their customers oil royalties in sufficient quantity to yield the monthly returns which were so persistently emphasized. True enough, in each instance the exact quantity of the fractional interest was plainly stated in the various mineral deeds. Nevertheless, having in mind the certainty and definiteness of fixed, undiminishing monthly payments continuously and constantly stressed by appellants, we may not in fairness declare that the credulous victims of appellants could not have understood that the representations meant that sufficient quantities of oil royalties would be provided to yield the promised returns. If such was the situation, and inspection of the record impels the conclusion that the jury may well have inferred that it was from the mass of evidence bearing upon the matter that was placed before it, then no difficulty is encountered in determining that false promises were in fact deliberately made by appellants with the positive intent not to perform them.

[11-15] Appellants further complain of their conviction of the crime of grand theft as charged in the eleventh, thirteenth, and fifteenth counts of the indictment. The contention advanced with respect to these charges is likewise insufficiency of the evidence to support the jury's verdict. It is again urged that the representations which were shown to have been made by them related exclusively to the future, and hence could amount to nothing more

than mere predictions or expressions of opinion. It must be conceded that all of the evidence which was produced in support of the grand theft charges showed that the representations made by appellants related to the future. Again, without attempting to state in detail the various representations upon which respondent relied to establish the necessary element of false pretenses, it is proper to say that each and all of the representations were in effect that the persons to whom they were made would, if they should purchase the oil royalties, derive definite returns therefrom payable monthly.

Before attempting an analysis of the representations thus shown to have been made certain general observations are in order. In the first place, it is apparent that the offenses of grand theft of which appellants were accused consisted of the fraudulent acquisition by appellants of certain described personal property of others by means of false representations or pretenses. We do not understand that there is any contention to the contrary by the respondent. In the second place, it is clear that the conviction of appellants of the charges of grand theft may not be sustained on the ground that the representations amounted to false promises. In this respect there is a marked distinction between the charges of conspiracy contained in the tenth and twelfth counts of the indictment and the charges of grand theft contained in the eleventh, thirteenth, and fifteenth counts. In those counts which alleged the commission of conspiracy it was fully and carefully alleged that the conspiracy which appellants had committed was a conspiracy to obtain property by false promises with fraudulent intent of nonperformance. The accusation thus made was drawn under section 182 of the Penal Code wherein the crime of "criminal conspiracy" is defined and follows the exact language of subdivision 5 of said section. The accusation of grand theft was drawn in accordance with the provisions of section 484 of the Penal Code, as amended by St.1935, p. 2194, wherein the crime of theft is defined. The last-mentioned statute makes no reference to promises. The words therein contained which are important to the present discussion are "representation" and "pretense." It is necessary, therefore, to approach the matter now under consideration with a distinct realization that promises, however false and fraudulent they

may be, cannot support a conviction of grand theft as defined in section 484 of the Penal Code, as amended by St.1935, p. 2194.

The obvious distinction between the offenses of criminal conspiracy with whose commission appellants were accused and the charges of grand theft made against them provides a proper introduction to a familiar principle of criminal jurisprudence which, in our opinion, furnishes a key to the solution of the immediate problem now under consideration. The offense specified in each of the three counts of the indictment now being considered is what was formerly denominated the crime of obtaining money, property, or labor by false pretenses. This last-mentioned offense is still denounced by section 532 of the Penal Code. However, as has been heretofore pointed out, the effect of section 484 of the Penal Code, amended, as it now reads is merely to amalgamate the crimes of larceny, embezzlement, false pretenses, and kindred offenses under the cognomen of theft. *People v. Myers*, 206 Cal. 480, 483, 275 P. 219; *People v. Bratton*, 125 Cal.App. 337, 341, 14 P.2d 125; *People v. Brock*, Cal.App., 70 P.2d 210. There is no inconsistency between sections 484 and 532 of the Penal Code, and the applicable provisions of the former have in effect repealed the identical provisions of the latter. *People v. Carter*, 131 Cal. App. 177, 182, 21 P.2d 129.

Since it is abundantly apparent that the only evidence submitted which tended to prove that appellants had committed the crime of grand theft indicated that they had obtained certain property by means of false representations, it becomes necessary to measure these representations by the test of a familiar and well-settled legal principle peculiarly applicable to the offense of obtaining property by false pretenses or representations. This established principle is that the representations shown to have been made must relate either to an existing or to a past fact. *People v. Wasservogle*, 77 Cal. 173, 19 P. 270; *People v. Walker*, 76 Cal.App. 192, 244 P. 94; *People v. Moore*, 82 Cal.App. 739, 256 P. 266; *People v. Robinson*, 107 Cal. App. 211, 290 P. 470; *People v. Reese*, 136 Cal.App. 657, 29 P.2d 450. Representations which in reality amount to no more than mere predictions of events to occur in the future or which in fact con-

sist of expressions of opinion do not satisfy the statutory requirements and a conviction obtained on the strength of such representations may not be sustained. *People v. White*, 85 Cal.App. 241, 250, 259 P. 76. The representations which it was shown appellants had made to the persons mentioned in the grand theft counts of the indictment were statements that looked to the future alone. They did not pretend to relate either to the present or to the past. Measured by the above-mentioned test, it is manifest that the representations do not constitute a proper evidentiary basis for the conviction of grand theft which appellants suffered.

Respondent makes some effort to sustain the jury's verdict finding appellants guilty of the grand theft charges by arguing that appellants advertised and represented to the public that they had a certain well-conceived plan whereby they would assure to investors the payment of a definite monthly income for life, whereas it appeared that in reality they had no such plan. It is, we believe, a sufficient answer to this contention to observe that the evidence which respondent produced which related directly to the persons named in the three grand theft counts of the indictment showed that to each of such persons appellants made oral representations the effect of which was as heretofore mentioned. Furthermore, it is not at all clear that respondent made satisfactory proof of the exposition to the public by appellants of the so-called "monthly income plan." Respondent did produce what purported to be copies of portions of radio programs broadcast to the public which were marked for identification, but apparently these documents were not received in evidence. In any event, the essence of the "plan" as developed was that prospective investors, by turning over to appellants securities, the income from which had either suffered diminution or entirely ceased, might be assured of definite monthly income in the future. The basic idea of the plan was therefore an assurance of future income and is vulnerable to the same criticism as are the oral representations shown to have been made directly to the persons designated in the grand theft counts.

The final complaint presented by appellants relates to a number of instructions which they offered and which it is contended the trial court erroneously refused to

give and to certain other instructions which were given by the court which it is claimed contained incorrect statements of legal principles. Examination of the entire body of the instructions given by the court impels the conclusion that the jury was fully, fairly, and correctly advised thereby of the various legal principles applicable to the evidence and that no reversible error was committed in the refusal to give certain instructions prepared and offered by appellants.

For the reasons stated herein the attempted appeal from the order denying the motion of appellants in arrest of judgment is dismissed. Those portions of the judgments and of the order denying the motion of appellants for a new trial which relate to the crime of grand theft as alleged in counts 11, 13, and 15 of the indictment are reversed. The remainder of the judgments and order denying a new trial from which this appeal has been perfected are, and each of them is, affirmed.

We concur: BARNARD, P. J.; MARKS, J.



24 Cal.App.2d 291

HITCH v. HITCH.

Civ. 2131.

District Court of Appeal, Fourth District,
California.

Jan. 6, 1938.

Hearing Denied by Supreme Court
March 7, 1938.

1. Deeds ⇨56(2)

It is essential to the validity of a transfer of realty that the grantor in parting with possession under conveyance intended to divest himself of title. Civ.Code, § 1056.

2. Deeds ⇨56(2), 66

Whether a delivery of a deed has taken place is a question of fact involving the intent of parties.

3. Deeds ⇨194(5), 208(4)

The recording and manual delivery of a deed to a grantee gives rise to a presumption of intent to pass title, and burden is upon one attacking the validity of the deed to establish by clear proof that there was no intention of grantor to divest himself of title.

4. Deeds ⇨56(2)

Payment of taxes and keeping up of insurance on realty which grantor had conveyed to granddaughter, reserving to himself life estate, was entirely consistent with the life estate, which was reserved as against contention that it showed grantor had not intended to transfer title.

5. Deeds ⇨56(2)

Acts of grantor, who conveyed realty to granddaughter and recorded deed which contained reservation of life estate in grantor, in applying for soldier's exemption on taxes stating that property was owned by him, was not inconsistent with intent to make valid transfer of the property, since as owner of life estate grantor was under duty to take care of taxes.

6. Deeds ⇨208(4)

Evidence that grantor made, recorded, and delivered to granddaughter deed to realty, reserving to himself life estate in the realty which was shown by the deed together with letters showing an intention to make a present conveyance subject to life estate held sufficient to sustain finding that grantor intended to pass title to granddaughter.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action to quiet title by Barbara M. Hitch, a minor, by Harold King, her guardian ad litem, against Anna C. Hitch. From a judgment canceling plaintiff's deed and denying relief, plaintiff appeals.

Reversed.

H. E. Thompson and Harold King, both of San Bernardino, for appellant.

C. O. Thompson, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet the title to and obtain the possession of a house and lot in San Bernardino. The plaintiff, a granddaughter of one John W. Hitch, resides in Omaha with her grandmother, who was formerly the wife of John W. Hitch. The defendant is the widow of John W. Hitch, having married him on September 30, 1925. A few months after their marriage the defendant left Hitch and came to California. Several years later Hitch came to California and he and the defendant lived together, except for some months when he was in a

hospital, until his death which occurred on March 28, 1935. He purchased the real property in question with his separate funds on April 10, 1929. It was thereafter used as a family home and the widow is still in possession. In his will, dated June 18, 1929, John W. Hitch made no mention of this property but left \$200 "to Anna C. Hitch (wife), in name only" and gave the remainder of his estate equally to a son, a daughter, and this plaintiff.

On August 7, 1930, John W. Hitch executed and acknowledged a deed conveying this property to the plaintiff, which deed recites that the "premises, and all of it, is conveyed subject to an estate for life reserved by the grantor, John W. Hitch, unto himself, as his individual property for life." On July 31, 1933, John W. Hitch recorded this deed and instructed the recorder to forward the same, when recorded, to the plaintiff at Omaha. This was done and the plaintiff in due time received the deed from the recorder. A month later John W. Hitch wrote to his son in Omaha asking to have the recorded deed sent to him. This was done and after Hitch's death this deed was found in a locked chest in his room, sealed in an envelope addressed to the plaintiff at Omaha and with 39 cents in uncanceled postage stamps attached. Aside from any possible interest in this real property John W. Hitch left personal property which, in probate proceedings, was appraised at about \$2,200 and set apart to the widow.

In this action which followed the court found that this deed had been delivered with the intent to convey title to the plaintiff and ordered judgment in her favor. After a motion for a new trial these findings were set aside and the case reopened for further evidence. After a further hearing similar findings were again made and judgment ordered in favor of the plaintiff. These findings were also set aside and another hearing ordered, after which the court found that at the time of recording said deed John W. Hitch intended to retain the title to the property so long as he lived and entered judgment canceling the deed and denying any relief to the plaintiff, from which judgment the plaintiff has appealed.

[1,2] There can be no question that this deed was recorded and actually delivered to the appellant. The only question presented is whether the grantor, at the time he recorded the deed and ordered it

sent to the appellant, intended to divest himself of title to the property, except for a life estate, or whether he intended that the deed should have no effect until his death occurred. While delivery of a deed to a grantee is necessarily absolute, section 1056, Civ.Code, a question may remain as to whether there has been such a delivery with the intent to transfer title. *Hotaling v. Hotaling*, 193 Cal. 368, 224 P. 455, 461, 56 A.L.R. 734. In that case the court said: "It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended * * to divest himself of title. If he did, there was effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question."

[3] Under well-settled rules the recording and manual delivery of a deed to a grantee gives rise to a presumption of an intent to pass the title, and the burden then rests upon one attacking the validity of such a deed to establish by satisfactory evidence that there was no intention on the part of the grantor to divest himself of title. If deeds which have been recorded and physically delivered to the grantee could be overthrown by slight testimony, the door would be opened to grave frauds and very clear proof ought to be and is required in order to warrant a court in holding that when such acts were performed by a grantor he did not intend to part with his title. *Mowry v. Heney*, 86 Cal. 471, 25 P. 17; *Jennings v. Jennings*, 104 Cal. 150, 37 P. 794; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377. The real question before us is whether under these general rules there is substantial evidence in this record to overcome the evidence and presumptions in favor of the validity of this deed and to support the finding that this grantor intended to retain title to this property so long as he lived.

Certain other evidence must be considered which is almost entirely documentary in nature. On the day he recorded the deed, John W. Hitch mailed a letter to the appellant enclosing a post office registry re-

ceipt, which he said was for an envelope containing "papers with reference to the deed of my property to you" and telling her not to open the registered envelope until she had word of his death. He also stated that he had on that day delivered for record a deed which would shortly be sent her by the county recorder and that he inclosed the recorder's receipt which she should hold until she received the deed from the recorder. He then said: "I shall pay this years taxes on the property and any taxes thereafter may accrue until my death, so if notices of taxes for next year should be sent to you by the assessor of this county just remail to me and I will pay the taxes for you from my own funds. The property remains mine until my death so there will be no expenses to you until after my demise. Do not listen to any pleas (my wife) Anna may make to being entitled to her one half. Do not give in without a court fight. She never has and never will be a wife to me. So ignore her in any move she or her attorney might make to you. Were it not for her inhumane treatment to me I would be a well person to day, but her constant insults to me and my relatives has preyed on my health, so that I am down and out and don't expect or desire to live much longer." The remainder of the letter warns the appellant about what the respondent might try to do and tells her to consult a named attorney if necessary to put the appellant out of the property after his death. In another letter written to the appellant about the same time John W. Hitch tells her that he is enclosing "various papers pertaining to my home here, and which I have deeded to you at my death" and that the deed to the property is in the hands of the county recorder and when recorded will be mailed direct to her. In this letter he tells the appellant that there may also be coming to her through his last will other property, and also states: "I have decided upon this disposition of my property after many many months of study. You will perhaps wonder why I did not give it to my wife, or my own children, your Aunt Elsie, and Uncle Walter. Reason for not so doing is because all of them have been unfaithful to me in many ways, and caring nothing for my welfare, happiness, etc." There is evidence that John W. Hitch paid the taxes on the property until the date of his death; that he applied for and was granted a soldier's exemption on taxes for several years, stating in his affidavit that the property was owned by

him on the first Monday of March of the respective years; that he kept the house insured; and that in an application for hospital care he made affidavit that the property belonged to him or his wife. On August 21, 1933, while he was in a government hospital in San Francisco, he wrote to the respondent, stating: "I now desire to do what is right toward you in a worldly way, and ask you in love and confidence what do you expect and believe is rightfully due, you can express yourself freely, feeling nothing you will say will make me angry so speak openly and from the heart, and I will assure you your words and wishes will be thought over carefully and prayerfully and I believe we can arrive at a just solution of the matter. In your consideration of this matter don't wholly forget my children." In a letter to her dated August 26, 1933, he said: "Got your letters of 23rd and 24th, in re property settlement, and as soon as able will take necessary steps to make everything right." In another letter, dated August 29th of that year, he said: "I fear sometimes when you know all you will curse me and tell me to go out and die."

[4,5] The respondent contends that the letters referring to a property settlement indicate that John W. Hitch was still of the opinion that he was the owner of the property and that these letters, with his actions in requesting the return of the deed a month after it was delivered, in paying the taxes on the property and making affidavits that he was the owner thereof, and in stating in the two letters to the appellant, written about the time the deed was recorded, that "the property remains mine until my death," and, "Herewith enclosed are various papers to my home here and which I have deeded to you at my death," are sufficient to overcome any evidence and presumptions in favor of the deed and to sustain the finding of the court that there was no intention to pass title. It may first be observed that the paying of taxes and keeping up the insurance was entirely consistent with the life estate which was reserved. *Merritt v. Rey*, 104 Cal.App. 700, 286 P. 510; *Stewart v. Silva*, 192 Cal. 405, 221 P. 191. The affidavits for the purpose of securing exemptions from taxes are also consistent with this theory as, in any event, the grantor owned a life estate in the property and was under the duty to take care of the taxes. In the letters of August 21 and August 26, 1933, referring to a property

settlement, no reference was made to this real property. Mr. Hitch still possessed considerable personal property, and the fact that he desired a property settlement with the respondent with whom, as the evidence shows, he had been having much difficulty, is far from sufficient to indicate that he intended to use the property which he had already conveyed to the appellant in making any such settlement. It is somewhat significant in this connection that in asking the respondent what she expected he asked her to show consideration for his children but made no reference to his granddaughter, the appellant. It may well be that this was because he considered that she had already been taken care of.

We have here clear and distinct evidence, which cannot be disputed, that this deed was recorded and actually delivered to the appellant, facts which ordinarily indicate a full and complete delivery. If any doubt as to the intention of the grantor at the time the deed was recorded and ordered sent to the appellant arises from the letters he wrote to her at that time, that doubt is removed and the matter clarified by the reservation made in the deed which clearly discloses the intention of the grantor. If he did not intend the deed to take effect until his death there was no possible reason for reserving a life estate. That part of the instrument should be given effect, and it could have none if the grantor was divesting himself of no part of the title prior to his death. The deed contains within it-

self rather complete proof of a specific intention to make a present conveyance subject to a life estate which was reserved. To allow any other conclusion to be drawn from the acts of the grantor would be to ignore and annul this definite provision of the deed.

The record does not disclose why the grantor later asked to have the recorded deed sent to him. Subsequently, he placed it in an envelope addressed to the appellant, with postage paid, and locked it up. If his action in this regard and his subsequent letters to the respondent with reference to a property settlement in any way indicate that he then believed that the property was subject to his disposal, they are much more consistent with the theory that he had changed his mind than with the idea that in executing a deed in that form he had not intended to convey any title at the time.

[6] In our opinion there is no evidence which is sufficiently substantial to sustain a finding that this grantor had no intention of passing title when this deed was recorded. The security of real property rights requires that a solemn instrument of this nature should not be set aside on such slight evidence as, at best, appears in this record.

For the reasons given the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.





